



10-1980

County of Washington, Oregon v. Gunther

Lewis F. Powell Jr.

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Paul - part of this
memo. is missing.

Check to see whether
this is true of what
pwc 10/22/80 you sent to
other chambers.

(Anyway, I think
I've seen enough to favor
a grant)

P. 6 added
(it became lost
in reworking)
Paul C.

Grant

Reply received.
Still grant.
10/29 Paul C.

Conflict on whether an employer
who has complied fully with
Equal Pay Act nevertheless may
be found to have violated
Title VII.

CA9 held Title VII sets higher

PRELIMINARY MEMORANDUM

& separate
standard.

October 31, 1980 Conference
List 3, Sheet 3

Cert to CA9 (Merrill,
Tang, Taylor [D. Ida.])

No. 80-429

COUNTY OF WASHINGTON, Oregon, et al.

v.

No problem

GUNTHER et al

Federal/Civil

Timely (w/ext)

1. SUMMARY: This important case involves the
relationship between the Equal Pay Act and Title VII of the
Civil Rights Act of 1964. The question is whether a pay
differential which does not violate the Equal Pay Act
nevertheless might violate Title VII.

I would grant. CA9 has really made a big mistake here,
and the issue is important. Plus, there's a conflict. Paul C.

2. FACTS AND DECISION BELOW: Resps are matrons at the women's jail in Washington County, Ore. During the period at issue in this lawsuit, matrons were paid \$525-\$668 per month. Inmates of the men's jail were guarded by male deputy sheriffs, who were paid \$736-\$940 per month.

Resps in this lawsuit complained that the wage differential was illegal under the Equal Pay Act and Title VII. The district court, believing that the "Bennett Amendment" to Title VII in effect incorporated the Equal Pay Act provisions into Title VII, analyzed the two claims as one. The issue under each theory, as the district court saw it, was whether women were paid less for equal work. The court found that the work was "not equal." The job of matron did not involve as much responsibility as that of deputy sheriff. On the average, a deputy sheriff guarded approximately 12 times more prisoners than did a matron. The matrons did spend more of their time performing clerical tasks, but the district court found that this work was different in kind and responsibility from the male deputy sheriffs' principal task of guarding prisoners.

CA9 accepted the district court's findings and affirmed with respect to the Equal Pay Act claim. The CA, however, held that the district court had erred in believing the scope of Title VII's wage protection was limited to that of the Equal Pay Act. The latter Act, according to the CA, was designed solely to ensure that women would receive equal pay for equal work. Where, as here, the work is demonstrably

*women earned less.
the pay was based in
part on sex discrimination^{3.}*

unequal, the Equal Pay Act analysis comes to an end. Title VII, by contrast, offers greater protection. The essence of resps' complaint was that the wage differential between the job of matron and that of deputy sheriff was at least in part the result of sex discrimination even though the work was not identical.

The CA recognized that the primary obstacle to its conclusion was the so-called "Bennett Amendment" to Title VII. That Amendment provides, in pertinent part:

It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining [compensation] if such differentiation is authorized by the [Equal Pay Act].

~~See also~~

42 U.S.C. § 2000e-2(h).

In a lengthy opinion, and in a second opinion denying rehearing, the CA analyzed this provision, and concluded that it was not intended to make the "equal pay" reach of Title VII coextensive with the Equal Pay Act. Rather, the Bennett Amendment was designed only to incorporate by reference the Equal Pay Act's affirmative defenses protecting compensation based on seniority, work quality, or piecework. The CA therefore remanded to permit resps to try to prove that at least some of the compensation differential resulted from sex discrimination.

*See
Hing*

3. CONTENTIONS: Petr contends that decisions in other circuits, legislative history, and sound policy reasons,

all require Title VII and the Equal Pay Act to be construed in pari materia in the area of sex-based wage discrimination.

Petr says the CA's decision represents a flat conflict with decisions of five other circuits. Lemons v. City & County of Denver, 620 F.2d 228 (CA10), cert. denied, --- U.S.--- (Oct. 6, 1980) (No. 80-82); Stastny v. Southern Bell Tel. & Tel. Co., ---F.2d--- (CA4 July 28, 1980); Orr v. MacNeill & Son, 511 F.2d 166 (CA5), cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (CA8 1978); Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). Only the CA3 has held the same way as CA9. IBEW v. Westinghouse Corp., --- F.2d--- (CA3 August 1, 1980).

Petr next argues that the legislative history is clear that the Bennett Amendment was intended to make the reach of Title VII on wage claims only coextensive with that of the Equal Pay Act. For example, one Senator noted, "[T]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." Representative Celler more explicitly commented that "compliance with the Fair Labor Standards Act [of which the Equal Pay Act is a part] satisfies the requirement [of Title VII] barring discrimination because of sex."

Finally, petr argues that the CA's theory would involve the courts in a morass never intended by Congress. A

court would have to compare the responsibilities of teacher and school principal, hand assembler and lathe operator, and innumerable others, to decide whether the responsibilities of each job warranted the pay differential. The Equal Pay Act's mandate is much more manageable: requiring that persons in fact performing equal work are paid equally.

Resps argue that the allegedly conflicting language in most of the cited CA decisions actually is nothing more than dictum. Most of the cases petr cites are "equal pay for equal work" claims. Such cases are properly analyzed under the Equal Pay Act. Resps concede that Lemons and Stastny arguably conflict with the CA9 decision in this case, but urge that the Fourth and Tenth Circuits be permitted to reexamine their positions in light of the CA9 opinion in this case.

In any event, argue resps, the CA9 decision is correct. If Title VII's pay protection is limited to equal work situations, employers are free to establish unfair pay differentials for jobs to the disadvantage of women. Congress should not be thought to have intended such a loophole. Legislative history cited to the contrary is ambiguous or not on point. The most plausible reading of the Bennett Amendment is that endorsed by the CA: that Title VII incorporated only the affirmative defenses of the Amendment. This is the view

taken by the EEOC in its regulations, which state:

Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of . . . Title VII . . . is not limited by [the Bennett Amendment] to those employees covered by the [Equal Pay Act].

4. DISCUSSION: The issue is extremely important because the CA9's decision permits a court to inquire into wage differentials between different jobs, not (as under the Equal Pay Act) complaints about unequal pay for equal work.

There does appear to be a conflict in the circuits although, as resps noted, the language in some of the cases cited by petr appears to be dictum.

The Court denied cert in the Lemons case, No. 80-82, which involved the same issue. But the pool memo in that case pointed out that the issue was not clearly presented by the papers in the case. Nor, in any event, did the CA in Lemons seem to be aware of contrary authority.

I would grant, and request a brief on the merits from the SG.

There is a response.

10/22/80

Cane

Opns in petn.

(LFP)

Argued, 19 . . .

Assigned, 19...

No. 80-429

Submitted, 19...

Announced, 19...

CTY. OF WASHINGTON

VS.

GUNTHER

Grant

[illegible]

pwc 03/14/81

Q - whether ~~the~~ with respect to alleged ^{sex} discrimination, Title VII controls because it is broader than the Equal Pay Act?

Resps are class of prison "matrons" who were paid less than prison guards. It is conceded on this appeal - as found by DC & accepted by CHA - that jobs (duties) are not comparable. It follows from this ~~concession~~ ^{concession} that Equal Pay Act was not violated.

Equal Pay Act prohibits "discrimination" on basis of sex ~~by~~ by "less pay --- for equal work"

VII, enacted few months later, ~~prohibits~~

prohibits "discrimination" with respect to compensation, conditions of employment "on account of race, etc, & "sex".

Equal Pay Act It is clear from leg. history of E/Pay Act

the term "equal pay" means "equal pay only for "equal work" - not "comparable work".

TO: Mr. Justice Powell

FROM: Paul Cane

DATE: March 14, 1981

RE: No. 80-429, County of Washington v. Gunther.

Title VII The term "sex" was a floor amend. to VII, & there is little leg. hist (not mentioned in Committee Reports. But Emanuel Celler & Senator Bennett made clear that VII was not intended to ~~be~~ broaden Equal Pay Act w/r to ~~sex~~ sex. This was purpose of Senator Bennett who introduced § 703(h) of Title VII (P. 4 & 7). Nevertheless, EEOC's present Regs., 29 CFR, & CHA now read

The question in this case is whether Title VII's VII as broader, requiring "comparability of work" (e.g. is a trained nurse comparable in extensive than that offered by the Equal Pay Act. worth to a doctor?)

DC found work was "not equal". CHA accepted this finding, but held VII created a different standard. (See CHA's supplemental opinion that

backed away from "comparable" standard.)

Background

This case presents an important and difficult question of statutory construction involving the relationship between the Equal Pay Act and Title VII. The Equal Pay Act was enacted in 1963. It provides, in pertinent part:

No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for "equal work" 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 factor other than sex

Equal Pay Act

In other words, the Equal Pay Act requires "equal pay for equal work." Suits brought under this Act thus turn on proof that jobs are substantially equivalent. If a plaintiff cannot show that her job is substantially the same as one receiving higher pay, the inquiry under the Equal Pay Act is at an end.

Proof required under Equal Pay Act

Title VII was enacted one year after the Equal Pay Act. It broadly proscribes discrimination in all facets of the employment relationship. Title VII declares it illegal

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.

Title VII
(one year later)

This broad prohibition of discrimination was qualified by the Bennett Amendment, section 703(h), which 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 [the Equal Pay Act].

§ 703(h) appears to provide as to "sex" that Equal Pay Act controls

In this case, resps are matrons at the women's county jail. They contended that their compensation was illegally discriminatory when compared to the compensation for male guards at the men's prison. It is not disputed that the male guards are paid about \$200 per month more than the female matrons. The matrons sued under alternative theories. First, they contended that the wage differential denied them "equal pay for equal work," and therefore violated the Equal Pay Act. In the alternative, they argued that even if the job of "matron" was not substantially equivalent to that of "prison guard," some part of the wage differential was attributable to sex discrimination. According to resps, any such discrimination violated Title VII even though it did not violate the Equal Pay Act.

With respect to the first theory, the district court found that the job of "matron" was not substantially equivalent to that of "prison guard." The women guarded fewer prisoners and devoted much of their time to clerical work. The court thus concluded that the Equal Pay Act had not been violated because resps had not shown that they in fact performed "equal

DC held jobs were different. Thus Equal Pay Act not violated

Here "matrons" at jail are involved - male guards paid more

work." With respect to the second theory, the district court held that resps' claim failed as a matter of law. According to the court, the Bennett Amendment makes clear that Title VII offers no greater relief for claims of sex-based wage discrimination than does the Equal Pay Act: "if the jobs are substantially dissimilar, that is the end of the inquiry."

DC
also
held
VII

provide
no greater
relief: jobs
are dissimilar

The Ninth Circuit affirmed in part and reversed in part. It did not disturb the lower court's conclusion that the job of matron was not substantially equivalent to the job of prison guard. The CA held, however, that the district court had erred in its understanding of the scope of Title VII. The latter offers "much broader" relief than the Equal Pay Act; according to the CA, resps were entitled to go to trial to prove that a portion of the wage differential was attributable to sex discrimination.

But CA9
reversed
as to VII-
holding
it

afforded

"much
broader"
relief

In this Court, resps do not challenge the lower court's conclusion that the job of matron is not equivalent to that of prison guard. The sole issue before the Court thus is the relationship between Title VII and the Equal Pay Act. The Supreme Court granted certiorari to resolve a conflict in the circuits on that issue.

Concededly
have
no
right
under
E/Pay
Act

Discussion

In a sense, this is a classic statutory cases. Petr and resps have arguments based on the plain language, the legislative history, deference to agency interpretation, and hoary (but sometimes useful) bromides about statutory

construction. In addition, there are significant public policy overtones to the case. I have a view as to the correct result, but before I present it I'll make the best case for each side.

A. Petr's Argument

1. The legislative history of the Equal Pay Act.

Congress considered the Equal Pay Act in 1962 and 1963. The legislative history of this Act and its predecessor are highly relevant to the present case. In 1962, as originally introduced, the bill would have required equal pay "for work of comparable character" (emphasis added). In hearings on that bill, witnesses testified that women were confined to "women's jobs" that were unfairly low-paying when compared to higher-paying "men's jobs." In the House, Representative St. George amended the bill to require equal pay only "for equal work on jobs, the performance of which requires equal skills" (emphasis added). The amendment was accepted because, as Rep. St. George commented,

the word "comparable" opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes.

Representative Landrum noted that the amendment would prevent

the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term "comparable" when "equal" is capable of the same definition throughout the United States.

The Senate inserted a similar amendment in its bill to narrow the focus from "comparable" work to "equal" work.

*Hist. of
Equal
Pay Act*

*- term
"equal
work"*

*substituted
for
"comparable
work"*

However, Congress adjourned in 1962 before a Conference Committee could be convened to iron out other differences.

In 1963, what became the Equal Pay Act was introduced. The bill as introduced was very similar to the bill that nearly had been enacted the previous year. Thus, the new bill required only "equal pay for equal work." Rep. Goodell noted:

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 We do not expect the Labor Department 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"

Rep. Goodell also noted that, "It is not the business of the Secretary of Labor to write job evaluation systems."

It is thus clear beyond peradventure that, in approving the Equal Pay Act, Congress considered and rejected the notion that claims of sex-based wage discrimination should be analyzed under any concept such as "comparable worth." Instead, Congress believed that only an "equal work" concept was desirable. Of course, it is true that the present case arises under Title VII, not the Equal Pay Act. But it is highly unlikely that the "same Congress" that demanded "equal work" under the Equal Pay Act would have changed its mind only a few months later in Title VII.

leg.
hist.
clear
as to
"equal
pay for
equal
work"

2. The legislative history of Title VII. In contrast to the detailed legislative history of the Equal Pay

*Little Leg. history 7.
on this & as to VII*

Act, the sex discrimination provisions of Title VII were added almost without comment. Indeed, sex discrimination was added to the Act at the last minute as a ploy to defeat the whole bill. It is not probable that Congress, through its silence, intended to abrogate the "equal work" rule that it had carefully debated the prior year. Indeed, Senator Clark commented, "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII."

This comports with maxims of statutory construction. *Canon*
In general, a specific statute controls over a more general one, and repeals by implication are disfavored. *#1 Construction* If Title VII abrogates the limitations of the Equal Pay Act, the Congressional purpose reflected in the restrictive Equal Pay Act provisions would be ignored because plaintiffs could elect to sue under the more generous statute.

Nevertheless, Senator Bennett sought to clarify matters by inserting his amendment quoted on p. 3 supra. His amendment properly was described as a "technical amendment" because it did nothing more than make explicit what everyone already had assumed: that Title VII incorporates the Equal Pay Act's "equal work" standard. According to Senator Bennett, his amendment ensured that "the provisions of the Equal Pay Act shall not be nullified."

Meanwhile, on the House side, Representative Celler

** Consistent with our Alaska case*

observed that the Bennett Amendment

provides that compliance with the Fair Labor Standards Act as amended [the Equal Pay Act] satisfies the requirement of the title [VII] barring discrimination because of sex.

*Enacted
Celler
Sponsored
on House*

Rep. Celler's comments are entitled to special weight because *indeed* he was the sponsor of the bill on the House side.

3. Subsequent legislative history. Because of cloture rules, Senator Bennett had not been given much time on the floor to explain his amendment. So, the following year, he took advantage of a provision of the Senate rules to note that "discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." Senator Dirksen, who also played a key role in the enactment of Title VII, agreed with Senator Bennett. Senator Dirksen said; "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted."

It is true, of course, that subsequent legislative history is not as relevant as committee reports or contemporaneous statements. E.g., Oscar Mayer, Inc. v. Evans, 441 U.S. 750 (1979). But the sex discrimination provisions of Title VII were enacted through a floor amendment. Thus, there was no committee report on the sex discrimination portion of the Act at all. In any event, and particularly under these circumstances, post-enactment legislative history sometimes is given weight. Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1942); Haynes v. United States, 390 U.S. 85 (1968).

yes

4. Contemporaneous "agency construction" of Title VII.

In 1965, the EEOC issued official guidelines interpreting Title VII. One guideline provided as follows:

EEOC

[T]he Commission interprets section 703(h) [the Bennett Amendment] to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.

Shortly thereafter, the EEOC General Counsel explained the guideline in a series of official opinion letters. One typical letter explained:

[I]t must be conceded that so long as no woman is in fact employed in a given job category, it is not unlawful for an employer to pay male workers less than he would have to pay a woman if she were employed, for we read the Equal Pay Act and the Administrator's interpretation thereunder to forbid actual and not hypothetical differentials, and, whatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex.

Same test

Another letter explained:

Assuming that male and female laborers perform the same functions ... a wage differential would violate the Act [Title VII]. Maintenance of the two job classifications based on sex would in itself be a violation unless there is a functional difference in the two job categories.

The EEOC's regulations now take the point of view the Title VII is broader than the Equal Pay Act. But it is the contemporaneous construction by the agency that must control.

*EEOC
Regs
changed*

5. Errors in CA 9's analysis. The CA ignored most of these arguments and took an overly literal approach to the

statute. It focused on the word "authorized" in the Bennett Amendment. According to the CA, the only discrimination that can be said to have been "authorized" by the Equal Pay Act is that embodied in its four affirmative defenses. But this approach draws too fine a line between something that is legal because it was not prohibited in the first place and something that is legal because it was covered by an affirmative defense. In any event, the CA's construction would read the Bennett Amendment out of existence. Title VII proscribes sex discrimination in compensation except where it results from a "seniority system," "merit system," or piecework system. The Equal Pay Act has four affirmative defenses. The first three-- "seniority system," "merit system," and piecework--duplicate those of Title VII. The fourth covers discrimination based on "any other factor other than sex." In the CA's view, the Bennett Amendment simply incorporated into Title VII the affirmative defenses of the Equal Pay Act. This makes no sense, because three of the four affirmative defenses already are found in Title VII. The fourth so-called "affirmative defense" in the Equal Pay Act is nothing more than a catch-all for other compensation differentials based on factors other than sex. Thus, if the CA is correct that the Bennett Amendment incorporates only the Equal Pay Act's affirmative defenses, the Amendment is reduced to saying nothing more than this:

It shall not be an unlawful employment practice under this title [VII] for any

employer to differentiate upon the basis of sex in determining the amount of wages or compensation ... if such differentiation is based on any factor other than sex.

Plainly, this is absurd. The Bennett Amendment was intended to make clear, as Rep. Celler stated, that compliance with the Equal Pay Act is compliance with any charge of wage discrimination under Title VII.

6. Administrative burden. If the Court holds that "equal pay for comparable work" claims are cognizable under Title VII, it would open the floodgates of litigation. There *Examples* are numerous jobs that are held overwhelmingly by women. For example, courts will be asked to decide if a hospital is discriminating against women because of the magnitude of the differential between the pay of nurses and doctors. Congress, if it chooses, can ask the courts to undertake to resolve questions of this sort. But the analytical and administrative difficulty that such lawsuits would create is precisely what Congress was trying to avoid in 1963 when it replaced the "comparable work" with the "equal work" requirement in the Equal Pay Act. *Yes*

B. Resps' Argument

1. Plain language of Title VII. Petr spends much of his brief discussing the legislative history of the Equal Pay Act. It is important to recognize that this case does not arise under that Act, but rather under Title VII. The latter unequivocally prohibits all forms of employment discrimination. In Los Angeles Department of Water and Power v. Manhart, 435

U.S. 702 (1978), the Court held that Title VII was violated when employers deduct from paychecks a greater pension fund contribution for men than for women. The Court did not find it necessary to analyze this form of wage discrimination under the Equal Pay Act, nor did it even intimate that the woman who were disadvantaged held jobs "equal" to those of men. Petr's theory was not argued in Manhart, but the case by implication rejects it.

Petr spends much time arguing that Congress could not have intended to make "comparable work" claims cognizable under Title VII. Petr fails to recognize, however, that such claims already are cognizable if brought in the context of race discrimination. Race-based claims are not covered by the Equal Pay Act, so nothing in the Bennett Amendment precludes such claims. It follows, therefore, that "comparable work" race claims can be brought under Title VII under existing law. For example, if an employer were to define the qualifications for a unique job and sent the yearly salary at \$15,000, and then reduce the salary to \$10,000 when a qualified black was found, that discrimination would violate Title VII. The result should be no different if it is a woman, rather than a black, that suffers from the discrimination.

Respect argument
Can't treat "sex" differently from "race"

It is true that Congress in enacting the Equal Pay Act demonstrated its concern about government review of wage rates in "comparable work" claims. But that concern reflected a general resistance to government involvement in any private

employment relationship. This concern was not demonstrated when Congress enacted Title VII.

2. Plain language of the Bennett Amendment. The Bennett Amendment addresses the relationship between that which is "authorized" by the Equal Pay Act and that which Title VII prohibits. The Bennett Amendment provides:

It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in ... compensation ... if such differentiation is authorized by the [Equal Pay Act].

Thus, the Bennett Amendment permits under Title VII only what is affirmatively authorized under the Equal Pay Act. Examining the latter Act shows that it consists of two parts. The first part proscribes unequal pay for equal work. The second part creates four exceptions to that proscription. The only part of the Equal Pay Act that can be said to "authorize" discrimination is the part containing the exceptions. The CA 9 correctly held that nothing in the four exceptions authorizes unequal pay for comparable work.

If the purpose of the Bennett Amendment was, as petr contends, to narrow the definition of wage discrimination under Title VII, it is odd that Congress inserted the amendment in the place that it did. Section 703(h) deals narrowly with certain defenses. If Congress had intended to do anything other than incorporate the Equal Pay Act's affirmative defenses, the Amendment would not have been placed there. Instead, Congress could have put it in section 703(a), which

would have modified the general definition of wage discrimination to make clear that sex-based wage discrimination is illegal only if it violates the Equal Pay Act.

3. The legislative history of the Bennett Amendment.

The Amendment was billed only as a "technical" amendment that was "necessary in the interest of clarification." It was not represented as a sweeping, substantive amendment affecting the basic coverage of Title VII. Second, the amendment was proposed only to ensure that there would be no "nullification" of the Equal Pay Act. This must have referred to "nullification" of the exceptions to the Equal Pay Act. Senator Dirksen commented that the Bennett Amendment was necessary to "recognize those exceptions."

The remarks, quoted on p. 8 supra, of Senator Dirksen and Senator Bennett in 1965 are irrelevant. Post-enactment legislative history cannot stand as evidence of what was on Congress' collective mind when it acted the year before.

4. The EEOC's position. ^{Present} The EEOC's guidelines make explicit that "comparable work" claims may be brought under Title VII. Nothing in its earlier statements is contrary to its current position. The first set of guidelines, quoted on p. 9 supra, simply makes clear that to the extent that Title VII and the Equal Pay Act converge, defenses under the latter Act are applicable to suits under the former. Nor do the "opinion letters," quoted on p. 9 supra, take a contrary view. Even if they did, the private "opinion letters" are not

entitled to weight because the public guidelines are to the contrary.

C. Analysis and Criticism

Although the question is not free from doubt, I would hold for petr. Taken alone, the text of the Bennett Amendment is somewhat ambiguous. In particular, its use of the word "authorized" tends to support CA 9's view that the Bennett Amendment simply desired to incorporate the affirmative defenses of the Equal Pay Act.

However, the preponderance of the legislative history supports petr. Rep. Celler's statement is particularly good. He flatly states that compliance with the Equal Pay Act is compliance with Title VII. Other floor statements quoted above also are helpful. Normally, a committee report is the preferred source for legislative history, not statements on the floor. But the sex discrimination provisions of Title VII were added on the floor, so there is no committee report that can be consulted.

Celler's view of VII

(No committee report on addition of "sex" to VII)

Because the Bennett Amendment was added on the floor, it is not suprising that Congress in its haste did not dot all the "i's" and cross all the "t's." For that reason, for guidance in construing Title VII it is appropriate to consult the legislative history of the Equal Pay Act. In enacting that legislation, Congress clearly demonstrated an aversion to "comparable work" claims. It simply is not credible to believe that, without comment, the same group of legislators changed their position within a few months.

- it was a floor amend.

The EEOC's contemporaneous construction of the Act also is helpful. Although it is not entirely unambiguous, the early guidelines and opinion letters do suggest that even the EEOC believed that Title VII did not cover sex-based "comparable work" claims.

For these reasons, I would hold for petr.

Paul

P.W.C. 03/14/81

P.S. This is a great case. Do you think we might get the writing assignment?

Resp and the SG are correct that Manhart by implication tends to support the CA's decision. But the "comparable work" argument was not presented there or discussed. In any event, Manhart easily could be distinguished because the insurance premiums deducted from workers' paychecks presumably affected women discriminatorily when compared to men doing equal work.

Paul Lane

80-429 COUNTY OF WASHINGTON v. GUNTHER CA9 Argued 3/23/81

Q - Does VII provide a broader standard of review of alleged sex discrimination than the "equal pay for equal work" of the Eq. Pay Act?

Purely a Q of statutory construction. Conceded here that the "matrons" in the prison did different work from the "guards."

See Pet. for Cert p 18a for CA9's attempt to avoid "comparable work" standard.

Equal Pay Act applies only to claim of differential in compensation.

Accrual of women to guards was a finding by DC.

There are women who are deputy-sheriffs.

~~the~~

Derr (Petr.)

"Comparable worth" would allow comparison of worth of jobs

Conceded have jobs ~~are~~ - the work is equal.

No claim of denial of access to women to the higher jobs (guards), Only claim is for equal pay ~~for~~ for continuing as matrons. ^{DC made a finding to this effect}

E/Pay ~~Act~~ requires an intent to discriminate. There would be a violation if it could be proved that employer would not employ qualified women as guards.

~~That~~ B R W said this would be a garden variety VII case ~~in~~ in that situation but under a different section of VII.

J PS noted that CA9 disavowed the comparability standard, Council replied that the Supplemental Op. of CA9 tried to disavow - but it identified no other standard that justified its departure from "equal pay for equal work".

1 MP.

Dert (cont)

Congress considered these Qs when these statutes were under consideration, & the "comparable" standard was rejected (I think Leg. history supports this view). There is a policy of that Congress has decided.

EEOC has no auth. to issue Regs. It does issue Guide Lines. Initially, EEOC made clear that VII applied the E/Pay Act standard. But EEOC later changed its mind & now takes dif. view.

Bennett Amend was introduced after Cloture had been voted so that leg. history is not illuminating. This Amend. was adopted in 1964. Senator Bennett clarified her understanding in 1965. & Dickson agreed with Bennett's clarification.

Mrs. Hewitt (Reck)

There can be deserve, even though jobs are dif.. But this can doesn't present this situation.

All matrons are women & all guards are men.

Sullivan (SG - for Reck)

SG doesn't take a position on "comparability" theory. SG relies on its interpretation of Bennett Amend.

If we agree ^{with this}, ~~the~~ SG argues that lower cts will work out standards under VII.

SG is not defending CAG's op. - but it is not inconsistent with Govt's position. CAG ~~remained~~.

(PS several times emphasized that issue is whether VII may apply more broadly than E/Pay to pay differentials).

See the only quest. present. Ret. for Cent

Appm 5-4

80-429 County of Washington v. Gunther
The Chief Justice

Conf. 3/27/81

Reverie
CA9 misconstrued Bennett Amend.

No ev. of discrimination
mis-use of VII

Mr. Justice Brennan Appm

No need in this case for any
comparison of jobs.

Gender based discrimination -
paying less to women.

Bennett Amend only incorporated
the 4 exceptions (SG's position)

CA9 is right.

Mr. Justice Stewart Reverie

Case of "enormous importance".

Bennett Amend. was "technical
amend" after Cloture - thus limited
debate. Amend. can be construed either
way.

Despite effort of CA9 to avoid
language of "job evaluation" (comparative
worth)

Mr. Justice Powell

Reverse

See my yellow notes.

Mr. Justice Rehnquist

Reverse

There will be some "comparability" even under E/Pay Act. e.g. whether jobs are equal.

CA's holding would put a "wild-card" in the deck.

Reading Bennett Amend as 56 does would make it ~~as~~ - in effect. meaningless

Bill spoke at length & well. I'll write talk to him

Mr. Justice Stevens

Affirm

~~I must~~ Must prove more than ~~that~~ Comparability is not the test but there can be discrimination in other respect. (I don't understand)

Mr. Justice White Affirm

Even if jobs are unequal, ~~these~~
~~employers~~ ^{they} should not be free to pay
what they please without any comparison
of worth.

Agree with ~~W~~ W & B..

Mr. Justice Marshall Affirm

Mr. Justice Blackmun App.

Agree case is important
Classic example is discrepancy
in pay of nurses as compared to other
Bennett Amendment not intended
to

3/25

80-429 County of Washington v. Gunther {Pre Conference1. Meaning of Bennett Amend (§ 703(h) of Title VII)

Floor amend. - little history.

Emmanuel Celler (sponsor in House):Only one
year after
Equal Pay
Act.

The amend. "provides that compliance with the Fair Labor Standards Act, as amended. (The Equal Pay Act) satisfies the requirement of Title VII, barring (except for) discrimination because of sex"

As to "equal pay", the Pay Act controls

2. No claim of discrimination in this case. DC found that women were not denied access to jobs as "guards."

3. EEOC's contemporaneous construction

- (a) Guideline in 1965 (first)
- (b) Gen. Council's letter - same effect
- (c) Guideline not changed until 1972

Out say less deference to a subsequent view. See Paul's

80-429 County of Wash. v Gunther

SEC v Sloan 436 U.S. 103, 120 (1978)
(court will defer to contemporaneous construction of the Act by an agency)

G.E. v. Gilbert, 429 U.S. 125, 143 (1976)
(court will not defer when the agency changes its mind)

EEOC guidelines in 1972
changed their position.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

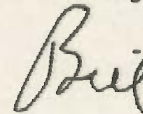
March 30, 1981

RE: No. 80-429 County of Washington v. Gunther

Dear Chief:

I'll undertake to try an opinion for the Court
in the above.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 4, 1981

Re: No. 80-429, County of Washington v. Gunther

Dear Potter:

Are you willing to take on a dissent
in this case? You recall Byron said his vote
to affirm was "tentative". A swift dissent might
"shake" the case.

Regards,

WRB

Justice Stewart
cc: Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 6, 1981

Re: No. 80-429, County of Washington v. Gunther

Dear Chief,

At the Conference discussion of this case, it became evident to me that at least some members of the majority did not see it as involving the broad and important issues that I perceived.

Accordingly, rather than preparing a "swift" dissent I would prefer to wait to see what the Court is going to say, and may well end up by joining the Court opinion.

Sincerely yours,

The Chief Justice


Copies to Justice Powell
Justice Rehnquist

P.S.
✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 6, 1981

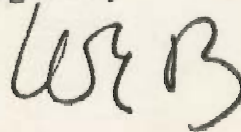


Re: 80-429 - County of Washington v. Gunther

Dear Bill:

Since Potter "opts out of the class," will
you put your hand to it?

Regards,



Justice Rehnquist

Copy to Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1981

Re: No. 80-429 County of Washington v. Gunther

Dear Chief:

I will be happy to undertake the preparation of a
dissenting opinion in this case.

Sincerely,

WHR

The Chief Justice

cc: Mr. Justice Powell

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

MAY 20 1981

I voted "other way"

I will await W.H.R.'s

1st DRAFT

Recircul *denied.*

SUPREME COURT OF THE UNITED STATES

No. 80-429

County of Washington et al.,
Petitioners,
v.
Alberta Gunther et al. } On Writ of Certiorari to the
United States Court of Ap-
peals for the Ninth Circuit,

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (h), restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.

I

This case arises over the payment by petitioner, the County of Washington, Ore., of substantially lower wages to female guards in the female section of the county jail than it paid to male guards in the male section of the jail.¹ Respondents are four women who were employed to guard female prisoners and to carry out certain other functions in the jail.² In January 1974, the county eliminated the female

¹ Prior to February 1, 1973, the female guards were paid between \$476 and \$606 per month, while the male guards were paid between \$668 and \$853. Effective February 1, 1973, the female guards were paid between \$525 and \$668, while salaries for male guards ranged from \$701 to \$940. *Gunther v. County of Washington*, 20 FEP Cases 788, 789 (Ore. 1976).

² Oregon requires that female inmates be guarded solely by women, Ore. Rev. Stat. §§ 137.350, 137.360, and the District Court opinion indicates that women had not been employed to guard male prisoners. 20 FEP Cases, at 789, 792, nn. 8-9. For purposes of this litigation, respondents concede that gender is a bona fide occupational qualification for

section of the jail, transferred the female prisoners to the jail of a nearby county, and discharged respondents. App. to Pet. for Cert., at 63a.

Respondents filed suit against petitioner in Federal District Court under Title VII, 42 U. S. C. § 2000e *et seq.*, seeking backpay and other relief.³ They alleged that they were paid unequal wages for work substantially equal to that performed by male guards, and in the alternative, that part of the pay differential was attributable to intentional sex discrimination.⁴ The latter allegation was based on a claim that, because of intentional discrimination, the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs.

After trial, the District Court found that the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and that the females devoted much of their time to less-valuable clerical duties. It therefore held that respondents' jobs were not substantially equal to those of the male guards, and that respondents were thus not entitled to equal pay. 20 FEP Cases 788, 791 (Ore. 1976) The Court of Appeals affirmed on that issue, and respondents do not seek review of the ruling.

some of the female guard positions. See 42 U. S. C. § 2000e-2 (e)(1); *Dothard v. Rawlinson*, 433 U. S. 321 (1977).

³ Respondents could not sue under the Equal Pay Act because the Equal Pay Act did not apply to municipal employees until passage of the Fair Labor Standards Amendments of 1974, 88 Stat. 55, 58-62. Title VII has applied to such employees since passage of the Equal Employment Opportunity Act of 1972, § 2 (1), 86 Stat. 103.

⁴ Respondents also contended that they were discharged and not rehired in retaliation for their demands for equal pay. Respondent Vander Zanden also contended that she was denied medical leave in retaliation for such demands. The District Court rejected those contentions, and the Court of Appeals affirmed. Those claims are not before this Court.

The District Court also dismissed respondents' claim that the discrepancy in pay between the male and female guards was attributable in part to intentional sex discrimination. It held as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act, 29 U. S. C. § 206 (d).⁹ 20 FEP Cases, at 791. The Court therefore permitted no additional evidence on this claim, and made no findings on whether petitioner's pay scales for female guards resulted from intentional sex discrimination.

The Court of Appeals reversed, holding that persons alleging sex discrimination "are not precluded from suing under Title VII to protest . . . discriminatory compensation practices" merely because their jobs were not equal to higher-paying jobs held by members of the opposite sex. 602 F. 2d 882, 891 (CA9 1979), supplemental opinion on denial of rehearing, 623 F. 2d 1303, 1317 (1980). The Court remanded to the District Court with instructions to take evidence on respondents' claim that part of the difference between their rate of pay and that of the male guards could be attributed to sex discrimination. We granted certiorari, — U. S. — (1980), and now affirm.

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,"¹⁰ under

⁹ See *infra*, at 5.

¹⁰ The concept of "comparable worth" has been the subject of much scholarly debate, as to both its elements and its merits as a legal or economic principle. See e. g., 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 (1979); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J. L. Ref. 231 (1980). The Equal Employment Opportunity Commission has conducted hearings on the question, see BNA Daily Labor Report Nos. 83-86 (April 28-30, 1980), and has commissioned a study of job evaluation systems, see D. Treiman, *Job Evaluation: An Analytic Review* (1979) (interim report).

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.⁷ Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale 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. The narrow question in this case is whether such a claim is precluded by the last sentence of § 703 (h) of Title VII, called the "Bennett Amendment,"⁸

II

Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U. S. C. § 2000e-2 (a). The Bennett Amendment to Title VII, however, 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 pro-

⁷ Respondents thus distinguish *Lemons v. City and County of Denver*, 620 F. 2d 228 (CA10), cert. denied, — U. S. — (1980), in which the plaintiffs, nurses employed by a public hospital, sought increased compensation on the basis of a comparison with compensation paid to employees of comparable value—other than nurses—in the community, without direct proof of intentional discrimination.

⁸ We are not called upon in this case to decide whether respondents have stated a *prima facie* case of sex discrimination under Title VII, cf. *Christensen v. Iowa*, 563 F. 2d 353 (CA8 1977), or to lay down standards for the further conduct of this litigation. The sole issue we decide is whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.

visions of section 206 (d) of title 29." 42 U. S. C. § 2000e-2 (h).

To discover what practices are exempted from Title VII's prohibitions by the Bennett Amendment, we must turn to § 206 (d) of title 29—the Equal Pay Act—which provides in relevant part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U. S. C. § 206 (d)(1).

On its face, the Equal Pay Act contains three restrictions pertinent to this case. First, its coverage is limited to those employers subject to the Fair Labor Standards Act. S. Rep. No. 176, 88th Cong., 1st Sess., 2 (1963). Thus, the Act does not apply, for example, to certain businesses engaged in retail sales, fishing, agriculture, and newspaper publishing. See 29 U. S. C. §§ 203 (s), 213 (a). Second, the Act is restricted to cases involving "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U. S. C. § 206 (d). Third, the Act's four affirmative defenses exempt any wage differentials attributable to seniority, merit, quantity or quality of production, or "any other factor other than sex." *Ibid.*

Petitioner argues that the purpose of the Bennett Amend-

ment was to restrict Title VII sex-based wage discrimination claims to those that could also be brought under the Equal Pay Act, and thus that claims not arising from "equal work" are precluded. Respondents, in contrast, argue that the Bennett Amendment was designed merely to incorporate the four affirmative defenses of the Equal Pay Act into Title VII for sex-based wage discrimination claims. Respondents thus contend that claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher-paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or "any other factor other than sex." The Court of Appeals found respondents' interpretation the "more persuasive." 623 F. 2d, at 1311. While recognizing that the language and legislative history of the provision are not unambiguous, we conclude that the Court of Appeals was correct.

A

The language of the Bennett Amendment suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII. The Amendment bars sex-based wage discrimination claims under Title VII where the pay differential is "authorized" by the Equal Pay Act. Although the word "authorize" sometimes means simply "to permit," it ordinarily denotes affirmative enabling action. Black's Law Dictionary 122 (5th ed. 1979) defines "authorize" as "[t]o empower; to give a right or authority to act." Cf. 18 U. S. C. § 1905 (prohibiting the release by federal employees of certain information "to any extent not authorized by law"); 28 U. S. C. § 1343 (granting district courts jurisdiction over "any civil action authorized by law"). The

⁹ Similarly, Webster's Third New International Dictionary states that the word "authorize" "indicates endowing formally with a power or right to act, usu. with discretionary privileges." *Id.*, at 147 (examples deleted).

question, then, is what wage practices have been affirmatively authorized by the Equal Pay Act.

The Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to "authorize" anything at all: it is purely prohibitory. The second part, however, explicitly authorizes employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act. It is to these provisions, therefore, that the Bennett Amendment must refer.

Petitioner argues that this construction of the Bennett Amendment would render it superfluous. See *United States v. Menasche*, 348 U. S. 528, 538-539 (1955). Petitioner claims that the first three affirmative defenses are simply redundant of the provisions elsewhere in § 703 (h) of Title VII that already exempt bona fide seniority and merit systems and systems measuring earnings by quantity or quality of production,¹⁰ and that the fourth defense—"any other factor other than sex"—is implicit in Title VII's general prohibition of sex-based discrimination.

We cannot agree. The Bennett Amendment was offered as a "technical amendment" designed to resolve any potential conflicts between Title VII and the Equal Pay Act. See *infra*, at 10-11. Thus, with respect to the first three defenses, the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies would adopt a consistent interpretation of like provisions in both statutes. Otherwise,

¹⁰ Section 703(h) provides in relevant part:

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

they might develop inconsistent bodies of case law interpreting two sets of nearly identical language.

More importantly, incorporation 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." *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971). 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 directly attributable to sex discrimination. H. R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963).¹¹ Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] established and employed a bona

¹¹ The legislative history of the Equal Pay Act was examined by this Court in *Corning Glass Works v. Brennan*, 417 U. S. 188, 198-201 (1974). The Court observed that earlier versions of the equal pay bill were amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job evaluation systems used by American businesses would otherwise be disrupted. *Id.*, at 199-201. This concern is evident in the remarks of many legislators. Representative Griffin, for example, explained that the fourth affirmative defense is a "broad principle," which "makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation." 109 Cong. Rec. 9203. See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197-9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson).

vide job rating system," but merely to "uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination." 109 Cong. Rec. 9209 (statement of Rep. Goodell, principal exponent of the Act). Although we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, see *supra*, n. 8, we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous.

We therefore conclude that only differentials attributable to the four affirmative defenses of the Equal Pay Act are "authorized" by that Act within the meaning of § 703 (h) of Title VII.

B

The legislative background of the Bennett Amendment is fully consistent with this interpretation.

Title VII was the second bill relating to employment discrimination to be enacted by the 88th Congress. Earlier, the same Congress passed the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of [sex-based] employment discrimination in private industry," *Corning Glass Works v. Brennan*, 417 U. S. 188, 195 (1974). Any possible inconsistency between the Equal Pay Act and Title VII did not surface until late in the debate over Title VII in the House of Representatives, because until then, Title VII extended only to discrimination based on race, color, religion, or national origin, see H. R. Rep. No. 914, 88th Cong., 1st Sess., 10 (1963), while the Equal Pay Act applied only to sex discrimination. Just two days before voting on Title VII, the House of Representatives amended the bill to proscribe sex discrimination, but did not discuss the implications of the overlapping jurisdiction of Title VII, as amended, and the Equal Pay Act. See 110 Cong. Rec. 2577-2584. The Senate took up consideration of the House version of the Civil Rights bill without reference to any

committee. Thus, neither House of Congress had the opportunity to undertake formal analysis of the relation between the two statutes.¹²

Several Senators expressed concern that insufficient attention had been paid to possible inconsistencies between the statutes. See 110 Cong. Rec. 7217 (statement of Sen. Clark); *id.*, at 13647 (statement of Sen. Bennett). In an attempt to rectify the problem, Senator Bennett proposed his amendment. *Id.*, at 13310. The Senate leadership approved the proposal as a "technical amendment" to the Civil Rights bill, and it was taken up on the floor on June 12, 1964, after cloture had been invoked. The Amendment engendered no

¹² To answer certain objections raised by Senators concerning the House version of the Civil Rights bill, Senator Clark, principal Senate spokesman for Title VII, drafted a memorandum, printed in the Congressional Record. One such objection and answer concerned the relation between Title VII and the Equal Pay Act:

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

"Answer. The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 Cong. Rec. 7217 (1964).

This memorandum constitutes the only formal discussion of the relation between the statutes prior to consideration of the Bennett Amendment. It need not concern us here, because it relates to Title VII before it was amended by the Bennett Amendment. The memorandum obviously has no bearing on the meaning of the terms of the Bennett Amendment itself.

controversy, and passed without recorded vote. The entire discussion comprised a few short statements:

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

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

"The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

"I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic]; I shall ask that the amendment be voted on without asking for the yeas and nays.

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

"Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

"We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

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

"Therefore, this amendment is necessary, in the interest of clarification." 110 Cong. Rec. 13647 (1964).

As this discussion shows, Senator Bennett proposed the Amendment because of a general concern that insufficient attention had been paid to the relation between the Equal Pay Act and Title VII, rather than because of a *specific* potential conflict between the statutes. His explanation that the Amendment assured that the provisions of the Equal Pay Act "shall not be nullified" in the event of conflict with Title VII may be read as referring to the affirmative defenses of the Act. Indeed, his emphasis on the "technical" nature of the Amendment and his concern for not disrupting the "effective administration" of the Equal Pay Act are more compatible with an interpretation of the Amendment as incorporating the Act's affirmative defenses, as administratively interpreted, than as engrafting all the restrictive features of the Equal Pay Act onto Title VII.

Senator Dirksen's comment that all that the Bennett Amendment does is to "recognize" the exceptions carried in the Fair Labor Standards Act, suggests that the Bennett Amendment was necessary because of the exceptions to coverage in the Fair Labor Standards Act, which made the Equal Pay Act applicable to a narrower class of employers than was Title VII. See *supra*, at 5. The Bennett Amendment clarified that the standards of the Equal Pay Act would govern even those wage discrimination cases where only Title VII would otherwise apply. So understood, Senator Dirksen's remarks are not inconsistent with our interpretation.¹³

¹³ In an exchange during the debate on Title VII, Senator Randolph asked Senator Humphrey whether certain differences in treatment in industrial retirement plans, including earlier retirement options for women, would be permissible. Senator Humphrey responded: "Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett Amendment; so there can be no doubt about it." 110 Cong. Rec. 13663-13664. Apparently, Senator Humphrey believed that the discriminatory provisions to which Senator Randolph referred were author-

Although there was no debate on the Bennett Amendment in the House of Representatives when the Senate version of the Act returned for final approval, Representative Celler explained each of the Senate's amendments immediately prior to the vote. He stated that the Bennett Amendment "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex. . . ." 110 Cong. Rec. 15896 (1964). If taken literally, this explanation would restrict Title VII's coverage of sex discrimination more severely than even petitioner suggests: not only would it confine *wage discrimination* claims to those actionable under the Equal Pay Act, but it would block *all other* sex discrimination claims as well. We can only conclude that Representative Celler's explanation was not intended to be precise, and does not provide a solution to the present problem.¹⁴

Thus, although the few references by Members of Congress to the Bennett Amendment do not explicitly confirm that its purpose was to incorporate into Title VII the four affirmative defenses of the Equal Pay Act in sex-based wage dis-

ized by the Equal Pay Act. His answer does not reveal whether he believed such plans to fall within one of the affirmative defenses of the Act, or whether they simply did not violate the Act.

¹⁴ The parties also direct our attention to several comments by members and committees of Congress made after passage of Title VII. See 111 Cong. Rec. 13359 (1965) (statement by Senator Bennett that "compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act"); 111 Cong. Rec. 18263 (1965) (statement by Senator Clark criticizing Senator Bennett's attempt to create *post hoc* legislative history and adding his own interpretation); S. Rep. No. 331, 95th Cong., 1st Sess., 7 (1977) (stating that the Bennett Amendment authorizes only those practices within the four affirmative defenses of the Equal Pay Act).

We are normally hesitant to attach much weight to comments made after the passage of legislation. See *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 354, n. 39 (1977). In view of the contradictory nature of these cited statements, we give them no weight at all.

crimination cases, they are broadly consistent with such a reading, and do not support an alternative reading.

C

The interpretations of the Bennett Amendment by the agency entrusted with administration of Title VII—the Equal Employment Opportunity Commission—do not provide much guidance in this case. Cf. *Griggs v. Duke Power Co.*, *supra*, 401 U. S., at 433-434. The Commission's 1965 Guidelines on Discrimination Because of Sex stated 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." 29 CFR § 1604.7 (a) (1966). In 1972, the EEOC deleted this portion of the Guideline, see 37 Fed. Reg. 6837 (1972). Although the original Guideline may be read to support petitioner's argument that no claim of sex discrimination in compensation may be brought under Title VII except where the Equal Pay Act's "equal work" standard is met, EEOC practice under this Guideline was considerably less than steadfast.

The restrictive interpretation suggested by the 1965 Guideline was followed in several opinion letters in the following years.¹⁹ During the same period, however, EEOC decisions frequently adopted the opposite position. For example, a reasonable cause determination issued by the Commission in 1968 stated that "the existence of separate and different wage rate schedules for male employees on the one hand, and female employees on the other doing reasonably comparable work, establishes discriminatory wage rates based solely on

¹⁹ See General Counsel's opinion of December 29, 1965, App. to Brief for Pet., at 7a; General Counsel's opinion of May 4, 1966, App. to Brief for Pet., at 11a-13a; Commissioner's opinion of July 23, 1966, App. to Brief for Pet., at 16a, BNA Daily Labor Reports, No. 171, at A-3 to A-4 (Sept. 1, 1966); Acting General Counsel's Memorandum of June 6, 1967, App. to Brief for Pet., at 21a-22a.

the sex of the workers." Case No. AU 7-3-173 (April 25, 1968).¹⁰

The current Guideline does not purport to explain whether the equal work standard of the Equal Pay Act has any application to Title VII, see 29 CFR § 1604.8 (1980), but the EEOC now supports respondents' position in its capacity as *amicus curiae*. In light of this history, we feel no hesitation in adopting what seems to us the most persuasive interpretation of the Amendment, in lieu of that once espoused, but not consistently followed, by the Commission.

D

Our interpretation of the Bennett Amendment draws additional support from the remedial purposes of Title VII and the Equal Pay Act. Section 703 (a) of Title VII makes it unlawful for an employer "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 sex. 42 U. S. C. § 2000e-2 (a) (emphasis added). As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is "essential to overcoming and undoing the effect of a century of discrimination." S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

Under petitioner's reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain

¹⁰ See also Dec. No. 6-6-5762, 1973 EEOC Dec. (CCH) ¶ 6001, at 4008-4009, n. 22 (June 20, 1968); Dec. No. 71-2629, 1973 EEOC Dec. (CCH) ¶ 6300, at 4538-4539 (June 25, 1971).

no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioner's interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover, to cite an example arising from a recent case, *Los Angeles Department of Water & Power v. Manhart*, 435 U. S. 702 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioner's interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

Moreover, petitioner's interpretation would have other far-reaching consequences. Since it rests on the proposition that any wage differentials not prohibited by the Equal Pay Act are "authorized" by it, petitioner's interpretation would lead to the conclusion that discriminatory compensation by employers not covered by the Fair Labor Standards Act is "authorized"—since not prohibited—by the Equal Pay Act. Thus it would deny Title VII protection against sex-based wage discrimination by those employers not subject to the Fair Labor Standards Act but covered by Title VII. See *supra*, at 5. There is no persuasive evidence that Congress intended such a result, and the EEOC has rejected it since at least 1965. See 29 CFR § 1604.7 (1966). Indeed, peti-

tioner itself apparently acknowledges that Congress intended Title VII's broader coverage to apply to equal pay claims under Title VII, thus impliedly admitting the fallacy in its own argument. Brief for Petitioner, at 48.

Petitioner's reading is thus flatly inconsistent with our past interpretations of Title VII as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976). As we said in *Los Angeles Department of Water & Power v. Manhart*, 435 U. S., at 707, n. 13: "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." (Emphasis added.) We must therefore reject petitioner's interpretation of the Bennett Amendment.

IV

Petitioner argues strenuously that the approach of the Court of Appeals places "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts." Brief for Petitioners, at 99-100. It raises the spectre that "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men." *Id.*, at 101. But whatever the merit of petitioner's arguments in other contexts, they are inapplicable here, for claims based on the type of job comparisons petitioner describes are manifestly different from respondents' claim. Respondents contend that the County of Washington evaluated the worth of their jobs; that the county determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and 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. Thus, respondents' suit does not require a courts to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.¹⁷

We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII. It is sufficient to note that respondents' claims of discriminatory under compensation are not barred by § 703 (h) of Title VII merely because respondents do not perform work equal to that of male jail guards. The judgment of the Court of Appeals is therefore

Affirmed.

¹⁷ See D. Treiman, Job Evaluation: An Analytic Review 35-36 (1979) (interim report to the EEOC); Nelson, Opton, & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. of Mich. J. of Law Reform 231, 278-288 (1980); Schwab, Job Evaluation and Pay Setting: Concepts and Practices, printed in Livernash, Comparable Worth: Issues and Alternatives 49, 52-70 (1980).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



May 21, 1981

Re: 80-429 - County of Washington
v. Gunther

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

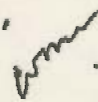
May 21, 1981

Re: No. 80-429 County of Washington v. Gunther

Dear Bill:

In due course I will circulate a dissent.

Sincerely,



Justice Brennan

Copies to the Conference

*I will await W H R S
dissent*

May 21, 1981

80-429 County of Washington v. Gunther

Dear Bill:

I will await Bill Rehnquist's dissent.

Sincerely,

Mr. Justice Brennan


lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1981



Re: No. 80-429, County of Washington
v. Gunther

Dear Bill,

Please add my name to your dissenting
opinion.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

P.S.
—

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



May 27, 1981

Re: No. 80-429 - County of Washington v. Gunther

Dear Bill:

Please join me.

Sincerely,

JM

T.M.

Justice Brennan

cc: The Conference

May 27, 1981

80-429 County of Washington v. Gunther

Dear Bill:

Please join me in your dissent.

Sincerely,

Mr. Justice Rehnquist

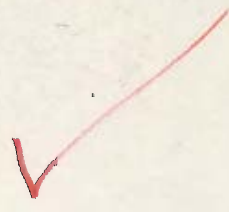
lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 29, 1981

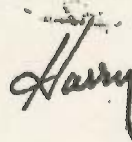


Re: No. 80-429 - County of Washington v. Gunther

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan


cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1981

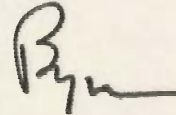
Re: 80-429 - County of
Washington v. Gunther



Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

five joined ✓

June 4, 1981

RE: 80-429 - County of Washington v. Gunther

Dear Bill:

I join your dissent.

Regards,

WRB

Justice Rehnquist

Copies to the Conference

