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Equality between the Sexes in the 1980's

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EQUALITY BETWEEN THE SEXES IN THE 1980'S*

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I. INTRODUCTION

ANY DISCUSSION OF EQUALITY UNDER THE LAW must necessarily revolve around the equal protection clause. Therefore, this discussion will indicate first where equal protection analysis has succeeded in effectively dealing with sex discrimination and the significance of the judicial policy behind these successes. Secondly, the failures of the equal protection clause will be examined with specific attention to the five methods in which the equal protection clause has failed to eliminate laws discriminating on the basis of sex. Finally, the failures of the equal protection clause will be illustrated as starting points for work in the area of sexual equality in the 1980's.

II. SEX DISCRIMINATION AND THE SUCCESS OF THE EQUAL PROTECTION CLAUSE

Since *Reed v. Reed*[1] in 1971, equal protection cases have developed to the point where it can now be stated that formal legal equality between

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[1] 404 U.S. 71 (1971). *Reed* was the first sex discrimination case in which the Court departed from the deferential "rational basis" test. Although it did not find fault with the state's objective—administrative efficiency in choosing estate administrators—the Court held that a preference for males over females was an "arbitrary" means to obtain that goal. *Id.* at 75. *Cf.* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (law prohibiting all women except wives and daughters of bar owners from tending bar was upheld as rationally related to the state's interest in protecting women from the "moral and social problems" that might "confront a barmaid without such protecting oversight").

Between its decisions in *Reed* and Craig v. Boren, 429 U.S. 190 (1976), the Court's direction in sex discrimination cases was unclear. In Frontiero v. Richardson, 411 U.S. 677, 681 (1973), a plurality of the Court held that sex was a suspect classification. That view, however, has not been adopted by a majority of the Court. The following year, in Kahn v. Shevin, 416 U.S. 351 (1974), the Court appeared to retreat to the traditional rational basis test when it upheld a nineteenth century paternalistic statute that provided a property tax exemption to widows as well as blind and disabled persons, but failed to provide such an exemption for widowers. The Court held that the sex classification was substantially related to its "benign," "compensatory" purpose of "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Id.* at 355. *See* notes 45-56 *infra* and accompanying text. Shortly

women and men is the general rule. Ordinarily, the law may not distinguish between similarly situated women and men solely on the basis of sex. The law may classify on the basis of sex where the state can demonstrate that there is an important governmental objective and that the sex classification bears a substantial means-ends relationship to that important governmental objective. This test has become known as the *"Craig* test," having been first enunciated in *Craig v. Boren.*[2]

The *Craig* test is not the suspect classification test used in racial discrimination cases,[3] nor does it seem to be the rational basis test.[4] Many commentators have described it as a middle-tier test.[5] It applies

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after *Kahn,* another law that discriminated against men was upheld in Schlesinger v. Ballard, 419 U.S. 498 (1975). *See* notes 28-30 and 57-60 *infra* and accompanying text.

At this juncture, it looked as though the Court might establish two different equal protection tests for sex discrimination cases: a heightened level of scrutiny for laws that harmed women and a more deferential standard of review for laws that harmed men or that were "benign" and "compensatory" in their effect upon women. In Wienberger v. Wiesenfeld, 420 U.S. 636 (1975), a male plaintiff claimed sex discrimination where the Social Security statute that was challenged gave "mother's benefits" to the surviving wife of a wage earner to allow her to stay home to care for a child, but not to the surviving husband of a deceased female wage earner. The Court found it unnecessary to decide which of the two standards of review should be applied because it viewed the law as discriminating against deceased female wage earners and their children, rather than against the male surviving spouse. The Court also rejected a "benign," "compensatory" purpose test of the statute since it did not find such purpose to be the actual rationale behind the statute's enactment. As a result, the statute was simply held unconstitutional under *Frontiero. Id.* at 642.

Finally, in *Craig,* the Court clarified the standard of review to be used in sex discrimination cases and indicated that that standard would be applied whether the statute harmed males or females. *See* notes 5-7 *infra* and accompanying text. The *Craig* test has been applied in all subsequent cases, including a case in which the Court found that the law in question was constitutional because of its "benign," "compensatory" purpose. Califano v. Webster, 430 U.S. 313 (1976). Thus, in sex discrimination cases, one uniform standard is applicable in all instances. *Cf.* University of California Regents v. Bakke, 438 U.S. 265, 359 (1978) (although "strict scrutiny" is usually applicable in race discrimination cases, the more lenient *Craig* standard applies to those race cases in which affirmative action programs are being challenged).

[2] 429 U.S. 190, 197 (1976).

[3] *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

[4] *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); Railway Express Agency v. New York, 336 U.S. 106 (1949).

[5] *See, e.g.,* Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection,* 86 HARV. L. REV. 1 (1972). Justice Powell, recognizing that some will view the *Craig* test as a "'middle-tier' approach," prefers to call it rational basis in "sharper focus." Craig v. Boren, 429 U.S. at 210, n.*. Justice Burger, dissenting in *Craig,* did not agree that gender should be treated as a "dis-favored classification." *Id.* at 217 (Burger, C.J., dissenting). Justice Rehnquist, complaining that the majority

regardless of whether the plaintiff is male or female, and whether the statute harms or purports to help women.[6]

Many statutes have failed to meet this test. In *Craig*, the Court stated that highway safety was an important governmental objective, but that the sex-based age differential for purchasing 3.2% beer (18 for women, 21 for men) was not substantially related to achievement of that objective.[7] In *Califano v. Goldfarb*,[8] the Court did not have to reach the substantial relationship issue because it did not find an important governmental objective underlying the Social Security requirement that a male surviving spouse prove dependency on the deceased wage earner while a female surviving spouse was presumed dependent. The alleged governmental objective was based on the "archaic" presumption that wives were always dependent on husbands and husbands were always breadwinners. In *Orr v. Orr*,[9] the Court considered three possible important governmental objectives for women-only alimony statutes. The first was maintenance of stereotyped sex roles, which the Court discarded as not constituting an important governmental objective. The second and third objectives were helping needy spouses and making up for past discrimination against women. As to these two, the Court held that there was not a substantial relationship between the sex classification in the statute and the asserted governmental objectives because there was an individualized hearing in every case in which alimony was requested.[10] A divorce court could consider these asserted governmental interests at the hearing with the result that any presumption that women were needier than men would be unnecessary. Similarly, in *Caban v. Mohammed*,[11] the Court found that promoting the adoption of

created the *Craig* standard "out of thin air," viewed the standard as falling somewhere between rational basis and compelling state interest. *Id.* at 221 (Rehnquist, J., dissenting).

The requirement of an important governmental objective (end) seems to be somewhere between the "compelling state interest" standard for suspect classifications and the deferential standard under the rational basis test, *i.e.*, the end must merely be "valid." Likewise, the *Craig* test requires that the means-ends relationship be "substantial" rather than "necessary" or simply "rational." However, some of this verbiage may be more misleading than informative. For example, in *In re* Griffiths, 413 U.S. 717 (1973), the Court stated that the compelling state interest standard should be applied to classifications based on alienage, but then explained in a footnote, "[t]he state interest required has been characterized as 'overriding,' . . . ; 'compelling,' . . .; 'important,' . . . or 'substantial,' . . . . We attribute no particular significance to these variations in diction." *Id.* at 722 n.9 (citations omitted). Thus, the "ends scrutiny" may be the same under the *Craig* test as under the compelling state interest test.

[6] *See* note 1 *supra*.

[7] 429 U.S. at 200.

[8] 430 U.S. 199, 217 (1977).

[9] 440 U.S. 268 (1979).

[10] *Id.* at 281.

[11] 441 U.S. 380 (1979).

children born out-of-wedlock was an important governmental objective, but that there was not a substantial relationship between this important governmental interest and a sex-based statute which required consent of the mother for adoption, but not the consent of the father. Finally, in *Califano v. Westcott*,[12] the Court held that even if the state's alleged important governmental objective—to induce indigent fathers not to desert their families—was the actual reason for the statute, granting welfare benefits to families where the father becomes unemployed, but denying those benefits to families where the mother becomes unemployed, was not substantially related to the achievement of the alleged governmental objective. The incentive to desert was the same in each situation.

The policies advanced within these cases are significant. In essence, the Court has declared war on sex stereotyping by law. In *Westcott*, the Court stated that a sex classification "cannot survive" if it is "part of the 'baggage of sexual stereotypes' . . . that presumes the father has the 'primary responsibility to provide a home . . . ' while the mother is the 'center of the home and family life.'"[13] Similarly, the Court in *Orr* realized that sex classifications are dangerous *per se*, even if the classifications are based on rational reasons, because they may perpetuate stereotyped thinking.[14] In other words, the law has an important educational function to perform. If the law applies to some people in a stereotyped fashion, then the general public will believe that this is proper and will also treat such people in the same manner.

Under the *Craig* test[15] it is expected that many other sex-based laws will fall in the 1980's. Examples of these are: the father's common law duty to pay child support;[16] the common law rule that when the husband moves the wife must follow or she will be guilty of abandonment;[17] the common law duty of the wife to do housework and care for the children;[18] and various other laws that will be discovered when state and

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[12] 443 U.S. 76 (1979). The Court did not believe that the purported objective for the statute was the actual purpose, but found that even the purported objective was not substantially related to the sex classification in the statute.

[13] *Id.* at 89. Five Justices concurred in the opinion; all nine Justices concurred in the holding of unconstitutionality.

[14] 440 U.S. at 283.

[15] *See* note 1 *supra*.

[16] Several courts have already held this type of statute unconstitutional. *See, e.g.*, Carter v. Carter, 58 App. Div. 2d 438, 397 N.Y.S.2d 88 (1977).

[17] This is still the rule in New York, although some lower courts are attempting to modify it. *See, e.g.*, Weintraub v. Weintraub, 78 Misc.2d 362, 356 N.Y.S.2d 450 (Fam. Ct. 1974).

[18] In New York, for example, a wife who fails to carry out these duties may be divorced for "constructive abandonment" of her husband. *See, e.g.*, Rosner v. Rosner, 202 Misc. 293, 108 N.Y.S.2d 196 (Dom. Rel. Ct. 1951).

federal statutes are processed through computers.[19]

Unfortunately sex-based laws will not fall of their own weight. Litigation and legislation will be necessary to change them, requiring huge expenditures of time, money and effort.[20]

III. SEX DISCRIMINATION AND THE FAILURE OF THE EQUAL PROTECTION CLAUSE

There are five ways in which the equal protection clause has failed to eliminate laws that discriminate on the basis of sex. First, the requirement that women and men be "similarly situated" has been manipulated by the Court.[21] Second, in certain cases the Court has failed to find sex discrimination because the two groups that were treated differently did not consist of a group of women on the one hand and a group of men on the other, but rather consisted of women on the one hand and *both* men and women on the other.[22] Third, the Court has held that certain laws pass muster under the *Craig* test.[23] Fourth, the Court's application of the disparate impact theory in sex discrimination cases has had a devasting effect on the effort to remove sex-based discrimination.[24] Finally, the equal protection clause does not address areas of the law where there is formal equality but actual inequality.[25] In a sense, this last failure may not be a defect in the equal protection clause. If the equal protection clause simply requires formal equality then one cannot fault it for not going further. However, the issue of whether the equal protection clause does require more than formal equality is still open to question.[26]

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[19] *See, e.g.*, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, SEX BIAS IN THE UNITED STATES CODE (1977).

[20] The Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971), would be a more efficient way of dealing with sex-based laws. The E.R.A. would become effective two years after ratification. Presumably most state legislatures would take advantage of this period to identify and amend their laws which result in sex discrimination.

The E.R.A. would also outlaw some varieties of sex discrimination that might survive the *Craig* test. *See* notes 86-89 *infra* and accompanying text and Vorcheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (separate but equal sex segregated public schools are not unconstitutional). The E.R.A. would make sex a prohibited rather than a suspect classification. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889 (1971).

[21] *See* notes 27-40 *infra* and accompanying text.

[22] *See* notes 41-44 *infra* and accompanying text.

[23] *See* notes 45-88 *infra* and accompanying text.

[24] *See* notes 89-106 *infra* and accompanying text.

[25] *See* notes 107-12 *infra* and accompanying text.

[26] *See generally* Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 106-07. See also the excellent arti-

A. *The Requirement that Male and Female be "Similarly Situated"*

In two cases, the Supreme Court has held that the women and men who were treated differently under the law were not similarly situated;[27] as a result, the appropriate test of the law's constitutionality was not the *Craig* test but the simple rational basis test. In the first case, *Schlesinger v. Ballard*,[28] a male naval officer challenged the Navy's "up and out" provisions regarding promotions. The provision for women officers required promotion or discharge within thirteen years. The provision for male officers required discharge if a male was passed over for promotion three times, which usually occurred in less than thirteen years. The Court held that female officers were not similarly situated to male officers because there were many restrictions on a female officer's opportunities to compile records entitling the officer to promotion. For example, women were not permitted in combat nor eligible for seaduty other than on hospital ships and transports.[29] As the dissent pointed out, these restrictions on women's opportunities were probably unconstitutional.[30] Therefore, the Court appeared to be holding that the male and female officers were not similarly situated because the women were being treated in an unconstitutional manner, and thus it was rational for Congress to give the women a longer promotion time to make up for the fact that they were not similarly situated.

The second case, *Parham v. Hughes*,[31] is more disturbing than *Ballard* because it was decided in 1979. In *Parham*, a plurality of the Court

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cle by Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979).

[27] The basic equal protection doctrine provides that the equal protection clause does not become operable unless the persons dissimilarly treated under the challenged statute are similarly situated. *See* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). If they are dissimilarly situated, this may be reason enough for treating them differently.

Justice Stewart was the author of both of the two "dissimilarly situated" cases: Schlesinger v. Ballard, 419 U.S. 498 (1975) and Parham v. Hughes, 441 U.S. 347 (1979). Interestingly, it seems the only other justice to discuss the "similarly situated" requirement was Justice Rehnquist dissenting in Trimble v. Gordon, 430 U.S. 762 (1977):

> For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. But that statement of the rule does little to determine whether or not a question of equality is even involved in a given case. For the crux of the problem is *whether persons are similarly situated* for purposes of the state action in issue. Nothing in the words of the Fourteenth Amendment specifically addresses this question in any way.

Id. at 780 (emphasis in original).

[28] 419 U.S. 498 (1975).

[29] *Id.* at 508. *See* 10 U.S.C. § 6015 (1970).

[30] 419 U.S. at 511 n.1 (Brennan, J., dissenting).

[31] 441 U.S. 347 (1979).

upheld a Georgia statute that allowed an unwed mother to sue for the wrongful death of her child, but disallowed an unwed father to sue unless he had procured a court order legitimating the child.[32] The plaintiff father had signed the child's birth certificate, had contributed to its support and had visited it, but he had never secured a court order legitimating the child. The plurality held that this was not sex discrimination because unwed fathers and unwed mothers are not similarly situated.[32]

The Court offered two reasons for this holding. First, under Georgia law only an unwed father could sue to legitimate the child; the unwed mother could not. This rationale, like that offered in the *Ballard* case,[34] is also probably unconstitutional,[35] yet it was used as the Court's basis for finding that unwed mothers and fathers were not similarly situated. The second reason the plurality gave for its holding that unwed mothers and fathers were not similarly situated was that the mother actually gave birth to the child and the father did not, hence the identity of the mother is always ascertainable.[36] Any uncertainty as to the identity of the father, however, can be eliminated by the father legitimating the child. Therefore, the law actually discriminates between those fathers who had legitimated their children and those fathers who had not legitimated their children. Under the rational basis test, the Court found that the requirement of legitimation was rational, especially considering the danger of spurious wrongful death claims brought by men who would not be the child's actual father.[37]

This reasoning may lead to unjust results in two particular kinds of cases. First, there are those cases involving different treatment of unwed mothers and fathers in adoption laws. In *Caban v. Mohammed*[38] the Court found unconstitutional a New York law that deprived the unwed father of the right to prevent the adoption of his child by another, a right afforded the unwed mother. However, the children involved in *Caban* were not infants, and the majority implied that it might rule differently if the law concerned the adoption of only newborn out-of-wedlock children with no psychological ties to the father.[39] The second

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[32] *Id.* The plurality consisted of Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens.

[33] *Id.* at 355.

[34] *See* notes 27-30 *supra* and accompanying text.

[35] *See* note 30 *supra* and accompanying text.

[36] 441 U.S. at 355 n.7.

[37] *Id.* at 357.

[38] 441 U.S. 380 (1979).

[39] *Id.* at 389. See W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (Ct. App. 1979), where the court upheld a law giving the right to consent to adoption to all unwed mothers, but only to those unwed fathers who had acknowledged their children and received the children into their homes. The court stated: "To the extent that this classification is based upon gender, it is based

type of case in which the reasoning offered in *Ballard* and *Parham* could lead to inequitable results in child custody cases. In this situation there is a danger of the Court upholding a preference for the mother when the child is an infant on the theory that since the child is born of her body, she is psychologically closer to the child and, thus, the mother and the father are not similarly situated. Justices Stevens, Burger and Rehnquist implied in *Caban* that they could accept this theory.[40]

B. *Cases Finding the Groups Legally Distinguished are not Entirely of One Sex*

The most flagrant example of this type of reasoning is the pregnancy disability benefits case, *Geduldig v. Aiello*.[41] The Court, in its infamous footnote twenty, stated that the exclusion of pregnancy-related disabilities from the state's disability benefits statutes did not distinguish between women and men; it merely distinguished pregnant people from non-pregnant people and, as a result, sex-based discrimination did not exist.[42]

Parham v. Hughes[43] could also be explained as falling within this category. One could say that the Court viewed the statute as creating two distinct categories: one consisting of unwed mothers plus "legitimated" unwed fathers, and the other consisting of "non-legitimated" unwed fathers. Again, this would not be discrimination between men and women, so only the rational basis test would be applicable.[44]

C. *Cases Involving Statutes That Meet the* Craig *Test*

Thus far, in all of the cases that have met the *Craig* test, the alleged important governmental objective has been one of compensating for past discrimination against women, *i.e.*, an alleged affirmative action purpose. In *Kahn v. Shevin*,[45] a property tax exemption for widows, but not widowers, was upheld by the Court on this theory. In *Schlesinger v. Ballard*,[46] different promotion procedures for women and men naval of-

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upon an actual difference in situation. Whatever else may be said of an unwed mother, she is not a stranger to her child. A gender-based classification is not improper where men and women are not similarly situated." *Id.* at 312, 160 Cal. Rptr. at 869.

[40] 441 U.S. at 405.

[41] 417 U.S. 484 (1974).

[42] *Id.* at 496 n.20.

[43] 441 U.S. 347 (1979). *See* notes 31-37 *supra* and accompanying text.

[44] 441 U.S. at 356-57. Abortion law challenges on sex discrimination grounds could also arguably fail under similar reasoning. The theory would be that the discrimination is not between men and women, but between pregnant people wanting abortions on the one hand and everyone else in the world on the other.

[45] 416 U.S. 351 (1974). *See* note 1 *supra*.

[46] 419 U.S. 498 (1975). *See* notes 27-30 *supra* and accompanying text.

ficers were upheld on the same theory. Finally, social security retirement benefits that were higher for women than those for men with comparable earnings were upheld by the Court in *Califano v. Webster*[47] on the theory that Congress had intended the higher social security benefits to compensate for past discrimination against women in the job market.

The statutes in the *Kahn*,[48] *Ballard*,[49] and *Webster*[50] decisions should not have been upheld for two reasons. First, the *Craig* test, as elaborated in *Weinberger v. Wiesenfeld*,[51] requires the Court to evaluate a challenged law on the basis of the *actual* reasons for which it was enacted, and not any reasons that can be hypothesized at the time the statute is challenged.[52] Yet, in all three of these cases, the Court accepted reasons that, upon further scrutiny, can be shown to have been hypothesized.

The tax exemption in *Kahn* clearly was not enacted to compensate women for sex discrimination in the job market or for sexism in society in general.[53] Justice Stevens perceptively analyzed the *Kahn* statute in his concurring opinion in *Califano v. Goldfarb*:[54]

> [T]hat case involved a discrimination between surviving spouses which originated in 1885; a discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males. It seems clear, therefore, that the Court upheld the Florida statute on the basis of a hypothetical justification for the discrimination which had nothing to do with the legislature's actual motivation.[55]

The real legislative purpose underlying the *Kahn* statute was the paternalistic assumption that married women do not work outside the home, and that if they attempt to do so they will not be able to support their

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[47] 430 U.S. 313 (1977) (per curiam).

[48] 416 U.S. 351 (1974). *See* FLA. STAT. § 196.202 (Supp. 1974-1975).

[49] 419 U.S. 498 (1975). *See* 10 U.S.C. § 6382 (1976).

[50] 430 U.S. 313 (1977) (per curiam). *See* 42 U.S.C. § 415 (1976).

[51] 420 U.S. 636 (1975).

[52] *Id.* at 648. Thus, the test used in *Wiesenfeld* and *Craig* must be a higher level of scrutiny than rational basis because under that deferential standard, the court may consider any valid purpose for upholding the statute even if the legislature never had that purpose in mind when it enacted the statute.

[53] *See* notes 1 and 47 *supra*.

[54] 430 U.S. 199, 217 (1976) (Stevens, J., concurring). No other Supreme Court Justice has ever suggested that *Kahn* be overruled, not even Justices White, Brennan, and Marshall, who dissented in *Kahn*.

[55] *Id.* at 223 (footnote omitted).

families because they are inherently physically and mentally incapable of doing so.[56]

Similarly, the legislative history of the *Ballard* statutes gives no indication that they were enacted to counterbalance discrimination against women in the Navy. The different treatment of men and women with regard to Navy promotion policy may well have been the result of simple congressional inadvertence.[57] Additionally, this discrimination against women in the Navy was officially allowed to continue at the same time that the Navy was purportedly attempting to compensate for such past discrimination.[58] Five years later, in the women-only alimony case,[59] the Court made an observation that would be equally applicable to *Ballard*:

> [Appellee argues] that while "[t]he common law stripped the married woman of many of her rights and most of her property ... it attempted to partially compensate by giving her the assurance that she would be supported by her husband." . . . This argument, that the "support obligation was imposed by the common law to compensate the wife for the discrimination she suffered at the hands of the common law," . . . reveals its own weakness. At most it establishes that the alimony statutes were part and parcel of a larger statutory scheme which invidiously discriminated against women, removing them from the world of work and property and "compensating" them by making their designated place "secure." *This would be reason to invalidate the entire discriminatory scheme—not a reason to uphold its separate invidious parts.*[60]

Under this analysis, even if the *Ballard* statutes were enacted for a "compensatory" purpose, they "were part and parcel of a larger statutory scheme which invidiously discriminated against women;"[61] restricting their opportunities to demonstrate their promotion-worthiness, and then "'compensating' them by making their designated place 'secure.'"[62]

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[56] See the discussion of the legislative history of the *Kahn* statute in Erickson, Kahn, Ballard, and Wiesenfeld: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?* 42 BROOKLYN L. REV. 1, 13-18 (1975) [hereinafter cited as Erickson II]. *Cf.*, Muller v. Oregon, 208 U.S. 412 (1908) (inherent physical inferiority of women).

[57] Schlesinger v. Ballard, 419 U.S. 498, 517 (1975) (Brennan, J., dissenting). *See* Erickson II, note 56 *supra* at 19-30.

[58] *See* Erickson II, note 56 *supra* at 29-30.

[59] Orr v. Orr, 440 U.S. 268 (1979).

[60] *Id.* at 279 n.9 (emphasis added). It is also possible that the *Kahn* statute could be criticized in the same manner. *See* note 48 *supra.*

[61] 440 U.S. at 279 n.9.

[62] *Id.*

The *Webster* statute[63] was also not enacted for the "benign," "compensatory" purpose of making up for past wage discrimination against women. The statute was passed because employers were forcing women to retire earlier than men and were also failing to hire older women. Congress believed that employers would continue to discriminate against women in these ways, hence it reduced the Social Security retirement age for women (but not men) to sixty-two years, and allowed women to compute their benefits in such a way as to result in higher benefits than those for similarly situated men.[64] At the same time, however, Congress failed to enact legislation forbidding such discrimination by employers, thus treating the symptoms rather than the disease. The foreseeable side effect of the *Webster* statute was that employers could use the Social Security law as justification for a continuing failure to hire women who were approaching the age of sixty-two and forcing female employees to retire earlier than men, even when the women preferred to forego increased Social Security payments in favor of continued paychecks.[65] Such discriminatory practices by private employers were finally outlawed by Title VII[66] and the Age Discrimination in Employment Act.[67] In 1972, when Title VII was extended to cover public employers, Congress also equalized the Social Security retirement ages and benefit compensation methods for women and men.[68] It would have been extremely embarrassing for Congress to allow the Social Security Administration to continue to treat women and men differently when Congress had prohibited private and public employers from doing so. As a result, the side effects of these "purportedly compensatory 'classifications in fact penalized women'."[69]

There is a second reason why the statutes in the *Kahn* and *Webster* decisions should not have been upheld by the Court. Even if the statutes truly had been enacted for the "benign," "compensatory" purpose of making up for past discrimination, the sex classifications in the statutes were not "substantially related" to the achievement of that objective.[70] The *Kahn* statute is both overinclusive and underinclusive. It gives a tax exemption to widows who have not suffered financially from sex discrimination, yet denies it to married and single women who have suffered from discrimination.[71] The *Webster* statute is overinclusive in that

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[63] 42 U.S.C. § 415 (1976).

[64] Califano v. Webster, 430 U.S. 313, 319 (1977).

[65] *Id.* at 319 n.7.

[66] 42 U.S.C. § 2000 (1976).

[67] 29 U.S.C. § 621 (1976).

[68] *See* Califano v. Webster, 430 U.S. 313, 320 (1977).

[69] Orr v. Orr, 440 U.S. 268, 281 n.11 (1979).

[70] Craig v. Boren, 429 U.S. 190, 197 (1976).

[71] *See* Kahn v. Shevin, 416 U.S. at 360 (Brennan and Marshall, JJ., dissenting); *Id.* at 361 (White, J., dissenting).

increased benefits are paid to all retired women workers, even those who might have been fortunate enough to escape the effects of sex discrimination in employment.[72]

Finally, lest it be argued that in *University of California Regents v. Bakke*[73] at least a plurality of the Court upheld affirmative action as constitutional, and that the above statutes are affirmative action statutes, the distinction between these purportedly "benign," "compensatory" statutes and true affirmative action programs must be clarified.

Affirmative action in the employment sector may provide individuals previously discrimination against with an edge in securing a job, but if such person does not work, he or she loses any benefits that could be obtained from that initial edge. Likewise, affirmative action in the educational sector may provide an edge in securing acceptance into a school, but the student still has to achieve a sufficient academic standing in order to remain and eventually graduate. Providing financial assistance to compensate for past discrimination is not affirmative action, it is simply a monetary payment. It is analogous to a recovery in a Title VII[74] case for wages lost because of discrimination, except that the payment is granted without any finding that the recipient was in fact discriminated against, and similarly without a determination as to the amount of damages. The Court in *Bakke* upheld a certain type of affirmative action program, but *Bakke* cannot serve as precedent for "benign compensation" cases. For example, the Court should not uphold higher social security benefits for blacks than for whites on the theory of counterbalancing past discrimination.[75]

In a recent case, *Wengler v. Druggists Mutual Insurance Co.*,[76] the United States Supreme Court had an opportunity to clarify the "benign compensation" theory. *Wengler* was a challenge to a workers' compensation law that presumes a widow to be dependent upon her deceased worker husband, but requires a widower to prove dependency. The Supreme Court of Missouri held that the law has a valid compensatory purpose, citing *Kahn v. Shevin*.[77] In an *amicus* brief, Ruth Bader Ginsburg argued that the Court should go further in *Wengler* and hold

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[72] Perhaps this subclass of women workers would be very small or even nonexistent. However, the fact that some women were "penalized" by the statute (*see* note 64 *supra* and accompanying text) is reason enough to overturn it. *See* note 69 *supra* and accompanying text.

[73] 438 U.S. 265 (1978).

[74] 42 U.S.C. §§ 2000 (1976).

[75] *Cf.* Kahn v. Shevin, 416 U.S. 351, 362 (1974) (White, J., dissenting) (facetiously suggesting a tax "break" for all members of minority groups to remedy past discrimination).

[76] 48 U.S.L.W. 4459 (Apr. 22, 1980), *rev'g* 583 S.W.2d 163 (Mo. 1979).

[77] 583 S.W.2d at 165.

sex to be a suspect classification.[78] She argued that this result was commanded by the fact that the Court already had been treating sex discrimination cases in such a manner.[79] In reversing the Missouri Supreme Court and rejecting sex as a suspect class, the Court applied the *Craig* test and held that although providing for needy spouses is an important governmental objective, the state had not met its burden of showing that the sex-based law bears a substantial relationship to that objective.[80]

The Court did not explain how the *Wengler* statute could be distinguished from the *Kahn* statute. It discussed *Kahn* only in a footnote:

> In *Kahn v. Shevin*, the Court upheld a Florida annual $500 real estate tax exemption for all widows in the face of an equal protection challenge. The Court believed that statistics established a lower median income for women than men, a discrepancy that justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." As in *Kahn* we accept the importance of the state goal of helping needy spouses, . . . but as described in the text the Missouri law in our view is not "reasonably designed" to achieve this goal. Thus the holding in *Kahn* is in no way dispositive of the case at bar.[81]

This implies that the *Kahn* statute was "reasonably designed" to achieve its goal. However, if its goal was to "help needy spouses," it is no less constitutionally infirm than the *Wengler* statute. If the goal of the *Kahn* statute is reformulated in terms of "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," (translation: providing financial assistance to widows) then by definition the means are well suited to achieving the ends, but the ends are sex discriminatory.

Another explanation must be sought for *Kahn*. It cannot be explained as a tax statute (where the state has more leeway) because it was followed in *Ballard* and *Webster*, neither of which is a tax case.[82]

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[78] Brief for the American Civil Liberties Union as *amicus curiae* at 50-51, Wengler v. Druggists Mutual Ins. Co., 48 U.S.L.W. 4459 (Apr. 22, 1980).

[79] Brief for the American Civil Liberties Union as *amicus curiae* at 44-51.

[80] Wengler v. Druggists Mutual Ins. Co., 48 U.S.L.W. 4459, 4462 (Apr. 22, 1980).

[81] 48 U.S.L.W. at 4461 n.4 (citing Kahn v. Shevin, 416 U.S. 351, 355 (1974)).

[82] One could attempt to distinguish *Kahn*, 416 U.S. 351 (1974); *Ballard*, 419 U.S. 498 (1975); and *Webster*, 430 U.S. 313 (1977) from *Wiesenfeld*, 420 U.S. 636 (1975) and *Wengler*, 48 U.S.L.W. 4459 (Apr. 22, 1980). All were alleged to be "benign compensation" cases, but in the latter cases the woman was working and had a right to expect that her work would benefit her family in the same way

With regard to the Court's failure to find sex a suspect classification, some of the Justices had previously expressed the belief that the courts should allow the political processes to make that decision through the Equal Rights Amendment, which had been passed by Congress and seemingly would be ratified by the required number of states.[83] Now, however, there is substantial question whether the Equal Rights Amendment will ever be ratified.[84]

Without the Court holding sex a suspect class, some other laws involving sex discrimination may be held to pass the *Craig* test. As the law now stands, in sex discrimination cases the state need not show a *compelling* state interest, just an *important* governmental objective. Interestingly, the only governmental objective that the Court has ever found *not* important enough was the reinforcement of rigid sex roles in marriage rejected in *Orr*.[85] When the Court has found laws unconstitutional under the *Craig* test, it has usually done so on the theory of lack of a substantial relationship between the sex classification in the statute and the important governmental interest, *i.e.*, an insufficiently close means-ends relationship.[86]

The Court might hold that some sex classifications are substantially related to important governmental interests. For example, under the *Craig* test, *Dothard v. Rawlinson*[87] could result in the same holding as it did under the Title VII theory. The Court could decide that the important governmental interest involved was the maintenance of order in a prison. It could then find a substantial relationship between such interest and a law prohibiting women from being in contact positions as

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that a man's work would benefit his family. Thus, to discriminate against her male family members is to discriminate against her also. In the former cases, on the other hand, men were complaining that women were receiving benefits that men did not get. However, the Court believed that no woman was being harmed either by being deprived of derivative benefits for her family members or in any other way. Thus, the statute actually operated to benefit women without harming any women. Even if that is so, however, I would still urge that *Kahn*, *Ballard*, and *Webster* are wrong for the other reasons that I have detailed in notes 45-75 *supra* and accompanying text.

[83] *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, Blackmun, and Burger, JJ., concurring).

[84] Thirty-five of the necessary thirty-eight states have ratified the E.R.A., but three of these have voted to rescind their earlier ratification. The constitutionality of such a rescission is an open question. The period for ratification was, however, extended to June 20, 1982.

[85] 440 U.S. 268, 279-80 (1979). In fact, this may not even be a *valid* purpose: "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re* Griffiths, 413 U.S. 717, 722 n.8 (1973).

[86] *See* notes 5-14 *supra* and accompanying text.

[87] 433 U.S. 321 (1977).

prison guards, because women by their "very womanhood" arouse men to sexual attacks.[88]

D. *Disparate Impact Cases*

The fourth area in which the equal protection clause has failed to eliminate laws discriminating on the basis of sex is the area of disparate impact analysis. The Court in *Washington v. Davis*[89] held that adverse impact on a protected class is insufficient to invalidate a law under the equal protection clause. Discriminatory intent must be found.[90] This holding was obviously a serious disappointment to civil rights advocates. However, a later case, *Personnel Administrator v. Feeney*,[91] was, in a sense, even worse. In *Feeney*, the Supreme Court upheld an absolute, lifetime veteran's preference in civil service jobs. The Court upheld the preference even though it knew that until 1967 there was a two percent quota on women in the military.[92] Other restrictions continued until the 1970's, and some even exist today.[93] As a result, not only were women prevented from entering the military, but they were punished in job seeking because they had not been in the military. The Court acknowledged that the veteran's preference had a devastating impact on the employment opportunities of women,[94] however it held that

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[88] *Id.* at 345. The Court decided Dothard v. Rawlinson on a Title VII theory, holding that the exclusion of women from the prison guard "contact" position was not a violation of Title VII because male sex is a bona fide occupational qualification for the job (based on the notion that women attract sexual assaults). However, *Rawlinson* was also litigated and appealed as an equal protection case. It is possible that the equal protection clause may provide more protection than does Title VII, although the opposite seems to be more often the case. *Compare* Griggs v. Duke Power Company, 401 U.S. 424 (1971) (holding that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests or other measures of intellectual competence if those tests have the impact of excluding minorities despite the employer's lack of discriminatory intent unless the employer can prove that the tests in question are substantially related to job performance) *with* Washington v. Davis, 426 U.S. 229 (1976) (holding that, for equal protection claims, proof of discriminatory intent was necessary, while for statutory cases proof of discriminatory impact was sufficient). But the Court did not have to consider the constitutional question because "[t]he parties [did] not suggest . . . that the Equal Protection Clause requires more rigorous scrutiny of a state's sexually discriminatory employment policy than does Title VII." 433 U.S. at 334 n.20.

[89] 426 U.S. 229 (1976).

[90] *Id.* at 239.

[91] 442 U.S. 256 (1979).

[92] *Id.* at 269 n.21.

[93] *See Army Officials Alarmed by Drop in Number of Women Recruits*, N.Y. Times, April 1, 1979, § 1, at 49, col. 3; *Should Women See Combat?* N.Y. News, March 25, 1979, at 65, col. 1.

[94] Personnel Admin. v. Feeney, 442 U.S. at 271.

the preference did not violate the Constitution because it passed muster in both steps of what the Court described as a "two-fold inquiry."[95]

First, the law was sex-neutral not only on its face but also in fact; it was not a "pretext" for discriminating against women, but was truly enacted to benefit veterans.[96] Second, although the statute had a disparate impact on women, there was no evidence that even the slightest discriminatory intent was a motivating factor in its enactment.[97] The plaintiffs had argued that the defendant should be held to intend the "natural and foreseeable consequences" of the law in terms of its impact on women.[98] In other words, disregard for the harm that the law would inflict on women's employment opportunities should be held the equivalent of discriminatory intent. The Court disagreed, stating that in order to invalidate a law that has a disparate impact on women, a court must find that it was enacted "because of" its invidiously discriminatory impact on women, not just "in spite of" that impact.[99] The *Feeney* definition of intent thus puts a very heavy burden of proof on the plaintiff in an adverse impact case. This is especially true when one considers that a legislator who intends to harm women is unlikely to admit such motivation,[100] and that he undoubtedly would not have passed the law if he had been a member of the group that it harmed.[101]

The pregnancy discrimination cases, notably *General Electric v. Gilbert*[102] and *Nashville Gas Co. v. Satty*,[103] are other examples of the failure of the disparate impact theory in sex discrimination cases. However, a full discussion of these cases is outside the scope of this paper, so they are mentioned only for the sake of completeness.[104]

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[95] *Id.* at 274.

[96] *Id.*

[97] *Id.* at 274-75.

[98] *Id.* at 278. Justice Stevens had favored this definition of intent in his concurring opinion in Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

[99] 442 U.S. at 279.

[100] *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1036-40 (1979).

[101] See Ely's "we-they" analysis, which is an extension of the "discrete and insular minorities" concept found in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933 (1973). (His application of the we-they analysis to Roe v. Wade, however, is flawed. Fetuses may not sit in the state legislatures, but males, who cannot get pregnant, do). *See also* J. RAWLS, A THEORY OF JUSTICE (1971).

[102] 429 U.S. 125 (1976).

[103] 434 U.S. 136 (1977).

[104] *See* Erickson, *Pregnancy Discrimination: An Analytical Approach*, 5 WOMEN'S RIGHTS L. REP. 83 (1979). The disparate impact theory was never advanced by the plaintiffs in Geduldig v. Aiello, 417 U.S. 484 (1974), because they believed it to be a disparate treatment case. Disparate impact was alleged in

It seems certain that under such analysis, challenges to many other laws that have a discriminatory impact would also fail. For example, the common law marital property rule has an extremely disproportionate impact on women.[105] Likewise, the failure to treat as deductible

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General Electric v. Gilbert, 429 U.S. 125 (1976), however, the Court found that, contrary to the common-sense notion of impact, there was no disparate adverse impact on women. The majority stated:

> The Plan . . . is nothing more than an insurance package, which covers some risks, but excludes others . . . . The "package" . . . is facially nondiscriminatory in the sense that "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [Geduldig] . . . [T]here is no proof that the package is in fact worth more to men than to women . . . .

Id. at 138.

In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court found that depriving workers of their accrued seniority after they returned from childbearing leave *did* have an adverse impact on women:

> [The Company's] policy denied [plaintiff] specific employment opportunities that she otherwise would have obtained. Even if she had ultimately been able to regain a permanent position with petitioner, she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career with [the Company].

Id. at 141. The Court further stated that the gas company "has not merely refused to extend to women a benefit that men cannot and do not receive [as in *Gilbert*], but has imposed on women a substantial burden that men need not suffer." *Id.* at 142. The result in *Satty* is clearly correct, but unfortunately it leaves the *Gilbert* holding unimpaired.

[105] *See* Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947 (1978).

> The marital property laws of the various American jurisdictions can be broken down into three main categories: strict common law, modified common law, and community property. In the eight strict common law property jurisdictions, a divorce court has no power to take property belonging to one spouse and award it to the other. Because married couples usually commingle their property, the courts in these states are often faced with the difficult task of deciding, according to the usual legal principles, who owns a particular piece of property. Once that decision is made, however, the court's jurisdiction is at an end.
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> In the thirty-six modified common law property jurisdictions, the court has power to distribute some or all of the property of the parties, usually only property acquired during the marriage, according to the principles and standards set by the applicable statute. Because the statutes of most of these jurisdictions do not specify the exact percentage of the marital property that the courts must award to each spouse, but grant considerable discretion to the courts to distribute the property in accordance with some broad standard of justice and equity, the modified common law property jurisdictions are sometimes called "equitable distribution" jurisdictions. Some jurisdictions provide no further guidelines to the court, while others specify the criteria to be used.
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> In the nine community property jurisdictions, ownership of all property acquired during the marriage, with certain exceptions in each jurisdiction, vests immediately upon acquisition in the "community." This is a

"business expenses" the child care costs necessary to allow the parent to be gainfully employed has a devastating effect on the incomes of working mothers.[106] Nevertheless, under the *Feeney* theory such laws would probably be upheld.

E. *Areas of Formal Equality but Substantive Inequality*

Our entire working society can be interpreted as being structured on the assumption that people do not bear or care for children and do not have household responsibilities. As a result, for example, law professors are expected to put in long hours of teaching, research and writing to impress the tenure committee, but law professors who give birth to children or who want to have a hand in raising their children are usually not given any consideration in terms of lighter loads (even for "lighter pay"), longer tenure tracks, etc.

In the 1980's, methods must be developed to deal with these problems. Some are already in progress in a small way: reduced hours, flexi-time, child care facilities and other ways of taking into account the fact that workers are indeed members of families.[107]

Other solutions are only on the drawing boards. For example, one commentator has some very intriguing suggestions with regard to overtime pay laws.[108] She postulates that if Congress determined that equalization of sex roles was to be the public policy of the country, Congress could work toward that goal by eliminating the "professional employees" exclusion from overtime compensation laws. The result would be a dampening of the employer's enthusiasm for "workaholics" and a concomitant increase in the amount of leisure time enjoyed by professional workers, most of whom are male. Male professional employees would then be able to spend more time on parenting, and thereby female professional employees, especially those with children,

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> civil law concept similar to the common law concept of a trust. During the marriage, both spouses have ownership of the community, and upon divorce, the assets and liabilities are distributed according to the standards prescribed in the statutes.

Id. at 961-62 (footnotes omitted).

Thus, in the strict common law states, the woman who plays the role that society encourages women to play, *i.e.*, the role of housewife and mother, would usually end up, upon divorce, with no property at all. If the husband's money went into the bank accounts, other forms of savings, house, furniture, etc., the wife would not be entitled to these upon divorce, absent a gift to her.

The strict common law marital property rule, therefore, has a very heavy adverse impact on women. However, it is not sex-based and thus not subject to constitutional attack under *Craig*.

[106] Child care expenses are a credit against taxes owed, but there is a fairly low ceiling. I.R.C. § 44A. *See* Jefferson v. Hackney, 406 U.S. 535 (1972).

[107] *E.g.*, the Section on Women in Legal Education of the Association of American Law Schools is conducting a study of part-time law teaching.

[108] *See* note 26 *supra*.

would have more opportunities for advancement because they would not suffer from unfair competition from males without parenting responsibilities.

Another example of formal equality but substantive inequality is illustrated by the failure of the Equal Pay Act[109] to help the majority of women workers. For example, the Equal Pay Act provides that if one hires two nurses, one male and one female, for the same work, the employer must pay them the same wages. Likewise, if one hires two garbage collectors, one male and one female, to do the same work, the employer must also pay them the same wages. Simply to state the above is to highlight the problem. Nursing, secretarial work, and some other professions hire virtually all female workers. These professions composed mostly of women are generally paid less *because* they are women's professions. In other words, the wages of women in sex-segregated jobs are artifically depressed while sex-segregation in the job market has not been shrinking over the past years.

There is, however, a ray of hope for the 1980's. This is the concept of comparable pay for work of comparable value. The theory behind this concept is that in "women's jobs," wages are artificially depressed, therefore these jobs should be evaluated in terms of their skill, effort and responsibility. One must compute what "male jobs" are of comparable skill, effort and responsibility, and then pay women in the "female jobs" the amount they would receive if they were in the comparable "male jobs." The legal basis on which this attack is being waged is that Title VII prohibits discrimination in compensation,[110] therefore paying artificially depressed wages to women who are in "female jobs" is a form of discrimination in compensation.

There was a nation-wide conference in October, 1979 on the issue of comparable pay for work of comparable value, and the Equal Employment Opportunity Commission is planning to hold hearings on the issues.[111] One case has already accepted the above theory as a possible

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[109] 29 U.S.C. § 206(d) (1976) which reads in pertinent part:

> Prohibition of sex discrimination. (1) 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. . . .

[110] 42 U.S.C. § 2000e-2(a) (1) (1976).

[111] Connolly & Copus, *Developments in EEO and OSHA Law*, 183 N.Y.L.J. 5 (1980), reports that the hearings proposed for early in 1980 have been postponed. *Id.* at 2, col. 3.

Title VII claim.[112] Thus, there is reason to believe that the 1980's will bring some successes where the 1970's have failed.

IV. CONCLUSION

Sex discrimination is a fairly recent and controversial legal problem area and, as a result, certainty is the exception rather than the rule. Formal legal equality between men and women seems to be guaranteed after *Reed v. Reed*[113] and its progeny, but the equal protection clause has still failed in five ways to eliminate laws which discriminate on the basis of sex. The "similarly situated" requirement, the various statutory groupings of men and women, the incongruent application of the *Craig* test, the disparate impact theory, and the areas where formal equality is present but actual equality is lacking are all problems which must be identified and remedied. The courts can no longer take a passive or restrictive role. As we enter the 1980's, sex discrimination will rise to the forefront and the courts must be ready to deal actively with these problem areas. With the equal protection clause as the vehicle by which sex discrimination can be eliminated, the courts are provided the machinery to achieve this goal, but the goal can only be attained if the law is fairly and judiciously applied.

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[112] Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979).

[113] 404 U.S. 71 (1971). *See* notes 1-20 *supra* and accompanying text.