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COUNTY OF WASHINGTON v. GUNTHER: MOVEMENT TOWARDS COMPARABLE WORTH?

I. INTRODUCTION

*County of Washington v. Gunther*¹ presented the United States Supreme Court with the opportunity to permanently dispose of a theory that would extend or supplant the established doctrine of "equal pay for equal work"—equal pay for *comparable worth*.² But rather than end the long-standing controversy over comparable worth,³ the five to four majority appeared to take an incremental step towards acceptance of the revolutionary idea by holding that women can sue their employer under title VII of the 1964 Civil Rights Act⁴ without demonstrating that they performed work equal to that of men.⁵ This step was not overt, however, as the Court specifically stated that it was not addressing the theory of comparable worth.⁶ Moreover, Justice Rehnquist sought to emphasize the limits of *Gunther* by indicating in his dissent that the majority "does not endorse the so-called 'comparable worth' theory."⁷ But while the Court clearly avoided endorsement, it just as clearly failed to permanently dispose of the theory. The decision in *Gunther* will have a minimal effect because, while it increases the range of circumstances under which title VII suits may be brought, an

1. 101 S. Ct. 2242 (1981) (probable publication in volume 452 of United States Reports).

2. See generally Comment, *The Comparable Worth Theory: A Critical Analysis*, 32 BAYLOR L. REV. 629 (1980); Comment, *Equal Pay for Comparable Work Value: The Failure of Title VII and the Equal Pay Act*, 75 NW. U.L. REV. 914 (1980).

3. For an exhaustive treatment of the legal, social, and economic ramifications of comparable worth, compare Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of The Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) [hereinafter cited as *Wage Discrimination*], with Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory In Perspective*, 13 U. MICH. J.L. REF. 231 (1980) [hereinafter cited as *Comparable Worth*]. *Comparable Worth* is a direct response to, and criticism of, *Wage Discrimination*.

4. 42 U.S.C. § 2000e-2 (1976).

5. 101 S. Ct. at 2254.

6. *Id.* at 2246. The Court stated:

We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of 'comparable worth,' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.

Id. (citations omitted).

7. *Id.* at 2265 (Rehnquist, J., dissenting).

overriding problem of proof will remain to preclude any increase in the number of title VII recoveries. Therefore, *Gunther's* significance lies not so much in its holding as in what it refused to hold. The gains to underpaid women achieved by *Gunther* are illusory, and the troublesome theory of comparable worth remains unresolved.

The concept of "equal pay for comparable work" is espoused by those seeking a greater degree of consistency between the value to an employer of a particular employee and that employee's rate of compensation.⁸ The premise is that where two employees are performing jobs that are of comparable value, they should receive equal pay.⁹ Those favoring comparable worth claim that employers avoid paying women the same rate as men by merely assigning women different job titles.¹⁰ But beyond that it is argued that completely dissimilar jobs should be compared as to their respective worth, and pay scales should be based on this comparison.¹¹

A conclusion of the wisdom of a comparable worth theory of wage determination, whether founded on economic or social principles, is beyond the scope of this note.¹² Rather, this note will examine the relevant legislation and case law to demonstrate that the present statutes¹³

8. See generally *Wage Discrimination*, *supra* note 3; Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. CHI. L.J. 723 (1977) [hereinafter cited as *Beyond EPA*].

9. Miller, *Preface* to NAT'L RESEARCH COUNCIL, COMM. ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, WOMEN, WORK, AND WAGES at ix (1981):

[A]dvocates of "comparable worth" have called for intervention to redress the inequity they perceive to be embedded in the present situation. In essence, the point made is that, within a given organization, jobs that are equal in their value to the organization ought to be equally compensated, whether or not the work content of those jobs is similar. The impetus for the formulation of the "comparable worth" concept has come primarily from the substantial differences in the types of jobs held by men and by women and from the belief that those traditionally held by women receive lower compensation because they are held by women.

Id.

10. *Wage Discrimination*, *supra* note 3, at 407.

11. See *Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 244 (1980). The plaintiff nurses in *Lemons* made a straightforward attempt to recover on the basis of the comparable worth theory. They demanded that their worth be compared with all employees of the City and County of Denver, arguing that to limit the comparison to other nurses is to perpetuate historically incorporated discrimination. This argument was summarily rejected by the 10th Circuit.

12. See generally *Wage Discrimination*, *supra* note 3; *Comparable Worth*, *supra* note 3; *Beyond EPA*, *supra* note 8. *Wage Discrimination* and *Beyond EPA* both advocate expanded use of title VII, the former using extensive extra-legal forms of analysis. *Comparable Worth* argues for a continued limit on title VII's application. For a technical report that attempts to classify and analyze all aspects of comparable worth, see WOMEN, WORK, AND WAGES, *supra* note 9.

13. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1976); Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1976).

cannot support a claim based on comparable worth and that the Supreme Court in *Gunther* would have better served all interested parties by so finding.

II. DEVELOPMENT OF EQUAL PAY PROVISIONS—BACKGROUND

The women employees in *Gunther* (hired as county jail “matrons”) instigated their suit under title VII of the 1964 Civil Rights Act,¹⁴ charging sex-based wage discrimination. They complained that male co-employees enjoyed higher salaries simply because they were men.¹⁵ Title VII states that it is unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”¹⁶ Read alone, this provision appears to provide a remedy for the matrons without requiring a showing of equal work. However, section 703(h) of title VII¹⁷ provides criteria under which an employer is exempt from the prohibition of what would otherwise be unlawful discrimination.¹⁸ In addition to the listed exemptions the section’s final sentence, known as the “Bennett Amendment,”¹⁹ ties title VII into the Equal Pay Act (EPA):²⁰

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA].²¹

14. 42 U.S.C. § 2000e-2.

15. 101 S. Ct. at 2245.

16. 42 U.S.C. § 2000e-2(a)(1) (1976).

17. *Id.* § 2000e-2(h).

18. *Id.* The section states:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production* or to employees who work in different locations, provided that such differences [sic] 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.

Id. (emphasis added).

19. 42 U.S.C. § 2000e-2(h) (1976).

20. 29 U.S.C. § 206(d) (1976). The EPA is part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976).

21. 42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

This sentence defines the relationship between title VII and the EPA and is the focal point of the *Gunther* controversy. The problem, then, becomes determining what exemptions were created by "differentiation . . . authorized by the provisions of [the EPA]."²²

The EPA has a somewhat narrower scope than title VII in that it deals exclusively with sex-based wage discrimination, whereas title VII deals with racial and religious discrimination, hiring practices, and working conditions. The EPA provides in 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) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .²³

Given these provisions of the EPA, title VII's language, "authorized by the provisions of [the EPA]," can have two reasonable interpretations. The prevailing view until *Gunther* was that the EPA prohibited certain forms of wage differentiation and, by implication, "authorized" all other forms.²⁴ The Bennett Amendment, therefore, provided that a particular practice of wage differentiation would not be unlawful under title VII unless it is also unlawful under the EPA. The dissenters in *Gunther* adopted this position.²⁵

22. See generally C. SULLIVAN, M. ZIMMER, R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 10.17-10.18 (1980); *1979-1980 Annual Survey of Labor Relations and Employment Discrimination Law—Title VII and the Equal Pay Act*, 22 B.C.L. REV. 40, 184 (1980); Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 344-46 (1968).

23. 29 U.S.C. § 206(d)(1) (1976) (emphasis added).

24. See notes 70-79 *infra* and accompanying text.

25. 101 S. Ct. at 2261 (Rehnquist, J., dissenting). One commentator criticizes this interpretation as an unconventional use of the word "authorize":

[T]hat the term "authorized" refers to all differentials not prohibited by the EPA . . . involves an assumption that the power of the employer to set wages derives from Congress. Only then could a wage rate which is not prohibited by the Act be said to be authorized by Congress. But the basic premise of our constitutional system is to the contrary. Governmental authorization is not necessary in order to engage in the ordinary economic and social activities of life. The concept of our government as one of limited powers presupposes a freedom of action in the absence of governmental regulation rather than an ability to act only with permission or authorization from the government.

The second interpretation, which was acknowledged²⁶ but never adopted until *Gunther*, is that the Bennett Amendment merely incorporates the EPA's four affirmative defenses into title VII. In other words, a particular practice of wage differentiation would not be unlawful under title VII if it is "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."²⁷

While both of these interpretations are reasonable, neither of them is without significant weakness. An analysis of the EPA and title VII will demonstrate that the first interpretation is the better of the two.

A. *Equal Pay Act*

The notion of mandating equal pay for work of equal or comparable value received significant congressional scrutiny between World War II and 1963.²⁸ Numerous bills were introduced during this period attempting to achieve this goal,²⁹ nearly all of which opted for the language "equal pay for *comparable* work."³⁰ These bills were consistently rejected, however, and it was not until 1963 that an equal pay bill eventually passed.³¹

House Resolution 10226 was one of the last equal pay bills introduced that retained the "comparable work" language.³² But after de-

Wage Discrimination, *supra* note 3, at 482. To the extent that this criticism is valid, the interpretation can be defended by looking beyond the language, to the intent of the Bennett Amendment. See notes 61-70 *infra* and accompanying text.

26. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 75-76 (1964).

27. 29 U.S.C. § 206(d)(1) (1976). The basic criticism levied against this interpretation is that title VII already includes these affirmative defenses, and it is unreasonable to assume Bennett added the provision as mere reinforcement thereof. See notes 62-63 *infra* and accompanying text.

28. See generally *Comparable Worth*, *supra* note 3; *Beyond EPA*, *supra* note 8, at 734-42. Gitt and Gelb found that since World War II, an attempt was made during every congressional session to pass some type of equal pay act. These commentators trace this activity to a similar equal pay requirement set forth by the War Labor Board. *Id.* at 734-37.

29. See, e.g., S. 1178, 79th Cong., 1st Sess., 91 CONG. REC. 6411 (1945) (Women's Equal Pay Act of 1945); S. 706, 81st Cong., 1st Sess., 95 CONG. REC. 550 (1949) (Women's Equal Pay Act of 1949); H.R. 3550, 82d Cong., 1st Sess., 97 CONG. REC. 3398 (1951) (Women's Equal Pay Act of 1949); S. 176, 83d Cong., 1st Sess., 99 CONG. REC. 155 (1953) (Women's Equal Pay Act of 1953); H.R. 59, 84th Cong., 1st Sess., 101 CONG. REC. 32 (1955) (Women's Equal Pay Act of 1955); S. 39262, 86th Cong., 2d Sess., 106 CONG. REC. 18961 (1960) (Women's Equal Pay for Equal Work Act of 1960); H.R. 11677, 87th Cong., 2d Sess., 108 CONG. REC. 8047 (1962) (Equal Pay Act).

30. E.g., H.R. 4273, 80th Cong., 1st Sess., 93 CONG. REC. 3929 (1947) (emphasis added).

31. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, (codified at 29 U.S.C. § 206(d) (1976)).

32. H.R. 10226, 87th Cong., 2d Sess., 108 CONG. REC. 2263 (1962).

bate in the House of Representatives,³³ the bill was amended and became one of the first to use the more restrictive "equal work" language. This change was made because of the more precise and limited definition of "equal." The amendment's sponsor, Representative St. George stated: "[T]here is a great difference between the word 'comparable' and the word 'equal'. . . . 'Equal' implies no difference in amount, number, value. This is not true of the word 'comparable.' The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes."³⁴ Agreeing with St. George, Representative Landrum stated, "If, in fact, we want to establish equal pay for equal work, then we ought to say so and [thereby prevent] employees of the Labor Department [from] harassing business with their various interpretations of the term 'comparable'. . . ."³⁵ These remarks indicate that the EPA was not intended to provide a remedy for a broad range of sex-based wage differentials, but rather to ensure "where men and women are doing the same job under the same working conditions that they will receive the same pay."³⁶ Included in the limited objectives of the EPA was that it "not be excessive nor excessively wide ranging."³⁷ Use of "equal" would help to achieve this goal of limitation, whereas "comparable" might allow Labor Department officials to exceed their authority.

The opponents of Landrum and St. George in the debate between "equal" and "comparable" did not disagree with the statements that "equal" has a more precise meaning and would therefore limit the effect of the EPA. Indeed, such a limitation was precisely the effect to which they objected.³⁸ Representatives Green and Zelenko felt that substituting "equal" for "comparable" would render the bill ineffectual because it would require exact uniformity; a criterion that could easily be overcome by an unscrupulous employer.³⁹ Use of the word "comparable," Zelenko argued, would permit "a realistic and practical ap-

33. 108 CONG. REC. 14767-14771 (1962).

34. *Id.* at 14767.

35. *Id.* at 14768.

36. 109 CONG. REC. 9196 (1963) (remarks of Rep. Frelinghuysen).

37. *Id.*

38. 108 CONG. REC. 14768-69 (1962).

39. *Id.* at 14768. "If a showing of equality was a requisite to establish the requirement of equal pay, the conscious introduction of one slight and trivial factor might be considered sufficient to justify a lower wage rate." *Id.* Rep. Olsen expressed his concern that use of "equal" would nullify the bill's effectiveness:

My impression of the amendment [to substitute "equal" for "comparable"] is that [it] would require an impossible proof, an impossible amount of proof, to require that the work and the skill be exactly equal. I think this would be an absolute impossibility. To

praisal of two jobs to determine whether they have enough like characteristics and skill demands to warrant the same basic pay rate."⁴⁰

Thus, the debate was focused on the desired degree of restriction that the Equal Pay Act should have. Using "equal" would allow less intrusion into wage determination practices of businesses but would include the risk of enacting an ineffectual bill. On the other hand, opting for "comparable" would allow greater interpretive latitude but might extend the effect of the legislation beyond the stated desire—equal pay for equal work.⁴¹

In the end the bill was defeated, but only after the amendment to substitute "equal" for "comparable" had been agreed upon.⁴² When the bill was re-introduced in 1963, it contained the word "equal" from the beginning, and there was no debate on the equal/comparable issue.⁴³ It had already been decided that the inherent limitations of the word "equal" were to be preferred to the less precise "comparable."⁴⁴

In order to emphasize the significance of the equal work standard, Representative Goodell stated shortly before passage of the bill:

[I]t 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.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they

have such an amendment in this legislation would be like having no bill at all. I think it would be much better to have the word "comparable" in the legislation.

Id. at 14770.

40. *Id.* at 14768. These fears of the word "equal" were to be allayed by three district court holdings. See *Shultz v. Brookhaven Gen. Hosp.*, 305 F. Supp. 424 (N.D. Tex. 1969); *Wirtz v. Rainbo Baking Co. of Lexington*, 303 F. Supp. 1049 (E.D. Ky. 1967); *Wirtz v. Basic, Inc.*, 256 F. Supp. 786 (D. Nev. 1966). The Third Circuit followed suit in *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970): "Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be substantially equal. Any other interpretation would destroy the remedial purposes of the Act." *Id.* at 265 (footnote omitted).

41. H.R. REP. NO. 309, 88th Cong., 1st Sess., reprinted in [1963] U.S. CODE CONG. & AD. NEWS 687, 688 (stated intent: "employees doing equal work should be paid equal wages, regardless of sex").

42. 108 CONG. REC. 14771 (1962).

43. See 109 CONG. REC. 9197 (1963).

44. *Id.* The EPA was passed June 10, 1963. See note 31 *supra*.

come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.⁴⁵

While one representative's statements cannot, as a rule, be taken as indicative of the whole legislative history, Representative Goodell's remarks appear to accurately summarize the general intent of the House. This is true not only for those favoring "equal," but also for the representatives that would have preferred "comparable,"⁴⁶ because, to a great extent, the debate was merely a "battle of semantics"⁴⁷ not a battle of substance. The desire was to grant the Labor Department sufficient power to realize the limited goal of the EPA while precluding from the Labor Department the opportunity to run roughshod over businesses.

As the foregoing discussion indicates, the Congressional considerations on the Equal Pay Act culminated in a clear rejection of the comparable worth notion. Although some commentators might argue that Congress rejected the *term* comparable without necessarily rejecting the *idea* of comparable worth, this proposition is contrary to the intentions expressed in the legislative history. The decision was to limit governmental intervention to only those situations where a man and woman were performing substantially equal work.⁴⁸ While some commentators have suggested that in 1963 Congress lacked a thorough understanding of sex discrimination,⁴⁹ the decision to limit the Equal Pay Act arose, not from Congressional naiveté, but from an unwillingness to overextend governmental influence.

B. *Title VII*

In contrast to all of the care and consideration given by Congress prior to passage of the Equal Pay Act, there is a striking paucity of legislative history surrounding the sex-based wage discrimination por-

45. 109 CONG. REC. 9197 (1963). Goodell's remarks were made May 23, 1963, just eighteen days before passage of the EPA.

46. See notes 38-40 *supra* and accompanying text.

47. 108 CONG. REC. 14770 (1962).

48. See *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir. 1975) ("[w]hen Congress enacted the Equal Pay Act, it substituted the word 'equal' for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other,'" *Id.* at 171 (quoting from *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973)); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970) (quoted in note 40 *supra*).

49. See, e.g., *Beyond EPA*, *supra* note 8, at 765. Commenting on later amendments to title VII, the authors state, "Congress recognized in 1972 that discrimination is more subtle and complex than had been imagined in 1964"

tion of title VII of the 1964 Civil Rights Act.⁵⁰ Indeed, the very notion of protecting against sex discrimination via title VII came as an amendment to the Civil Rights Act just days before its passage.⁵¹ This cursory—almost careless—treatment of the subject has resulted in a statute of considerable confusion.

In the course of analyzing title VII's prohibition of sex discrimination, it is difficult to arrive at a clear understanding of congressional intent. One problem lies in determining who really wanted the inclusion of "sex" in title VII. Representative Smith proposed the amendment, but it has been persuasively argued that he did so, not out of concern for sex inequalities, but in an attempt to defeat the Civil Rights Act.⁵² Those in Congress speaking in favor of the sex provision actually opposed title VII's passage, and those persons supporting title VII spoke out against the amendment.⁵³ For that reason, statements made by supporters of the provision are due less than the traditional consideration, and it is misleading to speak of their intent.⁵⁴

50. See 110 CONG. REC. 2577-85 (1964); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity").

51. 110 CONG. REC. 2577 (1964).

52. Berg, *Equal Employment Opportunity Under The Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 78-79 (1964); Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 310-12 (1968); MILLER, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-85 (1967).

53. See 110 CONG. REC. 2804-05 (1964). Note that the "sex amendment" supporters, (Smith (of Virginia), Dowdy, Tuten, Pool, Andrews (of Alabama), Rivers (of South Carolina), Gary, Huddleston, Watson, and Gathings), voted *against* the Civil Rights Act, while those *opposing* the sex provision, (Celler, Thompson (of New Jersey), Lindsay, Mathias, and Roosevelt), voted *for* the Civil Rights Act. *Id.* Representative Celler, floor manager of the bill, stated that the sex amendment is "illogical, ill timed, ill placed, and improper." 110 CONG. REC. 2578 (1964). One commentator has noted:

The very people who most strongly opposed this bill . . . became the strongest advocates of the "sex amendment" . . . As if this were not enough of a clue to its mischievous intent, the fact that the sponsor of the amendment was the leader of the civil rights opposition in the House left no room for doubt. I believed then, and I believe now, that the "intent" of the sponsor of the bill was to enlist additional opposition to Title VII of the Civil Rights Bill.

Miller, *supra* note 52, at 883 n.34, (quoting Rep. Green). See Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441-43 (1966); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 676-77 (1968).

54. The supporters' statements would not be particularly useful even if they were more credible. The proposal by Representative Smith was greeted with a great deal of tongue-in-cheek support such as how every American female has a right to a husband, and that Congress should take immediate steps to protect this right. 110 CONG. REC. 2577 (1964). *But cf.* *Federal Energy Administration v. Algonquin SNG*, 426 U.S. 548, 564 (1976) ("[a]s a statement by one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute").

The same Congress that passed the Equal Pay Act in 1963 approved the Civil Rights Act of 1964. The 1964 Act was comprehensive and intended primarily to alleviate racial discrimination,⁵⁵ but, as previously explained, was amended to include sex discrimination. While the "sex" amendment was apparently not of sufficient concern to delay passage of the Act, at least two farsighted senators recognized the potential for confusion in reconciling title VII with the EPA. After extensive debate in the Senate, Senator Dirksen expressed his concern that the sex discrimination amendment to title VII would effectively negate the carefully designed limitations placed in the EPA:

The sex anti-discrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that Act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.⁵⁶

Speaking as floor manager for the bill, Senator Clark responded to alleviate the concern:

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.*⁵⁷

While this exchange has been interpreted differently by some,⁵⁸ it seems to be best read as stating that the EPA's specific standards, rather than title VII's more general prohibitions, were to control in sex-based wage discrimination cases. Another commentator has agreed, stating that, "[w]ith respect to Title VII's proscription of 'discrimination as to wages,' Congress intended that Title VII not go beyond the limits of the

55. S. REP. NO. 872, 88th Cong., 2d Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2355, 2355. "The purpose of [the Civil Rights Act] is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation . . ."

56. 110 CONG. REC. 7217 (1964). Senator Dirksen seems to have been bothered that title VII might be read as requiring equal pay for wholly different jobs. He wanted to be certain that an employer could lawfully pay different wages for jobs of different types.

57. *Id.* (emphasis added).

58. See, e.g., *Wage Discrimination*, supra note 3, at 478 (this passage represents a recognition of title VII's applicability to situations of "segregated jobs"); *Beyond EPA*, supra note 8, at 747-48 (this passage emphasizes the difference in scope between title VII and the EPA).

EPA.⁵⁹

The Clark-Dirksen exchange notwithstanding, Senator Bennett recognized a remaining potential for confusion and, in the interest of clarifying the title VII/EPA relationship, proposed to amend title VII.⁶⁰ Unfortunately, this amendment did nothing more than retain the already high level of ambiguity, and it was clarified only slightly by Senator Bennett's equally perplexing statement of purpose:

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.*⁶¹

The problem with this statement came in discerning which "provisions of the Equal Pay Act" Bennett had in mind and how they might be "nullified."

An initial examination of the EPA suggests that the provisions referred to are the four affirmative defenses of the EPA.⁶² If these defenses were not available to employers in title VII suits, the EPA's purpose might indeed be nullified. For instance, if an employer based his wage scale on seniority, he could defend an EPA suit on that basis. But if the seniority defense were not available to employers in a title VII suit, the seniority defense provision in the EPA would be meaningless because the employee could simply sue under title VII rather than the EPA. This interpretation of Bennett's statement of purpose, however, loses its persuasiveness upon re-examination of section 703(h) of title VII, of which the Bennett Amendment is a part. In that section the sentence which immediately precedes the Bennett Amendment already

59. *Comparable Worth*, *supra* note 3, at 273.

60. 42 U.S.C. § 2000e-2(h) (1976). *See* note 21 *supra* and accompanying text.

61. 110 CONG. REC. 13647 (1964) (emphasis added).

62. *See* note 27 *supra* and accompanying text.

provides for three of those same affirmative defenses,⁶³ omitting only the catch-all provision: "differential based on any other factor other than sex. . . ."⁶⁴ If Bennett's purpose were merely to emphasize or clarify these defenses, his amendment lacks much substantive effect and is largely redundant.

In contrast, the second interpretation of Bennett's statement of purpose is more consistent with the idea that the Bennett Amendment was intended to have a substantive effect. This interpretation holds that one of the "provisions of the Equal Pay Act" that Bennett did not want to be "nullified" was the EPA's requirement that a plaintiff employee show "equal work".⁶⁵ The "equal work" provision would be nullified if an employee could circumvent that requirement by simply suing under title VII instead of the EPA.

Representative Celler's interpretation of the Bennett Amendment was consistent with this second view. During House considerations after the Senate had approved the bill, Celler stated that the amendment "provides that compliance with the [EPA] satisfies the requirement of title [VII] barring discrimination because of sex. . . ."⁶⁶ This statement suggests that if a wage differential is not prohibited by the EPA, it is also not prohibited by title VII. The implication here is that since the EPA does not prohibit any pay differentials unless equal work is shown, title VII, likewise, does not include such prohibitions.⁶⁷

It was not long after enactment of the Civil Rights Act that others began to notice the conflict between the two interpretations of the Bennett Amendment. In December of 1964 a commentator pointed out the ambiguity but concluded that "if 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."⁶⁸

Prompted by discussions such as these, Senator Bennett sought to further clarify his amendment of the previous year by entering his own interpretation into the Congressional Record:

The amendment therefore means that it is not an unlawful employment practice . . . to have different standards of com-

63. 42 U.S.C. § 2000e-2(h) (1976). See note 18 *supra* and accompanying text.

64. 29 U.S.C. § 206(d)(1) (1976).

65. See note 61 *supra* and accompanying text.

66. 110 CONG. REC. 15896 (1964).

67. See note 25 *supra* and accompanying text.

68. Berg, *supra* note 52, at 76.

compensation for nonexempt employees, where such differentiation is not prohibited by the [EPA]. Simply stated, the [Bennett] amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.⁶⁹

Of course, a difference in pay between a man and a woman could not violate the EPA unless the two employees performed equal work.

An additional authoritative interpretation of the Bennett Amendment, wholly consistent with Senator Bennett's 1965 statement, came in the Equal Employment Opportunity Commission's 1965 sex discrimination 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) [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.*⁷⁰

While this contemporaneous statement clearly states that a title VII claim requires a showing of equal work, it should be noted that the EEOC altered its position in 1972 by deleting reference to the equal work provision.⁷¹ However, notwithstanding this deletion, some courts have maintained that the earlier version remains authoritative.⁷²

69. 111 CONG. REC. 13359 (1965) (remarks of Sen. Bennett). It must be recognized that so-called subsequent legislative history is not as credible as prior legislative history. But the Supreme Court has indicated that it is certainly not without relevance. *See Galvan v. Press*, 347 U.S. 522, 526-28 (1954) (court relied on a sponsor's statement one year after the bill's passage).

70. 29 C.F.R. § 1604.7(a) (1966) (emphasis added).

71. 29 C.R.F. § 1604.8 (1980):

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 raised in a proceeding under title VII.

72. *See Int'l Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 19 FEP Cases 450 (D.N.J. 1979):

[I]t is clear to this Court that the earlier [EEOC] guidelines . . . are entitled to greater deference than the subsequent guidelines. The fact that the 1965 guidelines were issued contemporaneously with Title VII while the intent of the Congress which had created the Commission was clearly impressed upon the minds of the commissioners . . . coupled with the fact that the 1965 guidelines expressly addressed the incorporation of the "equal work" formula, while the 1972 guideline seems to avoid the issue . . . leads this Court to conclude that the 1965 guideline more nearly reflects the intent of Congress in enacting the limitation set out in section 703(h).

The Clark-Dirksen exchange, Bennett's statement of purpose, Celler's interpretation, Bennett's subsequent explanation, and the EEOC's report all seemed to be consistent with the notion that Congress did not intend title VII to provide a wage discrimination remedy unless the plaintiff could demonstrate that he had performed work equal to that of an employee of the opposite sex. Until *Gunther* the courts have agreed.

III. CASE LAW PRIOR TO *GUNTHER*

Title VII cases decided before *Gunther* were quite consistent in their view that the Bennett Amendment served to incorporate the EPA's equal work standard.⁷³ The equal work issue was confronted directly by several courts,⁷⁴ while others simply implied their recogni-

Id. at 456 (citations omitted), *rev'd*, 631 F.2d 1094 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3121 (1981). Although the district court decision was reversed, the quoted opinion is significant in that it is in complete agreement with the *Gunther* dissent. See 101 S. Ct. at 2261-62. Indeed, the whole of the district court's opinion as well as the Third Circuit's dissenting opinion closely parallel the *Gunther* dissenters. The Supreme Court has stated that EEOC opinions are to be accorded "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Moreover, as to which of two conflicting EEOC opinions take precedence, the Supreme Court said that less weight should be given to opinions not issued contemporaneously with the applicable act and to guidelines that contradict contemporaneously issued guidelines. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976). Furthermore, an EEOC guideline is not entitled to great weight where it varies from prior EEOC policy and no new legislative history supports the change. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 n.11 (1977).

73. *Lemons v. City & County of Denver*, 620 F.2d 228, 230 (10th Cir. 1980) ("to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work"), *cert. denied*, 449 U.S. 888 (1980); *Di Salvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978) ("prima facie case of violation . . . where it is shown that 'the employer [has paid] workers of one sex more than workers of the opposite sex for equal work'"); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 580 (4th Cir. 1977) (plaintiff failed to establish a prima facie case in that there was "no showing of any salary differential for . . . positions which were substantially equal"), *cert. denied*, 434 U.S. 904 (1977); *Calage v. Univ. of Tenn.*, 544 F.2d 297, 300 (6th Cir. 1976) ("salary disparity was . . . justified by substantially different duties assigned to each [employee]"); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446-47 (D.C. Cir. 1976) (court reviewed district court finding "to determine whether the jobs in question were actually equal within the contemplation of the Equal Pay Act"), *cert. denied*, 434 U.S. 1086 (1978); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975) (performance of equal work must be shown), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971) ("a differential in pay based on sex for performing 'equal' work must be proved"). See *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) ("[w]e do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications").

74. *Lemons v. City & County of Denver*, 620 F.2d 228, 230 (10th Cir. 1980) ("to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work"), *cert. denied*, 449 U.S. 888 (1980); *Di Salvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978) (same); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975) (same), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971) (same).

tion of the requirements.⁷⁵ For example, in *Orr v. Frank R. MacNeill & Son*⁷⁶ the Fifth Circuit unequivocally stated: "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."⁷⁷ In *Laffey v. Northwest Airlines*⁷⁸ it was equally clear that the court required equal work even though it did not expressly say so. In *Laffey* the appeals court undertook to review the district court's determination that the female plaintiffs had performed equal work.⁷⁹ If equal work had not been considered to be necessary for title VII cases, there would have been no reason for the review.

As stated, courts have consistently upheld the requirement that title VII claims must include a showing of equal work. Yet, when not dealing with the issue directly, some courts seemed to indicate that title VII might somehow be broader and provide remedies beyond those currently being sought. In *Los Angeles Department of Water & Power v. Manhart*⁸⁰ Justice Stevens stated: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"⁸¹ perhaps implying that title VII was not restricted to equal work situations. Paradoxically, some courts expressed this sentiment in conjunction with a proclamation affirming the equal work requirement.⁸² For instance, in *Lemons v. City & County of Denver*⁸³ the court stated that "we can consider wage discrimination claims which involve departures from equal pay for equal work."⁸⁴ But within the same paragraph the court noted that "to establish a case of discrimination under Title VII, one must prove a differential in pay

75. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 580 (4th Cir. 1977) (no prima facie case without showing that jobs were "substantially equal"), *cert. denied*, 434 U.S. 904 (1977); *Calage v. Univ. of Tenn.*, 544 F.2d 297, 300 (6th Cir. 1976) (salary disparity "justified by substantially different duties"); *Laffey v. Northwest Airlines*, 567 F.2d 429, 446-47 (D.C. Cir. 1976) (necessary to determine whether the jobs were actually equal), *cert. denied*, 434 U.S. 1086 (1978).

76. 511 F.2d 166 (5th Cir. 1975).

77. *Id.* at 171.

78. 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

79. *Id.* at 446-47.

80. 435 U.S. 702 (1978).

81. *Id.* at 707 n.13 (citations omitted). Justice Stevens believed that the Civil Rights Act, in general, made it unlawful for an employer to base his personnel policies on sex stereotypes. *Id.* at 707.

82. *Lemons v. City & County of Denver*, 620 F.2d 228, 229-30 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). *See Laffey v. Northwest Airlines*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

83. 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

84. *Id.* at 229 (emphasis in original).

based on sex for performing 'equal' work."⁸⁵ Such a seeming contradiction might best be explained as an expression of a desire to increase protection against discrimination while lacking the necessary statutory tools.

The general rule, then, until *Gunther*, was that title VII's Bennett Amendment required that equal work be shown. While some courts seemed to be less rigid when dealing with the issue tangentially,⁸⁶ none were willing to do away with the equal work standard.

IV. STATEMENT OF THE CASE

A. *Facts*

Gunther involved women employed as matrons by Washington County, Oregon, to guard female prisoners and perform certain clerical duties. These women brought suit claiming that the county employed male guards to perform nearly the same duties, and that, in violation of title VII of the Civil Rights Act, the men were paid more than the women.⁸⁷ The matrons were neither claiming equal work nor seeking equal pay. Their contention was simply that their wages had been discriminatorily depressed and that such was a violation of title VIII. While acknowledging the pay discrepancy, the county defended its pay scale by referring to the exemptions provided by title VII's Bennett Amendment. The County argued that the women had not performed the same work as the men and were, therefore, precluded from a title VII suit.

The district court agreed with Washington County's interpretation of the Bennett Amendment, stating that "[t]he Equal Pay Act of 1963 . . . and Title VII are interlocked . . . and the sex discrimination prohibitions of Title VII must be construed in the same manner as the Equal Pay Act."⁸⁸ The court went on to hold that the "[p]laintiffs have not met their burden of proving that the men's and women's jobs were substantially equal. . . . If the jobs are substantially dissimilar, that is the end of the inquiry."⁸⁹

On appeal to the Ninth Circuit Court of Appeals the matrons contended that the work they performed was substantially equal; and, in

85. *Id.* at 230.

86. *See* notes 80-84 *supra* and accompanying text.

87. In February 1973 the women guards were paid between \$525 and \$668; the men were paid between \$701 and \$940. 101 S. Ct. at 2245 n.1.

88. *Gunther v. County of Washington*, 20 FEP Cases 788, 791 n.7 (D. Or. 1976).

89. *Id.* at 791.

the alternative, even if the work was not substantially equal, part of the pay differential was due to sex discrimination, and for that part they were entitled to recover.⁹⁰ The appeals court affirmed the lower court's decision on the first of these contentions.⁹¹ But the court did not interpret the Bennett Amendment to mean that the absence of equal work necessarily precludes a title VII claim, and the case was remanded for consideration of the matrons' second contention.⁹² This carefully conceived second contention enabled the court to break with prior case law by not requiring equal work in a title VII, sex-based, wage discrimination case. Because the women were not demanding equal pay, the Ninth Circuit was able to hold that they did not have to show equal work, while still maintaining that demands for equal pay will continue to require such a showing.⁹³ The fundamental idea of this contention was the same as in a claim of "equal pay for equal work," but because the women were not demanding equal pay, the contention was called "discriminatory compensation."

B. *Issue Before the Supreme Court*

Washington County petitioned the United States Supreme Court, contending that the Ninth Circuit's interpretation of the Bennett Amendment was erroneous.⁹⁴ The appeals court held that the Amendment incorporated into title VII the four Equal Pay Act affirmative defenses, but, unless the plaintiff demanded equal pay, the Bennett Amendment did not incorporate the equal work standard. Thus, the issue squarely before the Court was whether the Bennett Amendment serves to require a showing of equal work in order to state a title VII claim of sex-based wage discrimination.⁹⁵ This question had been answered in the affirmative on numerous occasions by lower courts,⁹⁶ but never confronted directly by the Supreme Court. Had the Court agreed with prior case law that the Bennett Amendment does require that equal work be shown, all comparable worth claims would have

90. *Gunther v. County of Washington*, 602 F.2d 882, 885 (9th Cir. 1979). See also Note, *In Pursuit of Wages Based on Job Value—Gunther v. County of Washington*, 29 DEPAUL L. REV. 907 (1980); Comment, *The Bennett Amendment—Title VII and Gender Based Discrimination*, 68 GEO. L.J. 1169 (1980); Comment, *Civil Rights: Relationship of Title VII and the Equal Pay Act—New Muscle for the Struggle Against Sex Discrimination*, 19 WASHBURN L.J. 554 (1980).

91. 602 F.2d at 888.

92. *Id.* at 891.

93. *Id.*

94. 101 S. Ct. at 2247.

95. *Id.* at 2246.

96. See notes 73-79 *supra* and accompanying text.

been precluded, defeating the primary objective of the comparable worth theory which is to allow claims where it is not possible to demonstrate equal work.

C. *Supreme Court Decision*

The Supreme Court agreed with the appellate court in distinguishing between an "equal pay for equal work" claim under title VII (wherein equal work remains necessary) and a "discriminatory compensation" claim under title VII, wherein equal work need not be shown. The decision clearly does not endorse the theory of comparable worth, stating only, "It is sufficient to note that respondents' claims of discriminatory undercompensation are not barred by [the Bennett Amendment] merely because respondents do not perform work equal to that of male jail guards."⁹⁷ The Court's holding opens up the doors for a new category of discrimination suits, but provides no guidance on how these suits are to be pursued.

V. ANALYSIS

To the extent that the Supreme Court has now made it possible to bring a title VII suit without demonstrating equal work, the *Gunther* decision marks a clear departure from prior law and the creation of a new claim under title VII, "discriminatory undercompensation." The rationale of the majority is that there is nothing in the Bennett Amendment to preclude this new claim; it has simply gone unnoticed since title VII's enactment in 1964.⁹⁸ The reality of the "discriminatory undercompensation" notion is that its creation was dependent on an interpretation of the Bennett Amendment that had been consistently rejected since the amendment was added to title VII in 1964.⁹⁹ The majority has resurrected this interpretation, thereby encouraging lawsuits in an area that was not intended to be covered by title VII. The extensive debates over whether to use "equal" or "comparable" serve to illustrate the deep concern that Congress had in the early 1960's that a limit be maintained on the government's interference with businesses' wage setting practices. The majority in *Gunther* has now cast that deep concern aside.

The Court's departure from case law notwithstanding, the decision

97. 101 S. Ct. at 2254.

98. *But see* notes 70-79 *supra* and accompanying text.

99. *See* notes 69-79 *supra* and accompanying text.

cannot be said to be incorrect. Although Justice Rehnquist's dissenting arguments are at least equally persuasive, the majority's decision is neither illogical nor unreasonable. Yet, the decision is unfortunate because it avoids the ultimate issue of Title VII's applicability. The elimination of the equal work standard opens up a new category of lawsuits, but it is unlikely that any of these lawsuits will result in recovery.¹⁰⁰ The removal of the equal work standard in title VII suits is analogous to the taking down of a fence so that the plaintiff may run into a brick wall. Moreover, when coupled with this reality, the majority's opinion may serve to actually delay achievement of the goal toward which it purportedly strives—more equitable pay for women.

The Supreme Court in *Gunther* was faced with a dilemma. Title VII was found to be hopelessly ambiguous, and its equally ambiguous legislative history was in such short supply that it proved to be of little interpretative value. A common sense approach to this problem was to rely in large part on the legislative history of the EPA, since it more carefully dealt with the problem of sex based wage discrimination and was passed by the very same Congress one year earlier. Indeed, at least one court was explicit in its reliance on the earlier bill's history,¹⁰¹ and the EPA debate concerning the use of "equal" rather than "comparable" was undoubtedly of some influence. The legislative history demonstrates that during the early 1960's the focus was on providing relief to women who were doing the same work as men but were not receiving the same pay. This was understood to be a limited objective and was not meant to provide a remedy for each of the multitudinous inequities of the labor market. The plaintiff nurses in *Lemons v. City & County of Denver*,¹⁰² for example, contended that their rate of pay was inequitable because nurses have historically been underpaid. Many might agree with such a statement, but such an exceedingly complicated claim was simply not within the contemplation of Congress when it enacted title VII.

Justice Rehnquist's dissent in *Gunther* implicitly echoes the notion that reliance on the EPA's legislative history is warranted in title VII cases. He stresses:

It defies common sense to believe that the same Congress—

100. See notes 105-112 *infra* and accompanying text.

101. *Int'l Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 17 FEP Cases 16, 21 (N.D.W. Va. 1977) ("[w]ith the lack of legislative history regarding the Bennett amendment, it is useful to explore the background and purpose of the Equal Pay Act").

102. 620 F.2d 228, 229 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

which after 18 months of hearings and debates, had decided in 1963 upon the extent of federal involvement it desired in the area of wage rate claims—intended *sub silentio* to reject all of this work and to abandon the limitations of the equal work approach just one year later, when it enacted Title VII.¹⁰³

Whether or not this belief “defies common sense,” as Rehnquist stated, it was a belief adopted by the majority. Without accusing the majority of lacking in common sense, the different results can best be explained as arising from different opinions on the relevance of legislative history and other related materials. Where the dissent was willing to examine comments and interpretations made by several interested parties, the majority carefully limited its scope of review to the statutory language and a few selected bits of legislative history.¹⁰⁴ The majority’s error, then, is not one of misinterpretation but of unreasonably restricting its scope of review. While material beyond the statutory language can rarely be said to be controlling in the course of statutory interpretation, the high level of title VII’s ambiguity should surely have obliged the Court to use any relevant material that was available.

The unfortunate effect of *Gunther* is that it gives the false impression of breaking the last bastion of sex-based wage discrimination. At long last, women in traditionally female jobs will not be denied a title VII claim because of their inability to point to a higher paid male counterpart. But to their consternation, these women will continue to be denied relief because title VII in no way provides for an alternative means of proving sex discrimination. The Court surely realized this problem but refused to state any guidelines for its resolution: “We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under title VII.”¹⁰⁵

Indeed, there exists an inextricable problem of proof in demonstrating discrimination without using a comparison. If “discrimination” is to be defined as “different treatment,” the question then becomes, “different from what?” Without the existence of an equal job being performed by a man, a woman will find it exceptionally difficult

103. 101 S. Ct. at 2257 (Rehnquist, J., dissenting).

104. *Id.* at 2249 n.12 (“memorandum obviously has no bearing on the meaning of . . . the Bennett Amendment”); *Id.* 2251 n.16 (“hesitant to attach much weight to comments made after the passage of legislation. . . . we give them no weight at all”); *Id.* at 2251 (“[w]e can only conclude that Representative Celler’s explanation was not intended to be precise, and does not provide a solution to the present problem. . . . The interpretations of the Bennett Amendment by [the EEOC] do not provide much guidance in this case”).

105. *Id.* at 2254.

to show that she has been treated differently because of her sex. She may be able to prove that her employer pays men more than women, but the numerous legitimate factors for determining wages offer an employer an almost infinite number of ways to explain the wage differential. As a result, although the technical requirement of equal work is now gone, a practical requirement of equal work remains.

In a very few cases—and *Gunther* may be one of these few—it may seem possible to demonstrate discrimination despite the absence of equal work. *Gunther* was unusual in that Washington County all but admitted the claimed discrimination. Although the county conducted its own study to determine the worth of both the matrons' and the male guards' jobs, it paid the matrons somewhat less than the determined amount, while paying the men their full estimated value.¹⁰⁶ Even given this finding, the wage differential may still be legitimately explained as being within the realities of the labor market. For example, one need not be an economist to recognize that a large supply of available labor, in this case female prison guards, brings down the price of that labor to beneath that which it might otherwise be "worth." Duly supported defenses such as this would be difficult for the matrons to refute. For example, the court in *Christensen v. Iowa*¹⁰⁷ refused to grant recovery by saying, "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."¹⁰⁸ The decision to intervene in the process of wage determination implies wide-ranging economic effects,¹⁰⁹ and the courts have expressed great reluctance to become so involved.¹¹⁰ The notion of setting wages according to what some non-employer believes certain jobs to be "worth" is a fundamental violation of the precepts on which the free market economy is based.

The labor market defense is but one of the many legitimate factors for determining wages, and the plaintiff has the burden of proving that none of them were used.¹¹¹ While the situation in *Gunther* was unique

106. *Id.* at 2246.

107. 563 F.2d 353, 356 (8th Cir. 1977).

108. *Id.*

109. *Comparable Worth*, *supra* note 3 at 289-94; Wall St. J., Sep. 15, 1981, at 22, col. 1 (adoption of comparable worth policies estimated to cost around \$2 billion).

110. See *Lemons v. City and County of Denver*, 17 FEP Cases 906, 907 (1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 244 (1980) (comparable worth "is pregnant with the possibility of disrupting the entire economic system of the United States of America"); *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) ("[w]e do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications").

111. 563 F.2d at 355.

in that it appeared to offer a means of proving discrimination by reference to the County's own study, the vast majority of the cases will not provide such evidence. Absent a talkative employer who blatantly boasts of his intentional discriminatory practices, there will seemingly be no way for a court to discern whether a wage differential is due to sex discrimination or some other legitimate factor.¹¹²

While the foregoing discussion illustrates the failures of *Gunther*, of even greater chagrin to those seeking sexual equality is the decision's longer range effect. By giving the appearance of moving towards acceptance of the comparable worth theory, the Court serves only to delay arrival at a real solution to sex-based wage discrimination. Ultimately, title VII will fail in its assumed role as the vehicle with which to end all wage inequalities, and until this fact is realized, no legitimate progress can be made.

The most productive way the Supreme Court could have handled *Gunther* would have been to declare that, as written, title VII cannot provide relief for sex-based wage discrimination unless the plaintiff first demonstrates equal work.¹¹³ Such a decision would have forced the realization that the assumed inequities cannot be remedied via title VII. Once that realization is reached, the issue can receive attention in the proper forum, Congress, in which the necessary policy decisions can be legitimately made. The Court does not do justice to either proponents or opponents of comparable worth by encouraging the continued search for loopholes through strained interpretations of title VII and the EPA.

VI. CONCLUSION

In the final analysis, *Gunther* clearly does not represent real movement towards comparable worth because title VII simply cannot sup-

112. See *Int'l Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1108-1110 (3rd Cir. 1980) (dissenting opinion), *cert. denied*, 101 S. Ct. 3121 (1981). The dissent in this case found that use of the comparable worth theory would be the only way for a plaintiff to prove discriminatory compensation (an issue that the *Gunther* decision expressly avoids, note 105, *supra*, and accompanying text) and that this manner of proof is prohibited vis a vis the Bennett Amendment. This reasoning exemplifies the crux of the objection to allowing title VII claims without a showing of equal work. The dissenters in *Gunther* and *IUE v. Westinghouse* took account of Congress's clear rejection of comparable worth and reasonably inferred that by precluding the only manner of proving "discriminatory compensation," it obviously also intended to preclude the *cause of action*. It would be absurd to conclude that Congress conceived of a remedial law for which it concomitantly denied a means to recover.

113. Note that this position is not inconsistent with a desire to alleviate sex based employment inequalities. It merely recognizes the limited utility of title VII. See 631 F.2d at 1115 n.17.

port such movement. This fact was noted by Justice Rehnquist as the case's "saving feature."¹¹⁴ Yet, in the short run, the proponents of comparable worth will no doubt view the *Gunther* decision as a step towards achievement of equal pay for women. By removing the equal work requirement it allows many women in traditionally female jobs such as nurses and secretaries to sue their employer under title VII, claiming discriminatory compensation. But the right to sue is not the right to recover, and, because of the problem of proof, it is doubtful that *Gunther* will affect the number of title VII recoveries. The gains to women are, therefore, illusory.

The decision was not technically incorrect, as it was based simply on one of two plausible interpretations. However, the dissent made valid use of legislative history and arrived at a more reasonable and certainly more realistic conclusion. While the scope of title VII was intended to be broader than the EPA, it clearly does not provide remedies for all forms of sex-based wage discrimination. Its focus was limited to situations in which men and women are performing the same work. Although *Gunther* purports to widen that focus, in all practicality the equal work standard will remain, as will the frustrations of underpaid women.¹¹⁵

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114. 101 S. Ct. at 2265 (Rehnquist, J., dissenting).

115. Despite its infirmities, *Gunther* has not been ignored by the business community. The consulting firm of Hewitt Associates found that 180 of 537 companies surveyed since *Gunther* were at least considering pay-policy changes. Wall St. J., Nov. 10, 1981, at 1, col. 5.