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# A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth

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# A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth

*Michael Evan Gold*

Sex is the Cinderella of Title VII. The conventional view is that sex was added as a protected class to the employment discrimination title of the Civil Rights Act of 1964<sup>1</sup> (Act) for the purpose of defeating it by making it unacceptable to some of its supporters or by laughing it to death. Norbert A. Schlei, who in 1963 was the Assistant Attorney General of the United States in charge of the Justice Department's Office of Legal Counsel, wrote in the foreword to a leading treatise on the law of employment discrimination:

On the House floor, Title VII was amended *by its enemies* to add sex as a prohibited basis of discrimination. The amendment, offered by Judge Howard Smith of Virginia, then Chairman of the Rules Committee, was adopted by a majority most whose of members voted against the legislation as a whole. The fact that the prohibition of discrimination based on sex has probably had a greater impact than anything else in the legislation illustrates the hazards of the strategy followed by the bill's Southern opponents in the House.<sup>2</sup>

This view is espoused by the author of an excellent casebook on employment discrimination law.<sup>3</sup> It appears in the *Harvard Law*

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EDITOR'S NOTE: The author is Assistant Professor at New York State School of Industrial and Labor Relations, Cornell University. B.A., University of California at Berkeley (1965); LL.B., Stanford University School of Law (1967). The author is grateful to Maurice Neufeld, Professor Emeritus, and to James Morris, Professor, both of the New York State School of Industrial and Labor Relations, Cornell University, for their comments on this article.

1. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. I 1977, Supp. II 1978 & Supp. III 1979)).

2. N. Schlei, *Foreword* to B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW as xi-xii (1976) [hereinafter cited as *Foreword*] (emphasis in original). The *Congressional Record* shows the Smith amendment was agreed to by a vote of 168 to 133, 110 CONG. REC. 2584 (1964), but does not identify the voters by name. It is mathematically possible that a majority of the 168 Representatives who voted for the amendment voted against the civil rights bill because 130 votes were cast against the bill. *Id.* at 2804-05.

3. A. SMITH, EMPLOYMENT DISCRIMINATION LAW 327 (1978); Smith, *The Law and Equal Employment Opportunity: What's Past Should Not Be Prologue*, 33 INDUS. & LAB. REL. REV. 493, 504 (1980).

*Review*<sup>4</sup> and in popular books.<sup>5</sup> Even judges repeat it.<sup>6</sup> And it is wrong. It has misled at least one court to state, "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."<sup>7</sup> In hopes of saving future decisions from being influenced by this error, the following discussion will show that sex was added to Title VII for serious reasons and, accordingly (except in those cases in which sex is a bona fide occupational qualification),<sup>8</sup> under the Act women deserve as complete protection from discrimination based on sex as do blacks from discrimination based on race and Hispanics from discrimination based on national origin.

# I. THE GENESIS OF THE BAN ON SEX DISCRIMINATION

To know why sex was added to Title VII, it is important to understand why sex was not in the civil rights bill from the start. The simple reason is that Title VII itself was not in the bill from the start. The explanation is twofold. First, the civil rights movement had focused on segregation in public accommodations and public schools, rather than on discrimination in factories and businesses.<sup>9</sup> Second, emotion ran especially high on the issue of employment. It was one thing to tell a public school, which was supported by tax money, that it could not discriminate against blacks; and perhaps it was similar to tell a restaurant or hotel, which held itself open to the transient public, that it could not discriminate; but it seemed quite another thing to tell an

4. *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971). *Contra*, Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 883-85 (1967) [hereinafter cited as Miller].

5. See, e.g., C. BIRD, *BORN FEMALE* ch. 1 (1968).

6. See, e.g., *County of Washington v. Gunther*, 49 U.S.L.W. 4623, 4631 n.4 (Rehnquist, J., dissenting); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975), *vacated and remanded*, 424 U.S. 737 (1976).

7. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975).

8. A recent discussion of the bona fide occupational qualification (BFOQ) unfortunately repeats the common explanations of the legislative history of the addition of sex to Title VII; see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027 (1977) [hereinafter cited as Sirota].

Although Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to fail or refuse to hire an individual on the basis of an individual's race, color, religion, sex, or national origin, 42 U.S.C. § 2000e-2(a) (1976), employment choices may be made on the basis of an individual's religion, sex, or national origin in those instances where one of these attributes constitutes "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. § 2000(e)-2(e)(1) (1976).

9. J. GOULDEN, *MEANY* 320 (1972) [hereinafter cited as MEANY]. In 1963 there were 2,100 civil rights demonstrations. Two-thirds were directed at places of public accommodation, and the balance were related to public facilities. 110 CONG. REC. 7668 (1964) (remarks of Sen. Javits).

employer who operated a private enterprise that he could not choose whom to employ, work with, and rely on for his livelihood. The Kennedy administration feared that a fair employment practices (FEP) title would drive moderate support away from its comprehensive civil rights bill,<sup>10</sup> which the administration wanted enacted as soon as possible<sup>11</sup> in response to racial tension in the South.<sup>12</sup> Accordingly, when President Kennedy sent his first special message on civil rights to the 88th Congress, he mentioned racial discrimination by unions, but not by employers, and requested no legislation on private employment.<sup>13</sup>

Four months later, in his second special message on civil rights, President Kennedy told Congress, "I renew my support of pending Federal fair employment practices legislation, applicable to both employers and unions."<sup>14</sup> The value of this support was unclear, however. In the first place, there was pending at the time:

a plethora of civil rights bills. Some included comprehensive provisions relating to all areas of civic and economic life . . . others dealt primarily with equal employment opportunity. . . . The proposed methods of enforcement ran the gamut—from those providing for a strong administrative agency, like the NLRB . . . to those providing simply for conciliation and persuasion or merely further study and recommendations.<sup>15</sup>

In the face of such a variety of proposals, the President's general support was tantamount to no support at all. Moreover, the Kennedy administration's own civil rights bill, H.R. 7152, was introduced by Representative Celler of New York on the day after the President's second special message.<sup>16</sup> Title VII of this bill authorized the President only to establish a Commission on Equal Employment Opportunity, whose primary function would be to prevent discrimination by recipients of federal grants, contractors with the federal government, and the federal government itself.<sup>17</sup> If Title VII of H.R. 7152 was the

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10. H.R. 7152, 88th Cong., 1st Sess. (1963); see note 16 and accompanying text *infra*.

11. MEANY, *supra* note 9, at 320.

12. In June of 1963, President Kennedy addressed both the country and Congress concerning the "rising tide of discontent that threaten[ed] the public safety." He stressed the immediacy of the problem because "the events in Birmingham and elsewhere [had] so increased the cries for equality that no city or State legislative body [could] prudently choose to ignore them." 109 CONG. REC. 11,174 (1963). See Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432 (1966) [hereinafter cited as Vaas].

13. See Vaas, *supra* note 12, at 432.

14. 109 CONG. REC. 11,178 (1963), reprinted in Vaas, *supra* note 12, at 433.

15. Vaas, *supra* note 12, at 433.

16. H.R. 7152, 88th Cong., 1st Sess. (1963). Representative Celler of New York presented the bill on June 20, 1963. It was then directly referred to the Committee on the Judiciary. 109 CONG. REC. 11,252 (1963); see Vaas, *supra* note 12, at 434.

17. See Vaas, *supra* note 12, at 434.

measure of the Kennedy administration's support for FEP legislation, that support was lean, indeed.

That an FEP title on private employment appeared later in the bill and enjoyed the administration's blessing was due to the insistence of the American Federation of Labor and Congress of Industrial Organizations. According to its president, George Meany, the AFL-CIO wanted an FEP title in the law for two reasons:

First, we need the statutory support of the federal government to carry out the unanimously adopted principles of the AFL-CIO. . . .

Why is this so? Primarily because the labor movement is not what its enemies say it is—a monolithic, dictatorial, centralized body that imposes its will on the helpless dues payers. We operate in a democratic way, and we cannot dictate even in a good cause. . . .

Second, we want federal legislation because we are tired of being the whipping boy in this area . . . [while] the employers—who actually do the hiring—escape in many instances with no criticism whatever.<sup>18</sup>

When Andrew Biemiller, the AFL-CIO's chief lobbyist, presented the idea of an FEP title to President Kennedy, the President "kept saying, 'You are going to ruin my bill, you are going to ruin the whole thing.' He kept quoting statistics about black unemployment and what great progress had been made. I told him, 'I'm sorry, but this is our line, and we are going to carry though on it.'"<sup>19</sup> Because the support of organized labor was critical to the passage of the entire civil rights bill,<sup>20</sup> and because labor would not have worked so hard for a bill without an FEP title as it did for a bill with an FEP title,<sup>21</sup> the administration agreed to incorporate a title on private employment.

As George Meany's statement above demonstrates, labor's concern was race discrimination. Neither labor—nor, indeed, most of America—considered sex discrimination to be a problem at all, let alone a problem of magnitude equal to race discrimination. Even women's groups, which were sensitive to sex discrimination and which had been pushing for reform,<sup>22</sup> gave the problem of race discrimination a higher priority.<sup>23</sup> Thus, Title VII did not contain a ban on sex discrimination at the outset, not because the Kennedy administration believed a sex clause was unworthy or unneeded, but because the paramount issue of the day was race discrimination. If the administration had cause to fear an FEP title for blacks would be too much for Con-

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18. MEANY, *supra* note 9, at 320-21.

19. *Id.* at 320.

20. *Id.* at 322.

21. *Id.* at 320, 322-23.

22. See 110 CONG. REC. 2582 (1964) (remarks of Rep. May), quoted in the text accompanying note 68 *infra*.

23. See text accompanying notes 37-40 *infra*.

gress to accept, how much more cause it would have had to fear an FEP title with a sex clause! As it turned out, of course, the administration's fears were unfounded. Congress passed the Civil Rights Act, including the FEP title, and it added a sex clause as well. The sex clause was debated briefly in the House of Representatives.<sup>24</sup> In the Senate, however, although the bill was debated for eighty-three days,<sup>25</sup> "the sex provision went without challenge, and virtually without mention."<sup>26</sup>

These facts give rise to a forceful argument which bears on the way the sex clause should be regarded. The FEP title was omitted from the early drafts of the Kennedy administration's civil rights bill for reasons of practicality, not for reasons of principle. Nevertheless, Congress decided that race discrimination was unjust in employment as well as in voting, public accommodations, and public education; and Title VII was added to the law. The title initially lacked a sex clause because there was no powerful organization like the AFL-CIO to lobby for the clause and because women were willing to put blacks' needs ahead of their own. But when it was moved that sex be added to Title VII, the merits of the motion were obvious, and it was swiftly adopted.<sup>27</sup> Indeed, as will appear from the review below of the debate in the House of Representatives,<sup>28</sup> "It was difficult for anyone to speak against the amendment [adding sex] without appearing to favor discrimination against women, a position politically dangerous and hard to defend logically."<sup>29</sup> By adding sex as a protected class alongside of race, religion, and national origin, Congress recognized that sex discrimination was a significant problem that deserved as powerful a sanction as the other kinds of discrimination.

Let us now turn to the arguments that sex was added to Title VII because Congress thought a sex clause would be a good joke or because some Congressmen hoped to cripple the civil rights bill.

## II. THE DEBATE IN THE HOUSE OF REPRESENTATIVES

As reported by the Judiciary Committee to the House of Representatives on November 20, 1963, Title VII outlawed discrimination on the

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24. Judge Howard Smith proposed the amendment to add sex discrimination to Title VII two days before the House approved the civil rights bill. 110 CONG. REC. 2577 (1964). See text at section II *infra*.

25. 110 CONG. REC. 2882-14,511 (1964); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 10 (1970).

26. Miller, *supra* note 4, at 883.

27. The debate over adding sex to Title VII occupies only seven pages of the *Congressional Record*, 110 CONG. REC. 2577-84 (1964), and consumed less than two hours of time, see Miller, *supra* note 4, at 882.

28. See text at section II *infra*.

29. Miller, *supra* note 4, at 881.

grounds of race, color, religion, and national origin—but not sex.<sup>30</sup> On February 8, 1964, two days before the House sent the bill to the Senate, Judge Smith offered from the floor an amendment inserting the word “sex” after the word “religion” in several clauses of the bill,<sup>31</sup> and the amendment was promptly agreed to.<sup>32</sup> One can find neither committee hearing nor report to explain why the amendment was adopted or what it was intended to do.<sup>33</sup>

There is some support for the view that Judge Smith intended to ridicule the bill to death. Upon introducing his amendment, he occasioned great hilarity by reading excerpts from a letter he claimed to have received from “a lady.”<sup>34</sup> Said Judge Smith:

This lady has a grievance on behalf of the minority sex. She said that she had seen that I was going to present an amendment to protect the most important sex, and she says:

I suggest that you might also favor an amendment or a bill to correct the present “imbalance” which exists between males and females in the United States.

Then, she goes on to say—and she has her statistics, which is the reason why I am reading it to you, because this is serious—

The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an “imbalance” of 2,661,000 females.

....

Just why the Creator would set up such an imbalance of spinsters, shutting off the “right” of every female to have a husband of her own, is, of course, known only to nature.

But I am sure you will agree that this is a grave injustice—

And I do agree, and I am reading you the letter because I want all the rest of you to agree, you of the majority—

But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct—[laughter].

And you interrupted me just now before I could finish reading the sentence, which continues on:

immediate steps to correct, especially in this election year.

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30. H.R. REP. NO. 914, 88th Cong., 1st Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391.

31. 110 CONG. REC. 2577 (1964).

32. *Id.* at 2584.

33. *Id.* at 2582 (remarks of Rep. Green). *See also* Miller, *supra* note 4, at 880. The enigma is compounded when one learns that the House rejected attempts to add sex as a protected class to the titles on public accommodations, 110 CONG. REC. 1978 (1964), public facilities, *id.* at 2265, and public education, *id.* at 2281, and to the charge of the Commission on Civil Rights, *id.* at 2297.

34. 110 CONG. REC. 2578 (1964) (remarks of Reps. Celler and Griffiths).



Now I just want to remind you here that in this election year it is pretty nearly half of the voters in this country that are affected, so you had better sit up and take notice.

She also says this, and this is a very cogent argument too:

Up until now, instead of assisting these poor unfortunate females in obtaining their "right" to happiness, the Government has on several occasions engaged in wars which killed off a large number of eligible males, creating an "imbalance" in our male and female population that was even worse than before.

Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their "right" to a nice husband and family?

I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing. I just hope that the committee will accept it. Now, what harm can you do this bill that was so perfect yesterday and is so imperfect today—what harm will this do to the condition of the bill?<sup>36</sup>

There is also some support for the view that Judge Smith hoped to disable the bill with amendments. His amendment had no natural allies.<sup>36</sup> The President's Commission on the Status of Women opposed adding sex to Title VII.<sup>37</sup> The Women's Bureau of the Department of Labor opposed adding sex to Title VII.<sup>38</sup> The American Association of University Women opposed adding sex to Title VII.<sup>39</sup> There was no testimony in favor of such an amendment before the House Committee on the Judiciary or the House Committee on Education and Labor.<sup>40</sup> Who, then, favored the Smith amendment? According to Representative Green of Oregon, it was supported by opponents of Title VII. Referring to the amendment, Mrs. Green said:

It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it. And I hope that no other amendment will be added to this bill on

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36. *Id.* at 2577.

36. The National Woman's Party may be an exception to this statement. In a letter evidently written to a number of Congressmen, an excerpt of which was read on the House floor by Representative May, the national chairman of the Party said:

We are alarmed over the interpretation that may be given to the words "discrimination on the account of race, color, religion, and national origin" used in the bill, if the meaning of these words is not made clear in the bill itself. We are informed that in the past some government officials have interpreted "race, color, religion, and national origin" in a way that has discriminated against the white, native-born American woman of Christian religion.

*Id.* at 2582.

37. *Id.* at 2577 (remarks of Rep. Celler).

38. *Id.*

39. *Id.* at 2582 (remarks of Rep. Green).

40. See text accompanying note 34 *supra*.

sex or age or anything else, that would jeopardize our primary purpose in any way.<sup>41</sup>

Mrs. Green also argued that race discrimination was a more serious problem than sex discrimination and that further study was needed because of the biological differences between men and women.<sup>42</sup>

Nevertheless, as constructions of an act of Congress, these conventional explanations of why sex was added to Title VII are inadequate. They fail because they are inherently unlikely, because they provide no help in construing the ban on sex discrimination, and because they do not account for the remarks of Representatives who spoke in favor of the amendment.

Certainly it is unlikely that Congress put sex into Title VII as "a mischievous joke."<sup>43</sup> Congress is not known for making jokes into law (at least, not deliberately), and Title VII was no laughing matter for Congress or the country. The House may have been amused by the letter from which Judge Smith read, but that is scant evidence from which to infer that 168 Members of Congress voted for the Smith amendment because it was a joke.<sup>44</sup> As will appear below, there were serious reasons for voting for the amendment.<sup>45</sup>

It is also unlikely that the majority of the House voted for the Smith amendment in order to sabotage the bill. If a majority of all Representatives had truly wanted to defeat the bill, by hypothesis that majority had the votes to do so directly. Therefore, the most that can be argued is that the majority that voted for the Smith amendment did

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41. 110 CONG. REC. 2581 (1964). See Sirota, note 8 *supra* as an example of the traditional reliance upon Representative Green's remarks on congressional intrigue in analyzing the sex discrimination amendment:

On the last day of House debate on the Civil Rights Bill, Representative Smith, a staunch opponent of the Bill, proposed, in jest, the inclusion of "sex" as a prohibited classification in an attempt to make the Bill unacceptable to as many legislators as possible. This strategy resulted in support of the sex amendment by opponents of sexual equality and opposition to it by many advocates of the Bill, who feared that Congress would not pass an over-amended bill. Representative Green had argued that since the primary purpose of Title VII was to prevent employment discrimination against blacks, Congress should not add "sex" as a prohibited classification without first holding extensive hearings on possible employment-related biological differences between men and women. Nevertheless, the House did not hold hearings, and passed the sex amendment with the support of an unintended coalition of opponents of the Bill, who voted for the amendment with hopes of defeating the entire Bill, and many pro-Bill liberals, who favored giving women the protection of Title VII.

*Id.* at 1027 (footnotes omitted).

42. 110 CONG. REC. 2581, 2584 (1964).

43. THE NEW REPUBLIC, Sept. 4, 1965, at 101, quoted in Miller, *supra* note 4, at 884.

44. 110 CONG. REC. 2584 (1964).

45. See text accompanying notes 61-76 *infra*.

not represent the views of the House and that this unrepresentative majority hoped to poison the bill with sex, perhaps calculating that votes to take sex out of the bill could not be mustered but that, with sex in the bill, it could not pass. There are two facts which undergird this argument: First, as noted,<sup>46</sup> Mrs. Green feared the Smith amendment would clutter up the bill, inducing its friends to desert it; second, most Representatives who spoke in favor of the amendment eventually voted against the bill.<sup>47</sup>

Nevertheless, there is one fact which completely destroys this argument: *the House actually approved the Smith amendment twice*. As mentioned above,<sup>48</sup> the first vote was held on February 8th. At that time, the House was sitting as a committee of the whole, so that it acted informally and its decisions were not binding. Two days later, the House resolved itself out of committee of the whole for the purpose of voting on the entire bill as amended. Just before the final vote, Representative Williams of Mississippi exercised his right to demand another vote on the Smith amendment; the revote was taken, and for the second time the House approved the amendment.<sup>49</sup> The House then proceeded to pass the entire bill by a vote of 290 to 130.<sup>50</sup> Thus, even if we assume the majority who voted for the Smith amendment on February 8th hoped to scuttle the bill, that majority was superseded by the majority of February 10th. It would be absurd to believe that the Representatives who approved the Smith amendment on February 10th wanted to impair the very bill which they promptly approved by an overwhelming margin.<sup>51</sup>

Besides being unlikely, the conventional explanations of the Smith amendment provide no basis for construing the ban on sex discrimination. If Congress put sex in Title VII as a joke or as a strategy that backfired, what would this tell us about the meaning of the statute? The possibilities are unsettling. For how should we construe a Congressional joke? Perhaps we should ignore it. How can we find meaning in a strategem that succeeded tactically (sex was added to the bill)

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46. See text accompanying note 42 *supra*.

47. In addition to Judge Smith, those who spoke in favor of the Smith amendment and voted against the civil rights bill were Representatives Andrews of North Dakota, Dowdy of Texas, Gary of Virginia, Gathings of Arkansas, Huddleston of Alabama, Pool of Texas, Rivers of South Carolina, Tuten of Georgia, and Watson of South Carolina. 110 CONG. REC. 2578, 2583, 2584, 2804, 2805 (1964).

48. See text accompanying note 32 *supra*.

49. 110 CONG. REC. 2804 (1964).

50. *Id.* at 2804-05.

51. It might be argued that the majority which approved the civil rights bill hoped that Title VII with the sex clause would make the entire bill unacceptable to the Senate, but this theory would not explain why that same majority did not simply defeat the bill in the House.

but failed strategically (the bill passed anyway)? Perhaps we should conclude that sex was less important to Congress than race and interpret the Act accordingly,<sup>52</sup> despite its plain language.<sup>53</sup>

Disquieting implications like these can be avoided if we read the legislative history with two distinctions in mind. First, the reasons which motivate a legislator to introduce a bill may not be the reasons the legislature adopts the bill. Thus, perhaps Judge Smith did intend to torpedo Title VII. Who knows but that he made it even stronger in the eyes of other Representatives? In fact, it appears that Judge Smith himself, though opposed to the Civil Rights Act, preferred a bill *with* a ban on sex discrimination to a bill *without* a ban on sex discrimination: for while he offered no argument in support of his amendment when he first moved its adoption, after listening to the debate he argued for the amendment with conviction.<sup>54</sup> Second, we must distinguish between the reasons a legislator votes for a bill and what that bill is intended to do. For example, three legislators might vote in favor of conscription for three different reasons: one might think a strong army is the best way to avoid war; another might believe an army is necessary because war is inevitable; and a third might feel that a war would serve useful purposes at the present time. Knowledge of these reasons would shed little light on whom the legislators intended to conscript and whom they intended to exempt. Similarly, Judge Smith may have been motivated by a desire to cripple Title VII, but we cannot know from this fact what he intended his amendment to prohibit: he could have intended the amendment to be such a broad ban on sex discrimination that other Representatives

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52. Sex does receive less protection than race in constitutional cases, as the Supreme Court has expressly held. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. . . . [Classifications based upon gender] must bear a close and substantial relationship to important governmental objectives." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272-73 (1979).

53. To judge from the language of sections 703(a)(1) and (2), sex and race are entitled to equal protection.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with 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.

Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1976). *But see* text at section IV *infra* regarding the Bennett Amendment, which some people argue shows Congress intended to protect sex less fully than race.

54. *See* note 71 and accompanying text *infra*.

would recoil from a bill containing it; or he could have intended it to be such a narrow ban that advocates of women's rights would reject a bill disgraced by such a paltry measure. If there were an explanation of the adoption of the Smith amendment which did not rely on unspoken motives and which helped to interpret the amendment, it would be superior to the conventional explanations.

Finally, the conventional explanations do not account for the statement of the Representatives who spoke in favor of the Smith amendment, as a review of the debate shows. Following Judge Smith's reading of the letter in "support" of his amendment,<sup>55</sup> Representative Celler of New York spoke in opposition to the amendment. He presented his own letter from the Department of Labor, in which the Assistant Secretary in charge of the Women's Bureau was quoted as saying that adding sex to Title VII "would not be to the best advantage of women at this time."<sup>56</sup> Then Judge Smith and Mr. Celler skirmished good naturedly, after which Representative Dowdy of Texas elicited an admission that the letter from which Mr. Celler read had been signed by a man.<sup>57</sup> Representative Bolton of Ohio suggested the amendment belonged in another title of the bill.<sup>58</sup> Representative Bass of Tennessee inquired about discrimination against a young woman who worked for an airline and wanted to get married.<sup>59</sup> Judge Smith recurred to Mrs. Bolton's concern.<sup>60</sup> So far, a lackluster debate, signifying nothing.

And then Martha Griffiths rose to speak. It was the lady from Michigan who played the key role in the debate. Although several Representatives thereafter joined the discussion, Mrs. Griffiths presented all of the reasons that were marshaled in favor the Smith amendment. First, she argued that sex discrimination was real and deserved a remedy: "In his great work, 'The American Dilemma,' the Swedish sociologist [Gunnar Myrdal] pointed out 20 years ago that white women and Negroes occupied relatively the same position in American society."<sup>61</sup> Second, Mrs. Griffiths argued that outlawing race but not sex discrimination would work to the disadvantage of white women: "Mr. Chairman, I rise in support of the amendment primarily

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55. 110 CONG. REC. 2577 (1964); see text accompanying note 36 *supra*.

56. *Id.* at 2577.

57. *Id.* at 2578 (remarks of Rep. Celler).

58. *Id.* Mrs. Bolton stated that she would propose an amendment to Title X apparently on the matter of discrimination based on sex. *Id.*

59. *Id.* (remarks of Rep. Bass).

60. *Id.* Judge Smith described Title X of the bill as a miscellaneous category and stated, "I think women are entitled to more dignity than that." *Id.* The bill as enacted, however, lists Title XI as the title reserved for miscellaneous. 42 U.S.C. § 2000h to h6 (1976).

61. 110 CONG. REC. 2578 (1964).

because I feel as a white woman when this bill has passed this House and the Senate and has been signed by the President that white women will be the last at the hiring gate."<sup>62</sup> Apparently, Mrs. Griffiths reasoned that an employer would not want to reject a white man and could not legally reject a black, man or woman, thus leaving white women at the end of the line.<sup>63</sup> Finally, Mrs. Griffiths argued that the bill would offer no protection to black women:

Suppose a Negro woman had been washing dishes in a "greasy spoon," a very poor restaurant, and farther up the street there was a very good restaurant which employed only white people, and all the dishwashers were white men. Suppose they put a sign in the window, "dishwasher wanted." The Negro woman with experience, qualified, let us suppose, applied for the job and was turned away. . . .

Suppose the employer said to her, "No, we will not employ you as a dishwasher. We have only men dishwashers."<sup>64</sup>

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62. *Id.*

63. Mrs. Griffiths elaborated at length upon the inefficiency of the Act absent the word "sex," with regard to working white women. Following various illustrations, both hypothetical and factual, she stated:

And if you do not add sex to this bill, I really do not believe there is a reasonable person sitting here who does not by now understand perfectly that you are going to have white men in one bracket, you are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all.

Now, it has been suggested to me by one Member on the floor that if a job were repeatedly filled by colored women, that a white woman would be able to invoke the Federal Employment Practices Act. In my judgment, as long as a majority of the drivers in a haulaway concern were white drivers, as long as the majority of employees in the restaurant, in the university, were white people, no white woman could invoke the act. She will continue to work in the greasy spoon, drive the schoolbus, and do the other underpaid jobs.

*Id.* at 2579-80.

64. *Id.* at 2579. Subsequent to additional colloquy with Representative Celler, Mrs. Griffiths offered the further example:

Now, when I brought this up with various lawyers on the floor, one of them suggested to me that I was really trying to give a 100-pound woman the right to drive a haulaway truck. So I got to thinking about it. That is not really what I am trying to do, but let us take a case. Supposing a little 100-pound colored woman arrives at the management's door and asks for the job of driving a haulaway truck, and he says, "Well, you are not qualified," and she says, "Oh, yes, I am. During the war I was the motorman on a streetcar in Detroit. For the last 15 years I have driven the schoolbus."

Surely, Mr. Chairman, we are hiring the best drivers to drive the most precious cargo. Of course, that woman is qualified. But he has only white men drivers. Do you not know that that woman is not going to have a right under this law? Merely to ask the question is to answer it.

*Id.*

Mrs. Griffiths vitalized the debate. As though she had planted fresh seeds or fertilized dormant ones in their minds, all subsequent speakers in favor of the amendment took up one or the other of her first two points. (No one else expressed concern about the plight of the black woman, who, without the ban on sex discrimination, could not compete successfully with a white man.)

Representative St. George of New York, the first speaker after Mrs. Griffiths, opposed Mr. Celler's characterization of the Smith amendment as illogical and inappropriate,<sup>65</sup> and she spoke out strongly against America's long-standing discrimination against women.<sup>66</sup> Representatives Roosevelt of California and Thompson of Georgia rose in opposition to the Smith amendment, repeating Mrs. Green's arguments that women's groups did not support adding sex to the bill, that further study was necessary, and that the bill should not be endangered.<sup>67</sup> The next to speak was Representative May of Washington, who disagreed on two of these points:

I do not think we can ever really assume what is in the mind of any one of the 435 Members of the House when he offers an amendment or prejudge any Member on how he intends to vote on a measure. . . . I just cannot assume, as [Mrs. Green] has, that the addition of this important amendment, no matter who offers it, will jeopardize this bill. . . .

Since 1923 more and more Members have offered [an amendment to the Constitution on equal rights for women], but we have never gotten the bill out of the Committee on the Judiciary. The League of Women Voters, some Federated Women's Clubs, the National Federation of Business and Professional Women have joined the National Woman's Party in consistently asking that wherever laws or Executive Orders exist which forbid discrimination on account of race, color, religion, or national origin that these same laws and orders should also forbid discrimination on account of sex.<sup>68</sup>

Representative Kelly of New York iterated the theme that sex

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65. See *id.* at 2578 (remarks of Rep. Celler).

66. *Id.* at 2580-81. Said Mrs. St. George:

All you are doing is simply correcting something that goes back, frankly to the Dark Ages. Because what you are doing is to go back to the days of the revolution when women were chattels. Of course, women were not mentioned in the Constitution. They belonged, first of all, to their fathers; then to their husbands or to their nearest male relative. They had no command over their own property. They were not supposed to be equal in any way, and certainly they were never expected to be or believed to be equal intellectually.

. . . .

The addition of that little, terrifying word "s-e-x" will not hurt this legislation in any way. In fact it will improve it. It will make it comprehensive. It will make it logical. It will make it right.

*Id.* at 2581.

67. *Id.* at 2582; see notes 41 & 42 and accompanying text *supra*.

68. 110 CONG. REC. 2582 (1964).

discrimination was an evil that deserved to be outlawed,<sup>69</sup> and the next four speakers harked back to the argument that white women needed protection if other classes were to be protected.<sup>70</sup> Then Judge Smith, who had not previously offered any reasons in favor of his amendment, expressed a similar concern for white women:

If the bill is passed there is a provision . . . which would require that every employer in the United States, from General Motors on down to anyone who employs as many as 25 people, keep an accurate record of all hiring and firing activities. . . .

I put a question to you in behalf of the white women of the United States. Let us assume that two women apply for the same job and both of them are equally eligible, one a white woman and one a Negro woman. The first thing that the employer will look at [unless the Smith amendment is approved] will be the provision with regard to the records he must keep. If he does not employ that colored woman and has to make that record, that employer will say, "Well, now, if I hire the colored woman I will not be in any trouble, but if I do not hire the colored woman and hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit."

That will happen as surely as we are here this afternoon. You all know it.<sup>71</sup>

The intensity of Judge Smith's argument (as compared to his opening remarks) suggests he was now speaking sincerely and that he genuinely preferred a bill with a ban on sex discrimination to a bill without such a ban—though, of course, his first preference was no bill at all.

Representative Gary of Virginia associated himself with Judge Smith,<sup>72</sup> and Representative Huddleston of Alabama said that the Smith amendment would no more weaken the bill than the amendment allowing women to serve on federal juries had weakened the bill of 1957.<sup>73</sup> Representative Watson of South Carolina allied himself with Judge Smith.<sup>74</sup> Then some speakers argued against the amendment, repeating the arguments Mrs. Green had raised earlier.<sup>75</sup> Finally, Representative Gathings of Arkansas closed the debate by refocusing on the white woman: "There could be no plausible reason that a white woman should be deprived of an equal opportunity to get a job simply because of her sex and a colored woman obtain that position because of her preferential rights as contained in this bill."<sup>76</sup>

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69. *Id.* (remarks of Rep. Kelly).

70. *Id.* at 2583 (remarks of Reps. Tuten, Pool, Andrews, and Rivers).

71. *Id.* at 2583.

72. *Id.*

73. *Id.* (referring to the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634).

74. 110 CONG. REC. 2584 (1964).

75. *Id.* (remarks of Reps. Lindsay, Mathias, and Roosevelt).

76. *Id.* at 2584.



We have now accounted for all speakers who favored the Smith amendment. It is evident they relied on two principal arguments: sex discrimination was wrong, and white women should not be left at a disadvantage vis-a-vis black women. These arguments lead to the true explanation of why Congress added sex to Title VII.

### III. THE SCOPE OF THE BAN ON SEX DISCRIMINATION

Contrary to the superficial reading of it by many commentators,<sup>77</sup> the House debate is rich in evidence that the Smith amendment was seriously considered on its merits and not taken simply as a parliamentary ploy. This evidence establishes that sex was added to Title VII because the Representatives believed the time had come to end sex discrimination in employment and because they did not want to leave white women at the end of the hiring line. This explanation of the Smith amendment is superior to the conventional explanations on all three of the dimensions discussed above:<sup>78</sup> it derives from the Members of Congress, it is a probable account, and it provides a basis for construing the ban on sex discrimination.

The explanation offered herein of the Smith amendment comes from the pages of the *Congressional Record*; it is not based on reports of observers, who may or may not have witnessed the debate and interpreted it objectively. This explanation is also a highly probable reading of the mind of the House for two reasons: First, of course, it comes directly from the mouths of the Representatives. Second, while a majority of the House would not likely have voted for the Smith amendment on February 10th in order to defeat the civil rights bill and then immediately have approved that same bill, a majority of the House could very likely have believed that sex discrimination was unjust and white women should not be overlooked. This explanation also helps delineate the scope of the ban on sex discrimination, as the following discussion shows.

One of the two reasons Congress added sex to Title VII was that sex discrimination is unjust. We have seen that race discrimination in

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77. See, e.g., *Foreword*, *supra* note 2, at xi-xii; *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971); Miller, *supra* note 4, at 880-82; Sirota, *supra* note 8, at 1027-28; Vaas, *supra* note 12, at 441-42.

Although taking note of those provisions which were proposed but ultimately unsuccessful in becoming part of a bill can be helpful in understanding the legislative purpose behind a statutory enactment, the conventional explanations of the sex discrimination clause ask that a successfully enacted provision be understood in terms of a failed and oblique purpose.

78. See text accompanying notes 43-76 *supra*.

employment was a target of Title VII from its inception.<sup>79</sup> When Congress decided that sex discrimination was also an evil, and incorporated the ban on sex discrimination into the Act alongside of and without distinction from the ban on race discrimination (except for the bona fide occupational qualification clause), it impliedly determined that the two kinds of discrimination were equally unjust: whatever was unjust about one was unjust about the other, and whatever should be done to eliminate one should be done to eliminate the other. It follows that Congress intended to protect sex as fully as race and the other classes named in Title VII.

The other reason Congress added sex to Title VII was a fear that a black woman would enjoy greater protection than a white woman. In a legal sense, this fear was unjustified. If an employer preferred a black woman because of her race, a white woman would have had a *prima facie* claim for racial discrimination under the bill as it stood before sex was added to it; Congress had already decided that whites as well as blacks would be protected by Title VII.<sup>80</sup> In a practical sense, however, the fear for the white woman was realistic enough. As the debate shows, the Representatives sensed that an employer, choosing between a black and a white, might lean towards the black because of a belief that the black would be more likely to sue and win than the white.

At this point, an element of irrationality enters the discussion. Why the Representatives thought that adding sex to the Act would protect white women is a mystery; indeed, adding sex was medicine worse than the disease, for it not only failed to help white women but, by helping black women, created a problem for white men. The failure to help white women is obvious. If an employer prefers one woman over another, a ban on sex discrimination will (in most cases)<sup>81</sup> provide no

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79. See text accompanying notes 9-21 *supra*.

80. 110 CONG. REC. 2579 (1964) (remarks of Rep. Celler). *But cf.* the comments of Mrs. Griffiths quoted in note 63 *supra*. She believed the ban on race discrimination would not avail a black woman.

81. *Cf.* *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*), in which the ban on sex discrimination did protect a woman who was rejected in favor of another woman. The employer refused to hire women with preschool-aged children, but imposed no similar requirement on men. *Id.* at 543. Accordingly, the plaintiff, who had preschool-aged children, was rejected, while women without such children were hired. The Supreme Court found sex discrimination because applicants of like qualifications are entitled to employment opportunities irrespective of sex. Of course, the gist of the case is that men were treated more favorably than women, though some women also benefitted from the policy. However, if the employer had applied its rule about preschool-aged children to both sexes, or if the employer had a lawful reason to hire only women for the job in question, the plaintiff might well have lost her case.

recourse to the rejected applicant. As for white men, Mrs. Griffiths pointed out that, without the sex amendment, a black woman could not compete effectively with a white man because an employer who rejected the woman because of her race and chose the man because of his, could argue that his reason was sex, not race. Thus, the addition of sex to the bill gave black women the same "advantage" over white men which they enjoyed over white women.

That the Smith amendment did not accomplish what it purported to accomplish amounts to an argument that its real purpose was something else, such as an attempt to defeat the bill. That the Smith amendment exposed white men to a risk from which they would otherwise have been safe tends to support this argument: for, once the Representatives realized what they had done, they might have shied away from the FEP title altogether. On the other hand, it is much more likely that Judge Smith and others did not think through the implications in the foregoing paragraph. They were sincere in their desire to protect the white woman. They were convinced by Mrs. Griffiths' argument that the white woman would be at the bottom of the hiring list, and they saw the ban on sex discrimination as the means to prevent that result. Whether or not readers agree on this point, surely they will agree that what Judge Smith believed is not controlling. What other Representatives believed is important, and nothing in the *Congressional Record* suggests that any Representative realized the flaws in the Judge's argument.

Accepting, then, that Congress adopted the Smith amendment in order to protect white women against a kind of unfair competition from black women, we see that the ban on sex discrimination was meant to be a shield against the sword of the ban on race discrimination. It is reasonable to conclude the shield was meant to be as effective as the sword. If the bill without the Smith amendment was perceived to give black women an advantage over white women because of employers' fears of being sued by black women, and if the purpose of the Smith amendment was to rectify this imbalance, surely the ban on sex discrimination must have been intended to give employers equal reason to fear a suit by white women. It follows from this purpose, as it does from the purpose to end sex discrimination, that Congress intended to protect sex as fully as race.

A correct understanding of the legislative history of the Smith amendment serves to rebut notions that Congress was joking about sex or was duped by a wily Southern Representative. Congress had good and sufficient reasons to add sex to Title VII. Acknowledging those reasons is important to proper analysis of issues of sex discrimination. One such issue is comparable worth.

## IV. AN APPLICATION TO THE ISSUE OF COMPARABLE WORTH

Is a tree trimmer entitled to higher pay than a registered nurse? Should a guard in a jail be paid more than a matron? These questions raise no issues under the Equal Pay Act<sup>82</sup> because the jobs are different; but if the tree trimmers and guards are predominately men and the nurses and matrons are predominately women, an issue may arise under Title VII. The issue has become known as comparable worth, and it may be posed thus: Did Congress intend Title VII to outlaw an employer's compensating a male job more highly than a female job if the reason for the pay differential is the sex of the women? The reasons that sex was added to Title VII do not fully answer this question, but they contribute to the discussion, when the employer's discrimination is purposeful.

The Smith amendment was adopted for two reasons: the House believed that sex discrimination in employment was unjust and desired to protect white women in the job market.<sup>83</sup> Based on these reasons, it was argued that Congress intended to protect women against sex discrimination as fully as it intended to protect blacks against race discrimination (except where sex is a bona fide occupational qualification for a job). This argument affects comparable worth because it is obvious that a black would state a claim under Title VII if he alleged that he was paid less for his job than a white was paid for his job, and the employer's reason was the race of the black. That would be discrimination in compensation because of race, which section 703(a)(1) of Title VII expressly forbids.<sup>84</sup> If sex is as fully protected as race, a woman would state a claim under Title VII if she alleged that she was paid less for her job than a man was paid for his job, and the employer's reason was the sex of the woman. However, it is commonly argued, and it has been held,<sup>85</sup> that Congress intended a different

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82. 29 U.S.C. § 206(d)(1) (1976).

83. See text at section III *supra*.

84. The language of section 703(a) is quoted at note 53 *supra*. See also 110 CONG. REC. 5812 (1964) (remarks of Sen. Stennis).

85. As will be discussed, see text accompanying notes 86-102 *infra*, the extent of the protection given to sex by Title VII turns on whether the Bennett amendment to those provisions, 42 U.S.C. § 2000e-2(h) (1976), incorporated the Equal Pay Act's equal work formula, 29 U.S.C. § 206(d)(1) (1976), into the Title VII prohibitions, or simply the Equal Pay Act's four affirmative defenses and not its equal work standard, *id.* If the former, then in order to establish a case under Title VII, it must be proved that a wage difference was based on sex and that there was the performance of equal work for unequal compensation. See, e.g., *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 101 S. Ct. 244 (1980); *Orr v. Frank R. MacNeill & Son Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975). If the latter, then Title VII is broader in scope than the Equal Pay Act and other wage discrimination situations may be held violative of Title VII's prohibitions. See, e.g., *International Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC*

kind of protection for sex than for race. The basis of this argument is the Bennett amendment, which was added to Title VII in the Senate shortly before the bill was approved and sent back to the House.<sup>86</sup> The Bennett amendment was an addition to section 703(h). The amendment read:

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)).<sup>87</sup>

Section 6(d) of the Fair Labor Standards Act of 1938 (the Equal Pay Act) reads in relevant part:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work 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) system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .<sup>88</sup>

It has been argued that the Bennett amendment was meant to exempt from Title VII any sex-related pay differential not outlawed by the Equal Pay Act; that Congress rejected comparable worth as a theory under the Equal Pay Act; and, therefore, that comparable worth is not a legitimate theory under Title VII. It has been counterargued that the Bennett amendment was meant only to prevent Title VII from encroaching on the exceptions to the Equal Pay Act; that comparable worth does not affect those exceptions; and, therefore, that comparable worth is a cognizable theory under Title VII. Although the legislative history of the Bennett amendment cannot provide a complete answer to the issues raised by these arguments, it can shed considerable light on them.

If the Bennett amendment were intended to reserve all sex-related pay differential cases for the Equal Pay Act, the Senate would have significantly altered the ban on sex discrimination. In effect, in compensation cases there would have been one definition of discrimination for sex and a different, broader definition for all other classes: any pay differential caused by an employee's race, color, religion, or national origin would have been illegal, but a pay differential caused by an

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v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980); *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979), *aff'd*, 49 U.S.L.W. 4623 (1981).

86. See 110 CONG. REC. 13,647 (1964).

87. *Id.*

88. 29 U.S.C. § 206(d)(1) (1976).

employee's sex would have been illegal only if the man and woman did equal work requiring equal skill, effort, and responsibility under similar working conditions. Consider, for example, an employer who paid a man doubletime wages for overtime work, but paid a woman doing different work only time-and-a-half for overtime. Did the Senate intend that women should have no cause of action on these facts? Did the Senate intend to narrow Title VII's protection of women? A number of reasons suggest otherwise.

First, nothing said on the floor of the Senate indicates, or even hints, that the purpose of the Bennett amendment was to redefine the nature of sex discrimination. Only three Senators spoke on the amendment. The first was Senator Bennett himself. It is clear that he was concerned, not with narrowing the ban on sex discrimination, but with protecting the integrity of the Equal Pay Act:

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 conflict between the wholesale insertion of the word "sex" in the bill and 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.<sup>89</sup>

The second speaker was Senator Humphrey; he merely said the amendment was helpful.<sup>90</sup> The final speaker was Senator Dirksen, who explained the limited scope of the Bennett amendment:

We were aware of the conflict that might develop, because the Equal Pay 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.<sup>91</sup>

The foregoing comments clearly reveal that the Senate was not bent on limiting the scope of the ban on sex discrimination. Rather, the Bennett amendment was meant simply and solely to prevent Title VII from vitiating the exceptions to the Equal Pay Act, which had been passed just one year earlier.

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89. 110 CONG. REC. 13,647 (1964).

90. *Id.*

91. *Id.*

This conclusion is further supported by the identity of the speakers and by the absence of other speakers. Senator Humphrey was one of the floor managers of the civil rights bill,<sup>92</sup> and Senator Dirksen, at that time the minority leader, engineered the compromise that insured passage of the bill.<sup>93</sup> These Senators' complete acceptance of the amendment suggests that Senator Bennett had previously consulted with them and, very likely after discussing it with other Senators, they had agreed to it. If the purpose of the amendment had been a major change, such as narrowing the ban on sex discrimination, rather than a minor change, such as preserving the exceptions to the Equal Pay Act, Humphrey and Dirksen might not have embraced the amendment so readily, and other Senators (for example, Margaret Chase Smith and Maureen Neuberger) would surely have risen to decry the betrayal of women.

Another indication that the Senate did not intend to narrow Title VII's protection of women flows from the reasons the House added sex to the civil rights bill. The House believed that sex discrimination in employment was unjust and desired to protect white women in the job market.<sup>94</sup> To read the Bennett amendment to take sex-based compensation cases out of Title VII is to impute to the Senate a renunciation of both of the reasons for which the House agreed to the sex clause: for such a reading would permit blatant forms of sex discrimination to persist and would poke a large hole in the shield the House fashioned for white women. A few obvious examples will suffice to illustrate the extent to which sex discrimination in compensation could persist if only the Equal Pay Act applied.

One case is the common practice of compensating certain jobs less than others because women tend to hold the former.<sup>95</sup> If the women's jobs involve different work from the men's jobs, an employer could lawfully reduce the women's pay even further, and raise the men's pay—and admit his reason was the employees' sexes—without offending the Equal Pay Act. Another case is the employer with a unique job. He is free under the Equal Pay Act to say, "Miss Jones, I am glad you are a woman because I would have to pay a man twice your salary to do your work." A third case is the employer with two establishments; the Equal Pay Act permits him to pay a man at one establishment more than a woman at the other establishment, even

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92. *Id.* at 13,663 (remarks of Sen. Randolph).

93. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 10 (1970); see *Foreword*, *supra* note 2, at xii.

94. See text at section III *supra*.

95. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 410-15 (1979).

though their work is identical.<sup>96</sup> Finally, as mentioned above, the Equal Pay Act would not reach the case of an employer who paid a man doubletime wages for overtime work, but paid a woman doing a different job only time-and-a-half for overtime.

Did the Senate intend to condone these practices? Absolutely nothing in the *Congressional Record* suggests the Senate wanted to allow them. Without a clear signal to the contrary, we should not lightly attribute such a purpose to a body that was so concerned with the rights of blacks, Hispanics, and other disadvantaged groups.

As for the hole in the shield, consider the case of a black woman who holds a job for which she feels she is underpaid. If she can prove that she is in fact underpaid, she may well prevail against her employer on a claim of race discrimination. Suppose a white feels she is underpaid. If the Bennett amendment precludes a comparable worth theory, the white woman will have no case. Now look at the situation (as did several Members of the House) from the viewpoint of the employer. He knows if he pays a black woman less than she thinks she deserves, she can sue him and she might win; he also knows if he pays a white woman less than she thinks she deserves, she has no legal recourse. Therefore, the employer's first thought might be to hire a white woman and underpay her. (Could the Senate have meant to allow this?) But the employer's second thought would be that, if he hires the white woman, he will be sued for race discrimination by the black woman, so his only alternative is to hire the black woman—and pay her what she wants—in order to forestall a lawsuit. Surely the Senate did not intend the Bennett amendment to have such an effect. It follows that the theory of comparable worth under Title VII is essential to keep intact the protection the House extended to white women.

At the same time, the Bennett amendment must be given its due. It says an employer may differentiate in compensation on the basis of sex if the differentiation is authorized by the Equal Pay Act.<sup>97</sup> The Equal Pay Act can be read to authorize any pay practice it does not outlaw, or it can be read to authorize only those pay practices which fall within one of its exceptions.<sup>98</sup> The latter reading is the more plausible. *To authorize* is to invest with right or power; at a minimum, it is to approve. If Congress outlaws one thing, it does not make everything else right, nor does it approve everything else; it simply fails to speak about those things. But if Congress outlaws one thing, and then excepts something specific from the law, it definitely has approved and given a right to exist to that specific thing. Accordingly, the Equal Pay

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96. 29 U.S.C. § 206(d)(1) (1976).

97. 42 U.S.C. § 2000e-2(h) (1976); see text accompanying note 87 *supra*.

98. 29 U.S.C. § 206(d)(1) (1976); see text accompanying note 88 *supra*.



Act authorizes a pay differential between men and women only if (a) they are doing "equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . under similar working conditions" and (b) the differential is paid "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex . . . ."<sup>99</sup> On this reading, the Bennett amendment says nothing more than that Title VII does not destroy the exceptions to the Equal Pay Act. Of course, Title VII could not affect the Equal Pay Act's exceptions unless the rule of that law came into play. The rule of that law applies to compensation for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."<sup>100</sup> Comparable worth cases are entirely different; they involve different jobs, not similar jobs. It follows that the Bennett amendment has no bearing on the issue of comparable worth.

This reading of the Bennett amendment is confirmed by its legislative history. Senator Bennett suggested the scope of his amendment when he said, "[I]n the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."<sup>101</sup> It would be helpful to know what kind of conflicts the Senator had in mind, but he did not illustrate his statement. Nevertheless, we can know what the Senate understood the relevant conflicts to be, for Senator Dirksen said, "All that the pending amendment does is to recognize those exceptions, that are carried in the [Equal Pay Act]."<sup>102</sup> Evidently, the conflicts the Senate feared would occur in cases in which Title VII might be interpreted to override the exceptions to the Equal Pay Act. Clearly, such conflicts could only occur in cases to which both Title VII and the Equal Pay Act apply. Such conflicts could not occur, of course, in cases to which only one of the statutes applies. Because the Equal Pay Act does not reach comparable worth cases, which involve different jobs, and therefore no conflict is possible between Title VII and the Equal Pay Act, in regard to such jobs, the Bennett amendment does not affect the theory of comparable worth.

Curiously, the Senate may have been as irrational about the Bennett amendment as the House was about the Smith amendment. The Senate's concern—that, without the Bennett amendment to preserve the exceptions to the Equal Pay Act, Title VII might have been construed to outlaw employers' practices the Equal Pay Act permit-

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99. *Id.*

100. *Id.*

101. 110 CONG. REC. 13,647 (1964).

102. *Id.*

ted—may have been unfounded. As it stood before the Bennett amendment, section 703(h) contained language that, when read together with section 703(a), could have been interpreted to achieve the same purpose as the Bennett amendment. But, just as the House thought a sex clause was necessary to protect white women, the Senate thought the Bennett amendment was necessary to protect the exceptions to the Equal Pay Act. Once again our legislators acted quickly, without sufficient reflection, and their logic may have been questionable, but their intent was clear.

#### V. THE INTERRELATIONSHIP OF THE SMITH AND BENNETT AMENDMENTS

Not only does the Smith amendment suggest how to interpret the Bennett amendment, but also the Bennett amendment suggests how to interpret the Smith amendment. That is, we have just seen that the reasons the House agreed to the sex clause influence how we should understand the Bennett amendment;<sup>103</sup> now we are able to see that the debate on the Bennett amendment confirms our understanding of the reasons why the House agreed to the sex clause.

If the House added sex to Title VII as a joke or a stratagem to encumber the civil rights bill, the first real consideration of the effect of a ban on sex discrimination would have taken place in the Senate, and the Bennett amendment—which is the Senate's only discussion of sex discrimination in the *Congressional Record*—could have been the Senate's attempt to define the degree of protection to be afforded women. On the other hand, if the House added sex to the bill for serious and weighty reasons, the Bennett amendment should be seen as refining, rather than defining, the ban on sex discrimination. Conversely, if the Bennett amendment had sparked significant debate on the nature of sex discrimination, such debate would be consistent with the view that the Senate knew the House had not been serious about the sex clause. But if the Bennett amendment were adopted without opposition or discussion, this fact would suggest the Senate was satisfied with the House's deliberation on the issues.

The very brief debate on the Bennett amendment, quoted almost in full above,<sup>104</sup> demonstrates that the Bennett amendment was not a vehicle for the Senate to decide whether sex discrimination ought to be outlawed by Title VII. Apparently, by the time the amendment was offered, the Senate had accepted as settled the House's decision to include sex in the bill. This acceptance rebuts the notion that the House added sex to the Act without legitimate reasons. This acceptance also

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103. See text accompanying note 94 *supra*.

104. See text accompanying notes 89-91 *supra*.

suggests the Senate was substantially satisfied with the House's balancing of the relevant interests, that is, with the House's determination to protect sex as fully as race, religion, and national origin.

Thus, the legislative histories of the Smith and Bennett amendments complement one another. The House agreed to the Smith amendment to eradicate sex discrimination in employment and to protect white women. The Senate accepted the House's decision to add sex to the civil rights bill, but added the Bennett amendment to prevent impairment of the Equal Pay Act. Recognizing a cause of action under Title VII for purposeful sex discrimination in compensation would not dilute the Equal Pay Act because the latter statute would remain the controlling authority in cases to which both statutes apply. However, refusing to recognize a cause of action for purposeful sex discrimination in compensation would seriously erode the congressional purpose to protect women as the other classes covered by Title VII. The purposes of the Smith and Bennett amendments can be realized only if all purposeful sex discrimination can be redressed under Title VII or the Equal Pay Act.

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EDITOR'S NOTE: Shortly before this article went to press, the Supreme Court decided *County of Washington v. Gunther*, 49 U.S.L.W. 4623 (1981). Although its decision was based on other arguments, the Court reached the conclusion, as does the author in section IV of this article, that the Bennett amendment was not meant to preclude a Title VII action to redress sex discrimination in compensation if the discrimination was purposeful.