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Gender-Based Wage Discrimination and the Bennett Amendment: *County of Washington v. Gunther*

In recent years there has been considerable controversy[1] over the correct relationship between the Equal Pay Act of 1963[2] and Title VII of the Civil Rights Act of 1964.[3] The Equal Pay Act addresses a narrow aspect of gender-based wage discrimination. Specifically, it requires that employers compensate men and women equally for equal work.[4] In contrast, Title VII is much broader in scope because it does not specifically limit claims of wage discrimination to equal work claims.[5] The broad scope of Title VII, however, has been consistently limited by judicial interpretation of the "Bennett amendment,"[6] a last min-

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1. International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3121 (1981); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *supplemental opinion on denial of rehearing*, 623 F.2d 1303 (1980), *aff'd*, 101 S. Ct. 2242 (1981); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

2. 29 U.S.C. § 206(d) (1976).

3. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

4. The Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such an establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d) (1976).

5. Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> (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.

42 U.S.C. § 2000e-2(a)(1) (1976).

In addition, Title VII applies to a wider range of employees than the Equal Pay Act. *Compare* 42 U.S.C. § 2000e(b) (1976) (Title VII), *with* 29 U.S.C. §§ 203(s), 213(a) (1976) (Equal Pay Act).

6. The Bennett amendment, the last sentence of section 703(h) of Title VII,

ute addition to Title VII. The reference in the Bennett amendment to the Equal Pay Act has been interpreted as incorporating the equal work standard of the Equal Pay Act into Title VII, thus limiting the otherwise broad remedial powers of Title VII to the narrow scope of the Equal Pay Act in gender-based wage discrimination suits.[7] Opening the door for sex-discrimination claims that until now have been barred, the United States Supreme Court in *County of Washington v. Gunther*[8] gave the Bennett amendment a less restrictive interpretation, reasoning that Congress in passing Title VII "intended to strike at the *entire spectrum* of disparate treatment of men and women."[9] Just how far the door has been opened is a subject of some dispute.

I. *Gunther*

Arguing that they had been the victims of intentional sex discrimination, Alberta Gunther and three co-workers filed suit under the Equal Pay Act and Title VII demanding back pay and other relief.[10] These four women had been employed by the County of Washington (Oregon) to guard female inmates at the county prison. A market survey and job worth evaluation performed by the county indicated that female guards should be paid 95% of the wages paid to male guards. However, while the county paid male guards the recommended wage, it paid female guards only 70% of the male wages—25% less than the recommendation.[11]

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provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [The Equal Pay Act].

42 U.S.C. § 2000e-2(h) (1976).

7. *See, e.g.*, Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

8. 101 S.Ct. 2242 (1981).

9. County of Washington v. Gunther, 101 S. Ct. 2242, 2253 (1981) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

10. The initial complaint included allegations that because of the plaintiffs' demands for higher pay, the County retaliated against them by abolishing their jobs, forcing one plantiff to resign, refusing to rehire another, and by noting on their personnel forms that none would be rehired. Gunther v. County of Washington, 602 F.2d 882, 885 (9th Cir. 1979), *aff'd*, 101 S. Ct. 2242 (1981). These claims were discussed by the Ninth Circuit, but were not at issue before the Supreme Court.

11. 101 S. Ct. at 2253.

Gunther's argument before the district court was twofold. First, she claimed that the jobs performed by the male and female guards were substantially equal and therefore deserving of equal pay.[12] In the alternative, she argued that if the jobs were found to be unequal, some of the discrepancy in pay could be explained only by sex discrimination.[13] The district court rejected this argument, pointing out the substantial dissimilarities in the two jobs.[14] It was this second argument that gave rise to the central issue in the instant case and caused many, including Justice Rehnquist, to fear that Title VII might be seen to legitimate the theory of "comparable worth." Perhaps anticipating the difficulties involved in any other ruling, the district court rejected this second argument and held that the Bennett amendment limited claims of gender-based wage discrimination brought under Title VII to those that satisfied the equal work standard of the Equal Pay Act. Because the jobs were not equal, the plaintiffs had no claim.

The United States Court of Appeals for the Ninth Circuit agreed with the district court that the jobs were not equal and that the equal pay claim should therefore be dismissed.[15] On the alternative claim, however, the court took a different view. Expressing mild surprise that the issue had never been directly addressed by a federal court of appeals,[16] the court carefully examined the relationship between the Equal Pay Act, Title VII, and the Bennett amendment. The court decided that the Bennett amendment did not prevent a plaintiff from suing under Title VII merely because she could not allege equal work. Accordingly, the court "remanded for further proceedings to afford

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12. Gunther v. County of Washington, 20 F.E.P. Cas. 788, 789 (D. Or. 1976), *aff'd in part, rev'd in part*, 602 F.2d 882 (9th Cir. 1979), *aff'd*, 101 S. Ct. 2242 (1981).

13. *Id.* at 791.

14. *Id. See also* 602 F.2d at 887. The facts indicate that the male guards supervised more than ten times the number of prisoners per guard as the women. As a result, the women had more time to perform less valuable clerical work, which sometimes consumed half of their working time. The women did not dispute the fact that the clerical work was less important than the duty of guarding prisoners.

15. Gunther v. County of Washington, 602 F.2d at 887.

16. The Ninth Circuit distinguished cases such as Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975), and Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971), on the grounds that these cases involved claims of equal pay for equal work and therefore did not address the Bennett amendment in the same context as did the instant case. 623 F.2d at 1310, 1320. *See also* Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. U. CHI. L.J. 723, 752-55 (1977).

plaintiffs the opportunity to establish a claim of sexual discrimination apart from an equal pay claim."[17]

In a closely divided decision, the Supreme Court affirmed.[18] The Court focused on the meaning of *authorized* as that term is used in the Bennett amendment. The amendment exempts from Title VII coverage those wage disparities *authorized* by the Equal Pay Act. If the Equal Pay Act is interpreted as *authorizing* all practices not specifically prohibited, the Bennett amendment clearly limits Title VII coverage to the scope of the Equal Pay Act. Justice Brennan, writing for the majority of five,[19] rejected this interpretation of the Bennett amendment. To determine which employment practices are *authorized* by the Equal Pay Act, Brennan divided the Act into two parts. The first part, which includes the equal work standard, was characterized by the Court as purely prohibitive in nature and "can hardly be siad to 'authorize' anything at all."[20] Therefore, the Court stated, the Bennett amendment must refer only to the second part of the Equal Pay Act, which *authorizes* certain practices—otherwise prohibited by the Act—that are based on one of four affirmative defenses. According to the Court, only the four defenses, and not the equal work standard, are incorporated into Title VII by the Bennett amendment. As support for this interpretation, the Court noted a comment made by Senator Dirksen directly after introduction of the amendment: "The [Equal Pay Act] carries out certain exceptions [defenses]. All that the pending amendment does is recognize those exceptions."[21] In addition, the Court found that decisions issued by the Equal Employment Opportunity Commission (EEOC) and the Commission's current guidelines support this reading of the amendment.[22] Lastly, and most importantly, the Court relied on

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17. 602 F.2d at 894. In a supplemental opinion on denial of rehearing, the court reaffirmed and further explained its ruling on the Bennett amendment. Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1980).

18. 101 S. Ct. 2242 (1981).

19. Justice Brennan was joined in his opinion by Justices White, Marshall, Blackmun, and Stevens. Justice Rehnquist dissented, joined by Chief Justice Burger and Justices Stewart and Powell. *Id.* at 2254.

20. *Id.* at 2248.

21. *Id.* at 2250 (quoting 110 CONG. REC. 13,647 (1964)).

22. The Equal Employment Opportunity Commission is the federal agency responsible for the administration of Title VII (and more recently the Equal Pay Act), and its interpretation is therefore of some importance. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

the broad remedial purposes of Title VII.[23] After citing several types of discrimination that would be permissible under a different reading of the amendment,[24] the majority concluded that "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII."[25] Nevertheless, wary that the opinion might be read as approving the "comparable worth" theory,[26] the Court declined to address that issue, stating specifically that "respondent's claim is not based on the controversial concept of 'comparable worth' "[27] and emphasizing that the holding "does not require a court to make its own subjective assessment of the value of the male and female . . . jobs."[28] It is unclear, however, what type or quantum of evidence will suffice to state a claim under Title VII since the Court declined to "decide . . . the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."[29]

In dissent Justice Rehnquist made it clear that, to him, the Court's decision came unnervingly close to an acceptance of

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23. For evidence of congressional intent that Title VII should be broadly interpreted, see Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976); 42 U.S.C. § 2000e-2(a) (1976); S. REP. No. 867, 88th Cong., 2d Sess. 12 (1964).

24. If the Bennett amendment were read to incorporate the equal work standard, a woman could not allege gender-based wage discrimination unless a man performed the same work at a higher rate of pay. A woman filling a unique position or one strictly segregated by sex could not obtain relief, even if the employer admitted that her salary would have been higher had she been a man. Such a reading would also preclude the kind of relief that was actually granted in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). *Manhart* held that an employer could not require women to pay a higher percentage of their wages into a pension program than men. The holding did not require, however, that men and women both perform equal work before the women could allege discrimination.

Further, interpreting the amendment as *authorizing* those practices not prohibited by the Equal Pay Act would require not only the incorporation of the equal work standard but also the coverage of the Equal Pay Act. Therefore, those employers not subject to the Equal Pay Act would escape the provisions of Title VII. 101 S. Ct. at 2252-53.

25. 101 S. Ct. at 2243.

26. Basically, the "comparable worth" theory postulates that jobs which are of equal worth to an employer should receive the same compensation, even if the jobs involve different duties. For discussion of the comparable worth theory, see E. LIVERNASH, COMPARABLE WORTH: ISSUES AND ALTERNATIVES (1980); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 475-85 (1979); Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980).

27. 101 S. Ct. at 2246.

28. *Id.* at 2253.

29. *Id.* at 2254.

comparable worth. Such a result would be intolerable, given the clear thrust of the relevant legislative history. According to Justice Rehnquist, the issue was not whether Congress intended to permit the discriminatory practices cited by the majority, but "whether Congress intended to completely turn its back on the 'equal work' standard enacted in the Equal Pay Act of 1963 when it adopted Title VII only one year later."[30] The clear congressional decision in 1963 to reject the *comparable* standard, Rehnquist argued, is not countered by an equally clear intention in 1964 to adopt it. Further, the language of the amendment itself expresses a desire not to nullify the Equal Pay Act. Allowing employees to sue under Title VII without satisfying the equal work standard "would, for all practical purposes, constitute an implied repeal of the equal work standard of the Equal Pay Act and render that Act a nullity."[31] Finally, Justice Rehnquist noted that the EEOC guidelines of 1965 indicate that "the standards of 'equal pay for equal work' . . . are applicable to Title VII."[32] For Rehnquist the narrow result of the decision was its only saving feature.[33] He emphasized that the majority opinion did not approve a cause of action based on comparable worth. Instead, only a cause of action based on direct evidence of intentional sex discrimination would succeed under the Court's holding.

II. Analysis

Despite the Court's repeated efforts to emphasize the narrow nature of the *Gunther* holding, it is possible that *Gunther* will be read more broadly than intended by the Court. Specifically, two aspects of the decision lend themselves to potentially broad interpretations. First, there is dicta in the opinion that may be interpreted as implying that, unlike in most other Title VII litigation, the disparate impact theory is unavailable to a plaintiff with a gender-based wage discrimination claim. Second, the Court's effort to distinguish its holding from the comparable worth theory may be incorrectly read as a disapproval of the comparable worth theory. This Case Note will analyze the fallacies of these two conclusions.

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30. *Id.* at 2257 (Rehnquist, J., dissenting).
31. *Id.* at 2260.
32. *Id.* at 2261 (quoting 29 C.F.R. § 1604.7 (1966)).
33. *Id.* at 2265.

A. *The Disparate Treatment and Disparate Impact Theories of Discrimination as Applied to Equal Pay Claims under Title VII*

Civil Rights litigation under Title VII has developed several theories by which a plaintiff may prove discrimination under the Civil Rights Act, the two most prominent of which are the disparate treatment and disparate impact theories.[34] Under the disparate treatment theory, a plaintiff must prove that he has suffered unequal treatment because of his membership in a protected class. The essential element is discriminatory motive or intent.[35] In contrast, the disparate impact theory of recovery, as established by *Griggs v. Duke Power Co.*,[36] focuses on the effect of, rather than the motivation behind, a particular action. Proof of intent is not necessary, and lack of intent is not a defense.[37] These theories therefore complement each other in furthering the purposes of Title VII as envisioned by Congress.[38]

Because *Gunther* holds that gender-based wage discrimination claims under Title VII are no longer limited to claims of equal pay for equal work,[39] an effort will certainly be made to utilize the theories of recovery developed in other Title VII litigation to address the inequalities in this particular area. Suggested uses of both the disparate impact and the disparate treatment theories have already been advanced.[40] Because the relative strength of these two theories has not yet been tested in the wage discrimination context, it is not yet clear which will prove to be the most useful. It is therefore disconcerting to read dicta in *Gunther* implying that the impact theory may be unavailable to a plaintiff bringing a gender-based wage discrimination claim under Title VII.

The implication that the impact theory may be unavailable is found in the Court's response to one of Justice Rehnquist's strongest criticisms of the decision. Justice Rehnquist argued persuasively that the Court's reading of the Bennett amendment

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34. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (1976); Comment, *Beyond The Bennett Amendment: Establishing A Prima Facie Case of Sexual Discrimination in Compensation Under Title VII*, 54 ST. JOHN'S L. REV. 738, 754 (1980).

35. B. SCHLEI & P. GROSSMAN, *supra* note 34, at 1153-54.

36. 401 U.S. 424 (1971).

37. *Id.* at 432.

38. *Id.* at 429-31; International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

39. 101 S. Ct. at 2254.

40. Blumrosen, *supra* note 26, at 458-59; Comment, *supra* note 34, at 754-63.

as incorporating only the defenses of the Equal Pay Act could not be correct, since the defenses of the Equal Pay Act are already contained in Title VII. Under the Equal Pay Act an employer may pay lower wages to one group despite equal work if the difference is based on (1) a seniority system, (2) a merit system, (3) a system based on quality or quantity of production, or (4) any other factor other than sex.[41] The first three defenses are contained in Title VII itself.[42] Justice Rehnquist argued that the fourth is implicitly in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex.[43] According to Rehnquist, interpreting the Amendment as incorporating only the four defenses, and not the equal work standard, adds nothing to Title VII. The Amendment becomes "mere surplusage."[44]

In response to this criticism, Justice Brennan stated:

> [I]ncorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.[45]

Thus, by "confin[ing] the application" or prohibitions of Title VII in the wage discrimination context to "differentials attributable to sex discrimination,"[46] the fourth defense evidently *does* add something to Title VII not implicit in its general prohibition of discrimination. Just what is added and how it will affect Title VII is not explained. However, the Court's contrast of the scope of the Equal Pay Act as defined by the fourth defense with the scope of Title VII as defined by the impact theory of *Griggs v. Duke Power Co.* suggests that the impact theory will not be available to plaintiffs in gender-based wage discrimination litiga-

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41. 29 U.S.C. § 206(d)(1) (1976).
42. 42 U.S.C. § 2000e-2(h) (1976).
43. 101 S. Ct. at 2273, (Rehnquist, J., dissenting).
44. *Id.*
45. 101 S. Ct. at 2248 (citation omitted).
46. *Id.*

tion under Title VII.

However, this interpretation of the Court's cryptic reference to the disparate impact theory is in conflict with the tenor of the Court's opinion and probably does not reflect the Court's intent. Because the Court's understanding of the congressional purpose behind the Bennett amendment relies heavily on the remedial purposes and sweeping scope of Title VII,[47] it is inappropriate to attribute to the Court's language a meaning that would severely conflict with those same remedial purposes in a wage discrimination context. In addition, an inference of such major consequences conflicts with the expressly restricted nature of the holding. The Court purposefully avoided discussing the elements of a prima facie case; the decision discusses primarily what a plaintiff does not have to prove, i.e., equal work. After considering the fourth defense, the Court stated that it does "not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense."[48] The Court concluded the opinion by stating that it did "not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."[49] Given the Court's intent to avoid discussion of the elements of a wage discrimination case under Title VII, it is unlikely the Court would commit itself in a single paragraph to a principle which would bar a plaintiff's use of the disparate impact theory in subsequent litigation. One would expect such a decision only after careful thought and deliberation, and only if it were essential to the Court's holding.

Further, to interpret the Court's language as rejecting the impact theory in wage discrimination cases requires an unwarranted assumption regarding the definition of *discrimination.* The Court stated that the fourth defense "confine[s] the application of the Act to wage differentials attributable to sex discrimination."[50] To conclude on the basis of this proposition that

47. A basic premise of the majority opinion is that Title VII is broadly remedial and should not be interpreted to "deprive victims of discrimination of a remedy, without clear congressional mandate." *Id.* at 2252. The Court cited several examples of discrimination that would escape the reach of Title VII if the Bennett amendment were read to incorporate the equal work standard and concluded the Congress did not intend to protect such practices. Any other interpretation of the Bennett amendment would be "flatly inconsistent" with the Court's past interpretations of the broad nature of Title VII.

48. *Id.* at 2249.

49. *Id.* at 2254.

50. *Id.* at 2248.

the fourth defense bars the use of the impact theory one must assume that the impact theory is an inappropriate method of demonstrating sex discrimination under the Equal Pay Act (and thus under Title VII when the fourth defense of the Equal Pay Act applies).

It has been persuasively argued, however, that the impact theory should be used in Equal Pay Act litigation.[51] Under the fourth exception of the Equal Pay Act an employer can defend against allegations of discrimination by showing that his actions were based on some factor "other than sex."[52] Therefore, the question of whether the "other factor" is indeed sex-related is crucial. Ultimately, the answer depends on the definition of *discrimination*. Does *discrimination* as used in the Equal Pay act context mean the same thing as it does under Title VII, i.e., does it include acts that are facially neutral, but which have a disproportionate impact on a protected class? The answer is not entirely clear. One commentator has observed that Title VII and the Equal Pay Act are closely related statutes, and "[i]t is not apparent why they should approach the fundamental question of the meaning of sex discrimination differently."[53] While the Court correctly recognized that the Equal Pay Act is narrow in that it prohibits only a limited category of discriminatory practices, there is no indication that the very concept of discrimination should be defined more narrowly under the Equal Pay Act than under Title VII. Indeed, the Supreme Court recognized in its only Equal Pay Act decision that the act is "broadly remedial."[54] This same recognition led to the development of the impact theory under Title VII.[55] If the Court determines that the impact theory is applicable in defining "sex discrimination" for purposes of applying the fourth defense in Equal Pay Act litigation, then the impact theory should be applicable for the same purpose in Title VII litigation. Until the Court decides that *dis-*

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51. Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 583-87 (1978).

52. 29 U.S.C. § 206(d)(1) (1976).

53. Sullivan, *supra* note 51, at 585.

54. Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974). Indeed, the Supreme Court may already have decided that the impact theory can be used in the Equal Pay Act setting. In *Corning Glass*, the Court appears to have used the impact theory in rejecting a proffered defense, which was "phrased in terms of a neutral factor other than sex," because it "nevertheless operated to perpetuate the effects of the company's prior illegal practice." *Id.* at 209-10.

55. *See* Sullivan, *supra* note 51, at 585.

crimination has a narrower meaning under the Equal Pay Act than under Title VII, it is inappropriate to draw the conclusion suggested by Justice Brennan's rather ill-considered response to Justice Rehnquist's criticism.

Even if the Court intends to create a restrictive definition of *discrimination* for Equal Pay Act purposes, it is possible to reconcile the consequences of that decision with the Court's view that Title VII is intended to be very broad in scope. Because the purpose of the Bennett amendment was to avoid conflicts between the Equal Pay Act and Title VII,[56] the Court may decide that the fourth defense should apply only when the two statutes cover the same claim. Since the Equal Pay Act covers only claims based on equal work, Title VII claims not based on equal work would not be subject to the fourth exception and would therefore not be barred from using the impact theory.[57]

This view, while greatly limiting the impact of the Bennett amendment, is in harmony with Senator Bennett's own characterization of the amendment as a "technical" one, designed to avoid "possible conflicts."[58] Interpreted in this manner, the amendment would prevent a plaintiff with an equal work-equal pay claim from avoiding the fourth defense by suing under Title VII and would still further the remedial purpose of Title VII by permitting claims not based on equal work to proceed without the restriction of the fourth defense.[59] There is language in *Gunther* that supports this view. For example, the Court noted that "the substantive provisions of the Equal Pay Act's affirmative defenses [might] affect the outcome of *some* Title VII sex-based wage discrimination cases,"[60] implying that some litigation might not be affected.

Regardless of the meaning given to the fourth defense in future Title VII litigation, it is evident that the *Gunther* Court did not decide the issue. Therefore, to conclude from the elusive and somewhat contradictory language of the *Gunther* opinion that the disparate impact theory is unavailable to a Title VII plaintiff

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56. 110 CONG. REC. 13,647 (1964) (statement of Sen. Bennett).

57. *See* Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 474-75 (1981).

58. 110 CONG. REC. 13,647 (1964).

59. Ironically, under this interpretation, women would be encouraged to disprove equal work, whereas before *Gunther*, proof of equal work was an essential element of wage discrimination claims.

60. 101 S. Ct. at 2250 n.14 (emphasis added).

is unwarranted.

B. *The Impact of* Gunther *on the Comparable Worth Theory*

Before *Gunther* was decided, there was widespread speculation that the Court might use the case to decide the controversial comparable worth issue.[61] Plaintiffs, however, realized that the comparable worth question would only complicate matters and make it more difficult to get a favorable ruling.[62] Consequently, they presented the case in such a way as to make a decision on comparable worth unnecessary. Thus, the Court was able to examine the complex Bennett amendment issue in isolation. Comparable worth was simply never an issue in *Gunther*. However, the Court's efforts to emphasize this point may not have been entirely successful and may even have been misleading. The dissenting opinion demonstrates that some may read *Gunther* as an implied rejection of comparable worth.

To understand how this inference may be drawn, it is necessary to focus upon the Court's language. At the beginning of the opinion, and again at the end, the Court attempted to allay the concerns of those who might think *Gunther* addresses the comparable worth theory.

> Respondents' claim is not based on the controversial concept of "comparable worth" . . . . Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scales for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted.[63]

At the end of the opinion, the Court stressed that *Gunther* is "manifestly different" from claims based on comparable worth, in that it "does not require a court to make its own subjective assessment of the value of the male and female . . . jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates."[64] Some might infer from this language that the Court disapproves of the use of

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61. Marcus, *Comparable Worth Still up in Air*, The Nat'l L. J., June 22, 1981, at 5, col. 1; Powers & Cooper, *Validity of Comparable Worth Left Open by 'Gunther,'* Legal Times of Washington, June 15, 1981, at 15, col. 1.

62. Masters, *Comparable Worth Advocates Plot 'Gunther' Strategy*, Legal Times of Washington, Dec. 15, 1980, at 2, col. 1.

63. 101 S. Ct. at 2246.

64. *Id.* at 2253-54.

"statistical technique" and "subjective judicial assessment" of the worth of jobs—both of which are commonly included as elements of comparable worth theory. Justice Rehnquist had these statements in mind when he concluded that the Court's opinion suggests "that allegations of unequal pay for unequal, but comparable, work will not state a claim on which relief may be granted.[65]

Such a conclusion, however, is based on the mistaken assumption that the *Gunther* facts (failure by the employer to follow the results of his own survey) constitute evidence of discrimination sufficient to establish a prima facie case and therefore represent a possible standard against which other theories, such as comparable worth, may be tested. Justice Rehnquist stated, for example, that the "pleadings or proof . . . adduced in this particular case . . . [are] sufficient to state a claim,"[66] and implied that the Court's language condemns comparable worth since it is based on more tenuous proof than that submitted in *Gunther*. The majority opinion, however, does not support this position. The Court noted that it was not "called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII, or to lay down standards for the further conduct of this litigation."[67] Thus, even Justice Rehnquist's complaint that the opinion is a "restricted railroad ticket"[68] is generous, for there is no guarantee that the plaintiffs in *Gunther* will even be able to board the train.

Additional proof that the Court was not called upon to rule on the sufficiency of the evidence presented is found in the Court's restatement of the plaintiffs' contention that "the failure of the county to pay respondents the full evaluated worth of their jobs *can* be proven to be attributable to intentional sex discrimination."[69] This statement, indicating that the plaintiffs had other evidence that the employer's failure to follow his own survey was the result of sex discrimination, implies that the failure alone was not intended as evidence of discrimination. Previously, the Ninth Circuit had noted that the plaintiffs had other evidence, besides the survey deviation, which was never consid-

65. *Id.* at 2265.
66. *Id.* at 2255 (Rehnquist, J., dissenting).
67. 101 S. Ct. at 2246 n.8 (citation omitted).
68. *Id.* at 2255 (Rehnquist, J., dissenting).
69. 101 S. Ct. at 2253 (emphasis added).

ered.[70] That court merely held that the plaintiffs were not prevented by the Bennett amendment from introducing such evidence.[71] It is reasonable to assume that the Supreme Court, like the Ninth Circuit, remanded *Gunther* to permit plaintiffs to present this evidence.

The Court's expectation that the plaintiffs would prove their case with other evidence probably arises from the plaintiffs' pleadings rather than from some legal principle prohibiting the introduction of the survey as evidence of discrimination. There is no legal reason why the disparity could not stand by itself; the inference of discrimination is clear. Yet, while a deviation from a survey may in the future prove to be sufficient, *Gunther* did not hold that it is. Respondents evidently chose to base their claim on direct evidence,[72] not on an inference. Regardless of the reason that the Court anticipated proof based on other direct evidence, the Court had no need to rule on the sufficiency of the survey deviation as evidence of discrimination. This question was not presented to the Court and was not decided.

Because the facts presented in *Gunther* do not necessarily establish a prima facie case, they should not be held up as a standard in an attempt to demonstrate that different facts may not suffice. By highlighting the difference between *Gunther* and comparable worth, the Court simply established that comparable worth was not at issue.

III. Conclusion

The only issue addressed by the Supreme Court in *Gunther* was the correct construction of the Bennett amendment. It is now clear that plaintiffs seeking redress for sex-based wage discrimination are no longer barred by the Bennett amendment from suing under Title VII when their claims do not meet the equal work standard of the Equal Pay Act. What facts will suffice to state a claim under Title VII and what theories are appropriate in the wage discrimination context are questions that the Court has left open. The Court declined the opportunity to retie the knots loosened by its interpretation of the Bennett amendment. Whatever the ultimate resolution of these issues, *Gunther* will be the springboard for a considerable amount of

70. 623 F.2d at 1314, 1321.
71. *Id.*
72. 101 S. Ct. at 2246.

litigation seeking to further the cause of women's rights in employment.

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