ARTICLE

NO DISPARATE IMPACT: *GUNTHER*'S SIGNIFICANT BUT IGNORED LIMITATION ON SEX-BASED PAY DISPARITY CLAIMS UNDER TITLE VII

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I. INTRODUCTION

In *County of Washington v. Gunther*,[1] the Supreme Court was called upon to explain the proper relationship between the Equal Pay Act,[2] which insures women in the work place equal pay for equal work,[3] and Title VII of the Civil Rights Act of 1964 which protects employees from discrimination on the basis of sex.[4] A sharply divided Court narrowly rejected limiting Title VII claims for sex-based pay disparity to the equal work standard of the EPA.[5] In the process, the Court majority imposed a significant but frequently ignored limitation on the application of Title VII to sex based wage disparity claims.

Title VII sex based pay dispartity claims were limited to episodes of intentional discrimination under the language of section 703 (a) (1) of Title VII.

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1. 452 U.S. 161 (1981).

2. 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 perform 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; of (iv) a differential based on any other factor other than sex: Provided, that our employer who is paying a wage rate differential in violation of the subsection shall not, in order to comply with the provision of this subsection, reduce the wage rate of any employee. Equal Pay Act of 1963, 77 Stat. 56 Section 3, 29 U.S.C. Section 206(d)(1).

3. ". . . [T]he Equal Pay Act of 1963, 77 Stat 56, § 3, 29 U.S.C. § 206(d)(1), which added to § 6 of The Fair Labor Standards Act of 1938 the principle of Equal pay for equal work regardless of sex." Corning Glass Works v. Brennan, 417 U.S. 188, 190, (1974).

4. § 703 (a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex,. . . ." 42 U.S.C. Section 2000E-2(a). *See Gunther*, 452 U.S. at 167.

5. Brennan, White, Marshall, Blackmun, and Stevens for a more liberal construction, with Justice Rehnquist filing a dissent joined by Chief Justice Burger, and Justices Stewart and Powell. 452 U.S. 161, 167-204.

The majority reasoned that section 703 (a) (2) , which since the *Griggs*[6] case has been held to prohibit employment procedures fair in form but discriminatory in effect, would not be available for sex based disparity claims under Title VII. While recognizing the significant impact of the distinction between analysis of intent cases and effect cases, the Court created considerable confusion by declining to articulate an appropriate test or procedure for the analysis of *Gunther* claims. This predicament resounds of the larger controversy over the frequently halting if not obscure development of Title VII analysis. This problem is not related to the focused, public and frequently heated controversy over the propriety of affirmative action, or the legitimacy of disparate impact. Rather it is related to the more reserved and often technical debate over what critics have charged is the lack of skill or art with which much of Title VII analysis has been patched together.[7] Nor is the controversy sparked by a legal perfectionist's lament since the confusion in terms and procedures is charged with having short circuited the process of justice. The failure of the Court to establish an appropriate analysis of the particular problem of pay disparity cases has resulted in considerable disparity between the circuit courts[8] and even within individual circuits as they have addressed sex based pay disparity problems without the benefit of a disciplined analytical frame work.

This has resulted in a least two separate lines of cases addressing the problem: cases such as *AFSCME v. Washington*,[9] which are consistent with *Gunther,* but obscure in that they skirt the no-analysis quandary created by *Gunther*'s refusal to establish tests; and cases such as *Piva v. Xerox*,[10] the confused fruit of the no-analysis tree, inconsistent with *Gunther* but vital nonetheless.

This article argues that *Christensen v. Iowa*,[11] cited by the Court in *Gunther*, provides an appropriate paradigm for pay-disparity analysis under Title VII and should serve as a model for Title VII *Gunther* claims.

II. *GUNTHER:* DEFINING THE RELATIONSHIP OF THE EPA TO TITLE VII

Because of the closeness in the time of the passage of Title VII and the Equal

6. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Court interpreted Title VII to prohibit two major forms of discrimination. Intentional discrimination, under which a person is treated differently because of his/her membership in a protected class was said to be progibited by section 703(a) (1). The Court further held that section 703 (a) (2) prohibited employment practices without reference to intent which resulted in an adverse mpact on a protected class, and were not justified by a business necessity.

7. As Belton observed:

> The Supreme Court has been presented with several opportunities to formulate a coherent framework for allocating burdens in discrimination cases; unfortunately, however, its efforts to date have contributed to rather than clarified the confusion in this area. The Court has established different rules for allocating the burdens of pleading and proof under the several substantive theories of discrimination, but it has never attempted to articulate a rationale for these different approaches. [footnote omitted]

Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1208-1209 (1981).

8. *Cf.* American Nurses' Ass'n. v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986) with E.E.O.C. v. J.C. Penney Co. Inc., 843 F.2d 249 (6th Cir. 1988).

9. 770 F.2d 1401 (9th Cir. 1985).

10. 654 F.2d 591 (9th Cir. 1981).

11. 563 F.2d 353 (8th Cir. 1977).

Pay Act,[12] the district court in *Gunther* had presumed it was the Congressional intent that compensation practice claims be limited to the equal pay for equal work standard of the EPA.[13] First, the Court of Appeals for the Ninth Circuit,[14] and later the U.S. Supreme Court[15] rejected this narrow reading of the Bennett Amendment, which was adopted to regulate conflict between the EPA and Title VII, holding that the Bennett Amendment had not limited Title VII compensation claims to the EPA equal work standard. Rather, the Bennett Amendment had merely incorporated the four statutory defenses from the EPA into Title VII.[16]

This position puzzled the dissenting Justices. In his dissent, Justice Rehnquist argued that Congress clearly intended to limit compensation claims to the EPA standard.[17] Rehnquist was also baffled by the majority's assertion that the Bennett Amendment merely incorporated the four statutory defenses: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) is based on any factor other than sex,[18] because the four defenses were already present in Title VII; the first three facially and the last by implication. More careful analysis reveals that the incorporation of the four defenses was not an exercise in futility, but an attempt to place a principled limitation on the range of compensation practice cases by prohibiting cases based on *Griggs* analysis. Under this reading, only *McDonell Douglas*[19] analysis, and direct evidence cases of sex based pay discrimination, are possible under Title VII.

Confronted with Justice Rehnquist's challenge, the majority expressed a functional distinction between their analysis and the proposition expressed by Justice Rehnquist. The majority argued that the Bennett Amendment requires that, with respect to the first three amendments, the courts "adopt a consistent interpretation of like provisions in both statutes. Otherwise, they might develop inconsistent bodies of case law interpreting two sets of nearly identical language."[20] But in addition to this harmonizing function, the majority saw a critical and principle distinction between the provisions as a result of the Bennett Amendment:

12. 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.'(citation omitted) *Gunther*, 452 U.S. at 171.

13. "It [the district court] 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 of 1963, 29 U.S.C. § 206 (d). 20 EPA Cases, at 791." *Id.* at 452 U.S. at 165.

14. Gunther v. County of Washington, 623 F.2d 1303, 1311 (9th Cir. 1979).

15. 452 U.S. at 167-181 (1981).

16. *Id.* at 167-181.

17. The Flaw in interpreting the Bennett Amendment as incorporating only the four defenses of the Equal Pay Act into Title VII is that Title VII, even without the Bennett Amendment, contains those very same defenses. The opening sentence of § 703(h) protects differentials and compensation based on seniority, merit, or quantity or quality of production. These are three of the four EPA defenses. The fourth EPA defense, 'a factor other than sex', is already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex.
425 U.S. at 199, 200.

18. *Id.* at 200.

19. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

20. *Id.* at 170.

> 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 attributable to sex discrimination.[21]

Thus the principle limitation imposed on compensation practice claims under Title VII by incorporation of the fourth defense, was the prohibition of *Griggs* analysis for sex-based claims. Only proof of intentional discrimination would be actionable, otherwise the Court would continue to respect the broad discretion accorded employers under the EPA.[22]

While it was clear that *Gunther* did not embrace comparable worth,[23] the case was read by many activists and commentators as an open invitation to probe the courts in search of the outer limits of this new legal theory. This thematic exploration produced a tide of litigation which only subsided with the Ninth Circuit holding in *AFSCME.*

Under *Gunther,* sex based pay disparity cases should be limited to cases where dissimilar jobs were compensated differently as a result of *intentional* discrimination.[24] While this is the expressed limitation of the majority, circuit courts have in effect improperly applied *Griggs* analysis to compensation practice cases, largely because of the Court's failure to articulate a disciplined analysis.

The Court's distressing oversight in failing to set out an appropriate disciplined analysis, may be attributable to a misguided sense of judicial economy, i.e. conserving energy only by addressing the most limited precise question necessary to settle the case before the Court. It also may have resulted from the inherent difficulty of mustering a majority for a case on which the Court was so closely split. It is also possible that the reason for the failure of analysis was neither expedience nor oversight, but rather tactical: a way for the majority to buy time.

Frequently, when courts want to escape the burden of substantive precedent the mechanism of evasion is procedure, or as it might be suggested by this case, the lack of it. Procedure becomes substantive when it becomes outcome determinative.[25] Courts may chose to erode this well established legal principle not by frontal assault, for this risks a crisis of legitimacy, but by a train of exceptions to the general rule. Procedural changes are frequently the safe route. Vaguely understood, they permit a majority to advance or retreat without the sort of policy explanation required of a major shift in doctrine. It is a

21. *Gunther,* 452 U.S. at 170.

22. 452 U.S. at 171.

23. The issue was not before the court. *Gunther,* 452 U.S. at 166. The Court denied that its holding authorized wide comparison of various jobs. *Id.* at 180-81. *See also, id.* at note 7, (distinguishing the rejected comparable worth claim in Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), from the claim in *Gunther.*)

24. *See* American Nurses Ass'n. v. Illinois, 783 F.2d, at 723.

25. *See* Byrd v. Blue Ridge Rural Electrical Coop., 356 U.S. 525 (1958).

way to escape the burden of legal history. Procedural changes, however, leave the body of the law unchanged. They only block or expand remedial avenues.

It is always a risky proposition to attribute particular motive to any given judicial decision. Nevertheless, it is possible and profitable to analyze decisions in terms of their functional equivalents. In this form of analysis the system is judged in terms of its consequences as if they were intended. This permits an understanding of the consequences of policy. Like *Griggs* analysis, this approach's central purpose is not to impute motive but to assess impact. In this light, *Gunther* can best be understood in terms of an escape from its historic scenario. The majority in *Gunther* denied that it had addressed the issue of comparable worth under Title VII. However, it is difficult, if not impossible, to postulate an analysis which both precludes *Griggs* analysis from sex based pay disparity claims and allows comparable worth. Only by shifting attention from its "no *Griggs* proviso" could the Court hope to continue the debate, on any serious level, about comparable worth. And only by failing, or perhaps refusing to set out analysis, could the Court hope to escape the practical consequences not only of *Gunther*, but of its prior holdings under both EPA and Title VII.

Only by permitting future development to evolve, detached from past analysis, could notions such as comparable worth, remain vital. *Gunther* may well represent the limits of Title VII's remedial grasp without the occasion of serious historical revisionism of legislation. The no analysis solution permits courts to erode past precedent without the uncomfortable confrontation produced by analysis. Instead, evaluation shifts to the prudential review of business judgments — a process that invites courts to the very substitution of judgment prohibited by both Title VII and the EPA in this area. Following *Gunther*, the circuits appear to have applied *Griggs* to sex based pay disparity cases. A violation of *Gunther* made less obvious due to the the lack of systemic analysis for these types of cases. All that was facially forbidden in *Gunther* is advanced as a result of the no analysis tactic.

Perhaps it was the hope of the majority that as time passed and these outlaw cases became more familiar, their holdings could be absorbed into the body of the law as if by osmosis, without even the embarrassment of rationalizing the great departure from established precedents.

III. Systems of Proof Under EPA and Title VII

Under the EPA, a case is established when it is proven that positions held by employees of different sexes but involving equal work are not given equal pay. No proof of intent to discriminate on the basis of sex is required. The burden shifts to the defendant to establish as an affirmative defense one of the statutory defenses. This is in clear distinction to the three methods available under Title VII: direct evidence, inferential analysis under *McDonnell Douglas* for disparate treatment,[26] and *Griggs* for effects[27] analysis.

Direct evidence, which is exceptional, includes such factors as hostile statements towards the protected class members, or official policies limiting or

26. *See* McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973).
27. *See Griggs*, 401 U.S. 424.

prohibiting their employment.[28] *McDonnell Douglas* is designed to aid in litigation in the absence of such direct evidence of intent; *Griggs* functions without initial reference to intent. Its object is to evaluate the impact of work place practices on minorities and determine if they can be cost justified.

McDonnell Douglas permits a plaintiff to establish a prima facie case by establishing (a) membership in a protected class, (b) application for jobs, (c) denial, (d) employer continued the job search, or hired a non-class member (in some cases even replacing the employee with a minority member can be seen as a pretext.[29] The presentation of this evidence produces a presumption that discrimination is the reason for the job action. The courts have defended the reasonableness of this presumption by saying that the conclusion is consistent with the experience and history of the race relations in America.

Given these factors without further explanation, when an opportunity is presented to respond, the Court argues it is reasonable to presume discriminatory motive.[30] This presumption, however, drops from the case upon a mere articulation of a nondiscriminatory reason for the action.[31]

The Court has gone to great lengths to explain that the burden of proof under *McDonnell Douglas* never shifts but remains with the plaintiff. If the defendant articulates a response, which may be any non-discriminatory motive, the burden shifts back to the plaintiff to show that the articulated motive was mere pretext. While the allocation has been criticized, the Court has defended it as being fair. Proposals to impose either a higher burden on the defendant[32] or the plaintiff[33] have been rejected. Under *McDonnell Douglas*, the applicants are merely obligated to prove what they can reasonably be expected to know: membership in the class, application, qualification, and rejection.[34] The employer then has an obligation to disclose facts most readily at its disposal, such as the relative qualification of the candidates.

Further, the Court has repeatedly emphasized that *McDonnell Douglas* is not a decisional model. Rather, it is a procedural way to inform the parties of their evidentiary obligation at various stages of the proceeding.[35] It is also a way for the judge to organize the trial. *McDonnell Douglas*, however, does convert into a decisional model in the limited episode of default. If the plaintiff fails to establish one of the four factors, or if the defendant fails to articulate a non-discriminatory reason, the court should dismiss the action or award judgment.[36] However, once the parties have met their respective burdens, the presumption of discriminatory intent drops from the case - and the trier of fact must decide the issue *vel non*.[37] Further, if direct evidence of discrimination is

28. Player, *Employment Discrimination Law*, § 5.40(b) (Practitioner's ed. 1988).

29. *McDonnell Douglas*, 411 U.S. at 802.

30. . . . a prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). *See also* Belton, *supra* note 7, at 1227-28.

31. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

32. *See Burdine*, 450 U.S. at 257-58.

33. U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983) (rejecting requirement for direct intent).

34. *McDonnell Douglas*, 411 U.S. 792.

35. *See Burdine*, 450 U.S. 248.

36. This is inherent in the process of allocation of burden. *See,e.g.,* Belton, *supra* note 7 .

37. *Burdine*, 450 U.S. at 255, and note 10.

presented the judge abandons *McDonnell Douglas* analysis and evaluates the evidence directly.[38]

Curiously, despite the Supreme Court's repeated emphasis on the primary procedural nature of the *McDonnell Douglas* analysis, it is apparent that *McDonnell Douglas*, together with *Griggs*, has emerged as the principle substantive analysis under Title VII.

IV. *GRIGGS*

With it holdings in *Griggs v. Duke Power Co.*,[39] the Supreme Court extended the reach of Title VII from cases involving intentional discrimination to those involving employment practices that although facially non-discriminatory, result in a disparate and adverse impact upon members of minority groups, without the justification of business necessity.[40]

Under *Griggs* it is only necessary for a plaintiff to demonstrate that: (a) a facially neutral employment practice, has (b) adverse impact on members of a protected class. Once this showing is met the burden shifts to the employer-defendant to demonstrate that the practice is justified by business necessity.[41] If this is done, the plaintiff has an opportunity to demonstrate another method for the employer to achieve the same objective with less adverse impact on the protected class.[42]

Griggs is different from *McDonnell Douglas* in key ways. *McDonnell Douglas* is a method of inferring intent in the absence of direct evidence. *Griggs*, on the other hand, is designed to detect practices in the work place which result in undue injury to minorities without producing a counter balancing productive benefit for the employer.[43] Curiously, this judicial extension makes it somewhat easier to extend liability under Title VII to employers who accidentally abridge the rights of minority group members, than to those who are accused of deliberately discriminating. This results because the courts have held that *McDonnell Douglas* only requires that a defendant articulate a non-discriminatory reason for his action. The action need only reflect non-discriminatory business judgment; it need not reflect a choice of the best policy option.[44] The courts have repeatedly stressed under *McDonnell Douglas* that they will not substitute their judgments for those of the businessman.

The evaluation of the appropriateness of business options lies at the heart

38. Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983).

39. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

40. *Id.* at 432.

41. Recently in the Ward's Cove Packing Co., v. Antonio, 109 S. Ct. 2115 (1989), a plurality of the Court held that it was merely the burden of proceeding and not the burden of proof or persuasion which shifts to the defendant at this stage in *Griggs*. This holding appears to blur the impact of the distinction between *McDonnell Douglas* and *Griggs* from its prior concern with effects to an interest in intention of the employer.

The Court in *Ward's Cove* appears to deny this implication by asserting that its concern is with the mere fraility of statistical evidence in establishing a causal relationship between an employment practice and impact on minorities.

42. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

43. Broadus, *Arline: The Application of the Rehabilitation Act of 1973 to Communicable Disease*, 39 LAB. L.J. 9273 (1988).

44. ". . . the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

of *Griggs*. Once it is established that a business practice results in adverse impact on a protected class, the defendant must show the necessity of the practice. While the initial articulation by the defendant may be limited under *Griggs*, the ability of the plaintiff to articulate an alternative of less impact imposes considerably more restraint on employment practices under *Griggs* than under *McDonnell Douglas*, while granting far less discretion to the employer. Attempts to collapse the second and third stages of *Griggs* so that defendants have the obligation of demonstrating that they chose the method of less impact have been rejected as inappropriate.[45]

Under *McDonnell Douglas* and *Griggs*, the burden of proof is always with the plaintiff. To compel the defendant to establish initially that the method of "less impact" was chosen would misallocate the burden of proof. Prior to *Ward's Cove*, the presentation of the *Griggs* factors by the plaintiff had greater implication than the establishment of a prima facie case under *McDonnel Douglas*. This was because *Griggs* was designed not to discern intent but to establish disparity. The significance of disparity under *Griggs* was that it established the adverse effect which was the object of the analyis. Once this occured, only an appropriately narrow business necessity would save the employer from liability. Thus, business necessity emerged as a true affirmative defense under which the burden of proof actually shifted to the defendant, rather than the mere burden of articulation as under *Burdine*. Business necessity under *Griggs* was far more restrictive than the non-discriminatory reason standard under *McDonnell Douglas*.

The significance of *Ward's Cove* was in part its policy declaration that the burden of proof did not shift to the defendant upon proof of statistical disparity. Some confusion remains as to whether this was intended as a statement about the basic model, or whether it was a more restrictive statement about the sufficiency of statistical evidence alone to meet the requisite burden. However, in practice the distiction might not be of practical significance. One of the great benefits of *Griggs* was the ease of pleadings associated with the assumption that statistical dispartiy alone was enough to establish proof of discrimination.

While disparate treatment finds its statutory basis in § 703(a)(1) of Title VII which prohibits discrimination, *Griggs* and disparate impact are said to be predicated on § 703(a)(2) which prohibits classification of employees that results in discrimination. While some critics doubt the validity of *Griggs* as stating congressional intent, apparently neither Congress nor the Court has shared such doubts. When Title VII was amended in 1973 to extend its coverage to state and local government, the legislature took pains to express its approval of *Griggs* analysis and to praise the Court for the subtleness of its advancement in this area.[46]

V. CHRISTENSEN ANALYSIS

In *Gunther*, the Court declined to set out how litigation under Title VII should be structured to accommodate the fourth defense, and instead cited to

45. Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

46. Thompson, *The Disparate Impact Theory: Congressional Intent in 1972 - A Response to Gold*, 8 INDUS. REL. L.J. 105 (1986).

Christensen v. Iowa.[47] Given the restrictions imposed by the Court in response to Justice Rehnquist's criticism of the superfluous nature of the transfer of the defenses, it would appear that *Christensen* establishes a model for the ideal limits of compensation cases under Title VII. The majority, while not faced with that question as a matter of decision, was signaling its recognition of appropriate limits to its position.

In *Christensen v. Iowa*,[48] the court of appeals was presented with the question of whether comparable worth was an appropriate remedial model under Title VII. First the district court, and later the court of appeals rejected this remedial theory. At issue was the practice of paying female clerical workers less than the amount paid to physical plant workers, a predominately male group.

While the University of Northern Iowa opened all jobs to members of both sexes, non-professional jobs were segregated by sex as women tended to cluster in traditional jobs. Because the university based its salary scale on the local market, this tended to perpetuate the prevailing disparity between male and female salaries.

In an attempt to address this problem, the university instituted a Hayes system of compensation. This system was designed to create "internal" salary equity. The process evaluated jobs by thirty-eight factors, assigning point values to certain characteristics, and the grouped jobs that had similar point values as pay grades.[49]

The idealism of the Hayes approach system instantly collided with reality. The outside market paid more for physical plant workers than the amount used as the beginning scale of the Hayes system. The school could not recruit and responded by raising the first step pay for plant workers. It did not, however, similarly raise the wages of clerical workers.[50]

The female workers charged that paying male plant employees more than female clerical employees of similar seniority was a violation of Title VII. The court of appeals held that the plaintiffs had failed to establish a *prima facie* case in that they had failed to demonstrate that the pay disparity was based on sex.

The court observed that male and female plant workers were paid the same. The evidence only established that wages coincided with prevailing market conditions. This has led some commentators to talk about a market defense to Title VII — sex based wage disparity claims. However, under *Christensen* it is clear there is no "market defense". A defendant's claim that the market was relied on merely evidences plaintiffs' failure to state a claim.

The court confronted and rejected the theory at the heart of comparable work as a Title VII theory. The plaintiffs had argued that reliance on market wages perpetuates long standing discriminatory patterns in the local job market. The channelling of women into a small number of jobs theoretically resulted in an over supply of workers for these jobs, resulting in depressed wages. The court found the theory at odds with Title VII legislative history. The goal of Title VII was to provide equal opportunity by eliminating artificial

47. *Gunther*, 452 U.S. at 166, note 6.
48. 563 F.2d 353 (8th Cir. 1977).
49. *Id.* 354.
50. *Id.*

barriers. It rejected comparable worth because the theory ignores economic realities. It observed that the value of the work to the employer was only one factor significant in setting a wage. The court found nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work.[51] It was enough that the work was not substantially equal so as to invoke Equal Pay Act consideration, and that there was no evidence of intentional discrimination. The failure of the Hayes system to redress the pay disparity would not expose the school to Title VII liability. *Christensen*'s steadfast refusal to penalize innovative employers whose pay equity experiments fail, appears more in keeping with Title VII which encourages experiments. Further, it appears more soundly anchored in the history and text of Title VII insisting on a fixed view of congressional policy about free labor market, rather than giving into the subjective seduction of comparable worth theory. *Christensen* can be quickly distinguished from *Gunther* in terms of legal reasoning. *Gunther* like *Christensen* involved an employer job evaluation system and a resulting wage disparity. The disparity in *Christensen* was the result of a market based adjustment of compensation. Under that statement of fact, a *prima facie* case was not stated.

Under, *Gunther,* a *prima facie* case was stated where the disparity was facially inexplicable. This is consistent with the rule of *McDonnell Douglas* that unexplained disparities raise a presumption of discriminatory intent. In *Gunther,* the employer conducted a pay study and proceeded to pay male prison guards at 100 per cent of the projected rate for their jobs. Female prison guards were paid at less than 100 per cent of their projected rate which was lower than the rate of pay for male guards. The fact that male rates of pay and females rates of pay varied for jobs that did not involve equal work did not violate the EPA. But, the Court in *Gunther* concluded that the EPA equal pay for equal work standard would not be the end of the inquiry in Title VII pay disparity cases. The fact that females were not paid by the same method as males, i.e. at 100 per cent of their projected value, was enough to create a *prima facie* case and shift the burden to the employer to explain the disparity.

VI. *AFSCME:* An End to the Fast Track

The trial court holding in the *AFSME* case was a major, if short lived, victory for comparable worth proponents. It applied both disparate impact and disparate treatment models of analysis to sex based pay dispartiy claims in a way that raised doubts as to whether a significant number of public sector pay schemes were not in violation of Title VII. It suggested to many that Title VII could be violated if an employer failed to take corrective action once he was merely aware that females were paid less than males, and that some element of sex discrimination in the broader society was reflected in prevailing wage rates for labor.

There was an odd catch-22 quality to all of this, however, because the holding appeared to require a *Christiansen* situation. That is the employer was at least in part held accountable for the disparate impact of his facially neutral

51. 563 F.2d at 356.

system because of his acknowledgement of the unfairness of the prevailing wage scheme. The irony is that the requisite guilty knowledge was manifest by the employer's attempt to correct the pay dispartiy. *AFSCME I,* thus rejected *Christensen's* concern with the chilling effect of imposing penalties on good faith affirmative action experiments that failed. The net effect, however, was to consume much of the case's own province for some employers concluded that the way to avoid comparable woth litigation was to avoid comparable worth studies which served as predicates for cases like *AFSCME I.*

The analysis of the Ninth Circuit is directly opposed to that of the trial court in *AFSCME.* In *AFSCME,* the trial court assumed that adoption of a comparable worth system with its presumptions about the causes of pay disparity created a situation in which an employer could not retreat without a Title VII violation. This is because the employer was seen readopting a system he had preciously rejected as discriminatory.

Part of the problem is Title VII's failure to provide a definition of discrimination. Intentional discrimination has intuitive limits in that the trier of fact may rely on personal experience to guide the ultimate decision of whether the plaintiff was treated differently because of membership in a protected class. But, once one merely must evaluate effects as under *Griggs* the potential range of liability runs the risk of being boundless. This danger was reduced by *Albemarle's* modification of *Griggs* which focused the emphasis on cost benefit analysis of challenged practices.

The restraint of this system is greatly taxed, however, when it expanded to reach comparable worth. For comparable worth propenents while hailing the wisdom of *Griggs,* would generally strip the analyis of its cost benefit aspects by charging that costs do not matter when it comes to remediation of discrimination. This ignores the fact that under *Griggs,* the conduct is viewed as discrimation not because it is injurious, but because it injures those we have a special concern for — minorities — without a counervailing benefit.

Under comparable worth, the court, as under *Griggs* anaysis, postulates an objective definition of discrimination. Under comparable worth, to adopt the market, even without individual intent is to discriminate because the market reflects a deep history of discrimination.

AFSCME I, however, failed to explain why *Mt. Healthy*[52] considerations would not serve as a defense to a *prima facie* case of discrimination. Given that the employer's general good faith can be established by his adoption of the comparable worth system, his repudiation of it is not likely to result from sexual animus, but rather from economic hardship. Here comparable worth proponents are apt to insist that cost is not a relevant factor. It might not be in a case of established discrimination. But where the discrimination only exists because of the subjective intent of the actors, that the actors act on pure economics is relevant; for it would survive the rule of decision. It becomes clear that the actor would have taken the same steps without any discriminatory motive because the dominate motive is economic reality rather than sexual bias. Naturally, one might challenge all of this by questioning the mixed motive rules developed in labor law and transferred to the consideration of constitutional law and discrimination cases by *Mt. Healthy.* Given the exam-

52. Mt. Healthy School Dist. v. Doyle, 429 U.S. 271 (1977).

ple provided by *Gunther* in its flat rejection of disparate impact for Title VII sex based pay disparity claims, Judge Kennedy's handling of *AFSCME* on appeal is baffling. The *AFSCME* case involved, on a state wide level, the very sort of experiment which had failed in *Christensen.*

Instead of rejecting, as the Supreme Court had in *Gunther,* the application of disparate impact to sexually based pay disparity cases, the Ninth Circuit held that the cases involved selection factors lacking the focus required for appropriate disparate impact analysis.

The remarks appear to be misdirected. Judge Kennedy presumed the focus was required because "[t]he theory [disparate impact] is based in part on the rationale that where a practice is specific and focused we can address whether it is a pretext for discrimination in light of the employer's explanation for the practice."[53] The comment reduced *Griggs* analysis to a form of pretext analysis. This may be true in an unusual case - the case where the disparity between offered business necessity and evidence is great - but it's not at the heart of the analysis. The heart of the analysis is artificial barriers, regardless of intent. Pretext analysis is something *Griggs* analysis accomplishes only as an afterthought.

Nevertheless, the Ninth Circuit's basic insight that choice of pay systems is a complex matter vested in the sound discretion of employers, a decision to be disturbed only upon proof of discriminatory intent, is a sound one. The language of the Ninth Circuit's holding in *AFSCME* merely obscured precedent, and by failing to focus on *Gunther*'s rejection of disparate impact, permitted the flowering of cases such as *Kouba v. Allstate Insurance Co.*[54]

Sadly, what restraint the Court felt in *Gunther* appears to have been lost, at least partially in the curious rhetoric which *Gunther* has spawned. While *AFSCME* blunted the possibility of an open acceptance of comparable worth as mandated by Title VII, *Gunther*'s failure to set up a procedural paradigm permitted more subtle decay of the barrier of separateness Congress apparently intended to erect for the protection of business judgment in the selection of pay systems.

While the actual language of *Gunther* is extremely limited, its progeny have not vindicated Justice Rehnquist's speculation that the case would be like a railroad ticket good for one day only. This is because the progeny are apparently illegitimate. They ignore the heralded distinctions between the breadth of Title VII and the narrowness of the EPA. They skirt the requirement for a uniform body of interpretation under both the EPA, and Title VII. They ignore *Gunther*'s admonition that the primary change resulting from the majority holding was the addition of "intent" cases. Instead, the courts engage in a wide-range exploration into the judgment of various employers. This is particularly distressing in the case of public sector employers, who are presumed to precede without unlawful intent.

To understand the difference between "intent" cases and comparable worth cases, one need only compare *Gunther* to *Lemons v. City and County of Denver,*[55] a case the plaintiffs in *Gunther* were careful to distinguish from their

53. American Fed'n of State, County & Mun. Employees v. State of Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).

54. *See infra* note 57 and accompanying text.

55. 620 F.2d 228 (10th Cir. 1980).

claims. In *Lemons*, nurses in public hospitals protested a pay scheme that sought to achieve external equity between their positions and those in the private sector. External equity seeks to equalize the pay between one set of workers and those with similar jobs in the community. While external equity may reflect justice considerations, it tends to be market driven since a failure to achieve external equity may frustrate recruiting, or lead to the attrition of present staff. Internal equity is the notion that current employees in similar positions should be compensated at comparable levels. Failure to achieve this goal may result in lower staff morale; but, as long as the post is competitive with others in the community, it may be less likely to result in staffing problems.

The nurses' claim was one of comparable worth: "The basic position of plaintiffs is that they do not want the comparison to be with nurses in the community. They argue that nurses have historically been underpaid because their work has not been properly recognized and because nurses have almost universally been women."[56] In this theory the city was guilty of discrimination when its pay plan mirrored the discrimination of the outside world. Both the trial court and the court of appeals rejected the theory, holding that neither Title VII,[57] nor the fourteenth amendment authorized the court to strike a new balance in the market by reassessing jobs.

Some doubt was cast on *Lemons* because of its reference to an earlier Tenth Circuit case which held that the Bennett Amendment imparted the equal pay for equal work limitation to Title VII sex based pay disparity claims. This, however, appears at worst-harmless error, as the reference is dicta. The core holding is predicated on *Christensen*, which does not rely on a flawed interpretation of the Bennett Amendment. *Lemons* holds that, in the absence of intentional discrimination based on sex, that Title VII requires "equality of opportunity" to employ one's skills and be rewarded. The court in *Lemons* held that Title VII was limited to this equal opportunity notion. As the court observed " [t]he only showing was that the city's system of pay and classification provided equal pay for equal work. The proof demonstrated that the city provided equal opportunity for women including plaintiffs and the class."

Lemons, as *Christensen* before it, and *Spaulding* and *AFSCME* subsequent to it, holds to a common perception of Title VII, which is consistent with *Gunther*. Congress intended to redress certain sex based salary inequities, but it respected the subtle and complex interplay of market forces and did not intend to set the courts up as special masters to balance the market. The problem has come, for the courts, in fitting this unequivocal vision into the shifting technical apparatus of Title VII analysis. At times the courts have skirted it rather than risk articulation. In this perspective, *Griggs* and *McDonnell Douglas* appear more as impediments to the evolution of the law rather than as expedients.

Still, the cases decided after *Gunther* are flawed for their failure to grasp the centrality of the "no disparate impact" holding; a holding which both reinforces the earlier case law and sharply limits future pursuit. These cases would provide an outline for a model of a *Gunther* analysis. First, no dispa-

56. *Id.* at 229.
57. 42 U.S.C. Section 1983.

rate impact. Any claim that amounts to no more than a charge that females fare less favorably without proof of intent to discriminate should be dismissed, not because of an affirmative defense but because of a failure to state a claim.

Next, the model must recognize the difference between disparate treatment and disparate impact, and avoid the accidental importation of the machinery of one to problems under another. Here the Ninth Circuit, in avoiding analysis in *AFSCME*, did a better job than it did when it undertook analysis in *Kouba v. Allstate Ins. Co.*[58] where it applied a legitimate business reason test to judge a pay disparity claim. This procedure was followed by the Sixth Circuit in *E.E.O.C. v. J.C. Penny Co., Inc.*, which feared a no disparate impact analysis would be "too extreme." An odd statement at best for an analysis mandated by the Supreme Court, but a natural consequence of the confusion that *Gunther* created in its failure to provide a model.

Given the prohibition against disparate impact however, the legitimate business standard is too high. It should be enough if the *McDonnell* standard, a legitimate non-discriminatory reason, were presented. The imposition of the "legitimate business" reason converts the process from the search for intent required by *Gunther* into a balancing act under *Griggs* to determine if the disparate impact is compensated by a sufficient business justification. This results in the application of disparate impact with little more than the label removed. In these cases, the court should advance as it would under *McDonnell Douglas*, with some modification for EPA considerations while avoiding the forbidden fruit of the *Griggs* analysis.

VI. Degree of Deference

Recall that the Court was invited to extend *Griggs* analysis to constitutional cases and declined - instead insisting on the intent standard enunciated in *Washington v. Davis*.[59] The logic propelling that episode of self-imposed judicial restraint is instructive in addressing the proper structure for pay cases under Title VII. The court refused to extend the reach of *Griggs* because *Griggs* could only be defended in light of the special language and history of § 703(a)(2) of Title VII. It must be clear from *Gunther* that in the reading and construction of pay cases under Title VII, the special liability and language of § 703 (a)(2) is presumed absent. The Court should focus on those factors articulated in the *Corning Glass*[60] opinion. Those factors are reflective of a congressional intention to preserve for American business, broad discretion in adopting compensation schemes - a freedom much similar to the discretion exercised by governments under *Washington v. Davis*.[61]

VII. Equal Pay for Equal Work

Unlike Title VII which sets out a broad statement of public policy, and then leaves much of the task of constructing the appropriate enforcement artifice to administrative agencies and the Court, the Equal Pay Act provides an articulated structure with a delineated system for application. While the

58. 691 F.2d 873 (9th Cir. 1982).
59. 426 U.S. 229 (1976).
60. 417 U.S. 188 (1974).
61. 426 U.S. 229 (1976).

courts have envisioned considerable ingenuity in the development of *McDonnell Douglas* and *Griggs*, their tasks under the EPA have been simplified. The court need only ask if the jobs held by women are equal to jobs held by men. If the answer is in the affirmative, the courts need not probe the intent of the employer to place liability; they need only determine the equality-disparity question.[62]

In this light, "equal" has been given a special meaning. The statute does not require that the jobs being compared be identical - the jobs need only be substantially equal.[63] In making this determination, the court looks to the actual duties performed, and not to formal or official job descriptions. Thus substance, and not form, will be dispositive of EPA equality decisions.[64] The statutory factors are similar skill, effort, and responsibility, and performance under similar working conditions. These factors have generally been viewed as terms of limitation restricting and disciplining the inquiry to insure that the jobs, while not identical, are closely related.

VIII. COMPARABLE WORTH

Historically, female workers have been paid less for performing the same tasks performed by male workers. This was the evil the Equal Pay Act was designed to address.[65] It's goal is a standard of simple fariness. Workers who perform similar tasks under similar circumstances should not be paid widely varying compensation merely because of their sex. The EPA instructs the court to look to the actual tasks performed, and the conditions under which they are performed in making a determination of the fairness of the wage.

The comparable worth analysis can readily be distinguished from the approach of the Equal Pay Act. The theory of comparative worth is predicated on a series of beliefs about history, wage and price theory, and the proper relationships between governments and markets. Comparable worth is a theory which conducts an inquiry into the intrinsic value of similar jobs. It is an attempt to compare work place apples and oranges. Secretaries, for example, are compared with plumbers.[66]

In its broadest statement, the comparable worth theory asserts that employers have a power to set wages, and that these wages are set along sexual lines. Yet few of the underlying assumptions have ever been explored in detail. The theory is flawed in that it never explains why employers having the power to create a low pay work force, irrationally continue to disproportion-

62. Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facia Case*, 31 ARK. L. REV. 545 (1978).

63. For [it] is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable; [citation omitted] the phrase "equal work" does not mean that the jobs must be identical, but merely that they must be "substantially equal." A wage differential is justified only if it compensates for an appreciable variation in skill, effort, or responsibility between otherwise comparable job work activities.

Laffey v. Northwest Airlines, Inc. 567 F.2d 429, 449 (D.C. Cir. 1976)

64. Thompson v. Sawyer, 678 F.2d 257 (D.C. 1982).

65. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

66. Both *Corning Glass*, and *Gunther* discuss the legislative rejection of screening job examination and the prospect that courts would substitute their judgment for that of employers. The congress originally considered the proposition of "comparable work", but rejected in favor of "equality" *See* 108 CONG.REC. 9196 (1963) (remarks of Rep. Frelinghuysen); 108 CONG.REC. 9209 (Remarks of Rep. Goodell).

ately employ more expensive male workers. Instead it blindly assumes that employers care more about sexual bonding than profit. The theory also fails in that it never explains why women, unlike male members of the work force in earlier periods, fail to organize and take concerted steps to increase the price of their labor closer to its true productivity.

The theory also assumes that the government is capable of determining the proper wage for each job and enforcing it through various administrative or judicial devices.

In its purest form, comparable worth represents a form of command market. This view is softened by the fact that private sector participants are left to devise their own evaluation systems with the court and administrative agencies insuring professional uniformity. The debate over the proper characterization of the resulting systems - private, socialist, or administrative - is similar to the debate over the proper characterization of wage setting procedures under labor laws.[67] The key question is, once a particular system of determining compensation is imposed by state command, does the conduct of private sector actors remain essentially private or is it at best converted into administrative procedures. With the process of wage setting having become a governmental function, it is argued that the private actors — union and management — become merely off-budget bureaucrats. This analysis is even stronger in the case of comparable worth, as the labor laws can be distinguished in that they only require involvement in good faith in a process but are outcome neutral.[68] Comparable worth, however, both predicts and mandates a specific outcome, most routinely called pay equity, and judges the validity of any employers pay setting process by outcome alone. Bad faith is presumed not just from outcome, but from the initial failure to chose an enlightened pay setting scheme.[69]

IX. THE GOAL

Both Title VII and the EPA have cultural and economic efficiency goals. From a cultural perspective each aims to achieve fairness by compensating individuals in a similar fashion. Under both Title VII and the EPA, extraneous factors such as skin color or sex should have no role in setting the price of labor.[70]

Under both Title VII and the EPA analysis, employers should not benefit from racial and sexual bias. Because minorities and women are less favored, the employer uses their lower status to decrease the price of their labor. This, in the liberal perspective, is unfair as it permits enterprise to become a parasite which feeds off of the social deformation of prejudice whether racial, religious, or sexual. The lower wages received by minority groups are a graphic depiction of their lack of both social standing and market power. This model recognizes certain irrational aspects which intrude into price setting, including the power of authority both in institutions and between groups to compel ac-

67. Klare, *Labor Law or Ideology: Towards a New Histiography of Collective Bargaining Law*, 4 IND. REL. L.J. 450, 458-60 (1981).

68. Duty under national labor policy is to encourage bargaining but no result is required.

69. *See* Comment, *Comparable Worth and The Market Defense: A National Debate*, 16 GOLDEN GATE U.L. REV. 475 (1986).

70. *Griggs*, 401 U.S. at 434-35; *Corning Glass*, 417 U.S. at 195.

ceptance of otherwise unreasonable circumstances.[71]

X. MODEL

The comparable worth advocate has been misdirected into assuming that the flaw in earlier cases is their lack of statistical sophistication. This leads her to suspect that more sophisticated measurements of evidence might shift the judicial stance.[72] Sadly, this assumption is the product of a distorted view of the nature of both the disparate impact and the disparate treatment models and the role that statistics play in each. Both disparate impact, and disparate treatment are inferential models. They aid the court to see indirectly what cannot be presented by direct evidence.

Courts recognize that proof of variance in excess of the standard deviation is not intrinsic proof of racial discrimination because there is nothing in the statistics themselves that foreclose further explanation. The statistics do little more than demonstrate those cases that can't be accounted for by chance and must relate to some underlying social, economic, or business condition or policy. The existence of this disparity is said to be enough to shift merely the burden of articulation to the defendant under the *McDonnell Douglas* model where the issue is intent, or to shift the burden of articulating business necessity under *Griggs*.[73] Historic experience has taught that such statistical disparities, unexplained, lead one to a reasonable assumption of bias against the protected class. While the courts have never articulated all the factors involved in this particularly intuitive perception, they undoubtedly relate to experience of behavior between the races. Such a presumption, however, cannot be presumed to be correct in sex compensation cases. Congress rejected such a presumption in the area of sexual pay disparity, when it adopted the EPA.[74]

XI. LEVEL OF ANXIETY

Both the facially neutral practice under analysis in *Griggs* and the employment practices under examination in *McDonnell Douglas* are so discrete as to be presumed to be under the direct control of the employer. They do not reflect larger social conditions beyond the employer's control. Courts have disagreed over the exact extent of discreteness required to apply them to the interplay of multiple employment criteria. Their reluctance extends from concerns about the inherent ability of the model to isolate the impact of one stage in a process of multiple causation. The problem has primarily been resolved in

71. It has been suggested, however, in an odd but intriguing twist of logic, that pay disparities are proof of the power of the underdog to negotiate with the power structure, forcing the people in business to give relative values to their prejudices against the despised class as compared to their love for profits.

72. *See* Comment, *Comparable Worth and The Market Defense: A National Debate*, 16 GOLDEN GATE U.L. REV.475 (1986).

73. Contreras v. City of Los Angeles, 656 F.2d 1267.

74. *Corning Glass*, 417 U.S. 188. The goal of the EPA was limited. It addressed, "a serious and endemic problem of employment discrimination in private industry - the fact that wage structure of 'many segments of American industry has been based on an ancient but out moded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same' (citations omitted). The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages.' "

those cases where, as a pragmatic matter, the court felt confident it could isolate the influence of individual factors.

Further, it would appear that neither the lack of a bottom line adverse impact, *Connecticut v. Teal*,[75] nor the presence of such impact produced by suspect procedures, *Furnco*,[76] are either insufficient or sufficient to insure the presumed verdict under evidentiary models. In *Teal* the Court taught that there was no bottom line defense, that each discrete stage of the process had to be examined for its consequences. This is because the adverse impact prohibited by Title VII refers to impact on individuals, not groups. Thus, despite the lack of bottom line impact on Blacks, excluding them from employment, a procedure could be condemned if it results at some preliminary stage in limiting too large a group of Blacks from employment. *Furnco* reminds us that the true discriminatory intent and the reasonableness of the procedures are to be measured not merely by their impact or their form, but in light of what otherwise can be asserted about the motive of the employer.

Teal rejected the group theory which is at the heart of comparable worth. Blacks or women as a group are not insured an entitlement to some particular share of the national product. Rather, individuals, who happen to be Black or women, are entitled to work place procedures which will not unfairly deny them a chance to participate. Nor does the Title VII lockstep impose a duty upon employers to either produce bottom line earnings or market share for minorities; nor, despite the implied message of the endless guidelines, do employers have a duty to follow some rigid set of procedures. Rather the goal is environmental fairness where only relevant factors are considered.

The theory of comparable worth is at odds with the above logic. One cannot with ease assert that history supports such presumptions in the compensation pattern cases. The first problem is that the courts themselves can't be persuaded to write on a clean slate in this area. They are limited to fleshing out patterns initially outlined by Congress. Whatever the true contours of these patterns, it is undisputed that both under the Equal Pay Act and Title VII, the guidelines about compensation policy in the area of sex are far more restrictive than either the policy related to race or to sex discrimination more generally.

Congress understood the history of the pay gap and chose to address it first in the Equal Pay Act by prohibiting the disparate payments for essentially equal tasks. Later, *Gunther* teaches that Congress extended the prohibition to cases of intentional discrimination, but counter to the argument advanced by the advocates of comparable worth, Congress, rightly or wrongly, sought to shelter the market.

From this it can be assumed that a wage disparity within any particular unit which merely reflects the overall pattern of society cannot give rise to a presumption of discrimination. Title VII does not make individual employers accountable for society.[77] Nor does it empower judges to restructure the major social institutions.[78] Instead it more modestly permits the courts to adjust

75. 457 U.S. 440 (1982).
76. 438 U.S. 567 (1978).
77. AFSCME V. State of Washington, 770 F.2d 1401 (1985).
78. *Id.*

the relationship between individuals, when and if it can be demonstrated that one party acted improperly.

There are great and wise policy reasons for not extending the provisions of § 703(a)(2) to sex cases. The fourteenth amendment extends extraordinary powers to Congress to make adjustments in commerce primarily to overcome patterns initially imposed by slavery. Here both the minority status of Blacks, and their relative inability to achieve either market or political solution to their problems permitted Congress to experiment.

Women, however, share no such history of slavery and through their numbers both politically, and financially posses sufficient power to define and defend their own best interest. But each of these processes requires the evolution of both group consciousness and practical machinery. Advancement permits the political structure and the markets to responded to the true needs of their constituents. An attempt to impose some idealized solution either by Congress or the courts might prove frustrating in the long run to the evolution of social form. The Congressional method can be said to be the least offensive since it merely purports to represent the will of the majority at a given point. Thus it is readily amendable to change given, shifts in majority prospects.

XII. REMEDIATION

The majority in *Gunther* expressed a widely shared liberal belief when they suggested that without this expansion it was possible that a victim would be without a remedy. What separates the majority from the dissent is not so much their technical differences as their view on the topic of remediation. For the majority Title VII, and perhaps each piece of social legislation, is an authorization for the courts to exercise their jurisdiction to find wrong and remedy it. Because the legislation itself is viewed as remedial, the courts began to see injury as indistinguishable from jurisdiction. Each injury requires a remedy, just as danger invites rescue. But the dissent sees the legislation more as regulatory. The remediation is dependent first on the discovery of a violation of the work place regulatory scheme. They do not assume that personal injury and violation of statute are identical. To the dissent, the statute is a pattern to be followed carefully, not a license to be freely exercised. What separates both the majority and dissent in *Gunther* from comparable worth advocates is their shared acknowledgement that Title VII awarded only limited powers, particularly in compensation cases, to the courts. Yet the failure to encase this recognition in procedure has resulted in confusion.