THE EQUAL RIGHTS AMENDMENT:
CONSTITUTIONAL RIGHTS FOR WOMEN

In Fulfillment
of the Requirements for I. D. 499
Ball State University
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by
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Equality of rights under the law shall not be denied by the United States or by any State on account of sex.

—Proposed Amendment to the Constitution of the United States

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.
PREFACE

At the outset I shall declare my stand in favor of ratification and adoption of the Equal Rights Amendment. This study is undertaken to set out the facts surrounding the Equal Rights Amendment—its history, its present status, and changes of our legal system that will be brought about by adoption of the Equal Rights Amendment.
I The Need for a Constitutional Amendment
   A. Sex Discrimination and Equal Protection
   B. Sex Discrimination and Statutory Remedies
   C. The Case for the Equal Rights Amendment
   D. The Current Proposal

II The Effect of the Equal Rights Amendment
   A. Constitutional Stature
      1. Sex As a Classification
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   B. The Amendment in Operation
      1. Protective Labor Legislation
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      4. The Military
   C. Conclusion
INTRODUCTION

Women in America have always been classified differently than men and have been relegated to an inferior status. Anyone with even slight knowledge of courts and legislatures could tell you that men and women have in the past been accorded markedly different treatment solely because of sex.

Women were once classified with children and imbeciles as beings incapable of thinking and acting responsibly. When our own Constitution was drafted, in the eyes of the law women were non-persons. Not until 1920 with passage of the Nineteenth Amendment were women given the right to vote. Even then few women would have dared question the "natural order" and paternalism that assumed that woman's place was in the home.

The time to question and to reexamine woman's place and status is now. The first place to look should be the law.

Our legal system has always treated women as a subordinate class. The fact that common law rules—which gave women few rights—have been altered by many states, coupled with granting of suffrage to women shows great progress. Nevertheless, development has been slow and halting.

If discrimination on account of sex is practiced by government, then inevitably women's status in all other spheres will be a subordinate one. This is true due to three distinct but related reasons:

"First, discrimination is a necessary concomitant of any sex-based law because a large number of women do not fit the female stereotype upon which such laws are predicated. Second, all aspects of separate treatment for women are inevitably interrelated; discrimination in one area creates discriminating patterns in another. Thus, a woman who has been denied equal
access to education will be disadvantaged in employment even though she receives equal treatment there. Third, whatever the motivation for different treatment, the result is to create a dual system of rights and responsibilities in which the rights of each group are governed by a different set of values. History and experience have taught us that in such a dual system, one group is always dominant and the other subordinate. As long as woman's place is defined as separate, a male-dominated society will define her place as inferior."

This paper speaks of the Equal Rights Amendment as the proper impetus for change in the present legal structure. Part I considers the three avenues of attack that can be used to abolish sex discrimination. The conclusion is reached that the Equal Rights Amendment is the best of the three alternatives. A brief description of the genealogy of the present proposal is given also. Part II discusses the working impact of the amendment. Brief descriptions of the constitutional stature, and problems connected with transition to accepted standards under the Equal Rights Amendment are given. Four "critical" areas—protective labor legislation, domestic relations law, criminal law, and the military—are examined, and their anticipated operation is set forth.

PART I

THE NEED FOR A CONSTITUTIONAL AMENDMENT

Equal rights for women can be assured under the United States legal system by altering it using one of three methods. "One is by extending to sex discrimination the doctrine of strict judicial review under the Equal Protection Clause of the Fourteenth Amendment. A second is by piecemeal revision of existing federal and state laws. The third is by a new constitutional amendment."² For all sex discrimination to be eliminated, all three may have to be employed, but one method, or combination of methods, should be more effective than the others in eradicating sex discrimination. The question then, is which method or combination of methods is the most effective one for eliminating sex discrimination within the law.

A. Sex Discrimination and Equal Protection

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

-Bradwell v. Illinois (1872)³

We (cannot) conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with

²Emerson, op. cit., p. 875.

³85 U. S. (16 Wall) 130, 141, (1872) (Bradley, J. concurring.)
unconstitutionality. Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

-Hoyt v. Florida (1961)4

Proponents of equal rights for women formerly believed that their goals could be achieved through judicial interpretation of the Equal Protection Clause. This argument was put forth in 1963 by the President's Commission of the Status of Women: "the principle of equality (could) become firmly established in constitutional doctrine" through extension of the Fifth and Fourteenth Amendments, and concluded that "a constitutional amendment need not be sought."5 That statement has now been abandoned by some of the most ardent supporters of women's rights.6 Their shift in position is the result of three important factors that did not exist in 1963 when the President's Commission on the Status of Women argued in favor of judicial remedies. First and foremost, "the Court's failure to eliminate legal sex discrimination has been the major motivating force behind the concerted campaign to secure

5Emerson, op. cit., p. 875.
6Perhaps the two most prominent supporters of women's rights who have changed their preferences from the judicial interpretation to the amendment are Dr. Pauli Murray, a member of the Committee on Civil and Political Rights of the President's Commission on the Status of Women, and Professor Leo Kanowitz, author of Women and the Law (1969).
congressional approval of a constitutional amendment." Secondly, even
the most progressive equal protection doctrines, even those used to
eliminate race discrimination in the law, are inadequate for the task of
eliminating sex discrimination. As congressional sponsor Congresswoman
Griffiths put it, "This fight is with the Supreme Court."8

Decisions in cases dealing with the equal protection clause have
articulated two different standards of review to determine the validity
of singling out one group of people for special legal treatment. The
first, permissive review, upholds legislative distinctions if the dis-
tinction can be reasonably construed as being a legitimate interest of
the State. The burden therefore is upon the party challenging the
constitutionality of the distinction. The second standard, active
review, places distinctions under close scrutiny which affect "fundamental interests" (such as voting and procreation)9 or by statutes which
use "suspect classifications" (such as race or national ancestry)10 to
set apart a class of individuals. Under active review a heavy burden
is placed on the State to show that the distinction is related to some

7Sex Discrimination and Equal Protection: Do We Need A Constitution al Amendment?" 84 Harvard Law Review 1502 (hereinafter cited as
8Harv. Law Rev.)

8Hearings on S. J. Res. 61 and S. J. Res. 231 Before the Senate
Committee on the Judiciary, 91st Congress, 2nd sess. (1970), 228 (here-
inafter cited as Hearings.)

(or voting), and Skinner v. Oklahoma ex. rel. Williamson, 316 U. S.
535, 541 (1942), on procreation.

10See, e. g., McLaughlin v. Florida, 379 U.S. 184 (1964), on race,
and Korematsu v. United States, 323 U. S. 214 (1944), on national
ancestry.)
overriding state interest.

Two prominent features have characterized the Supreme Court's treatment of sex discrimination since the Fourteenth Amendment was ratified in 1868: a continued expression of belief in women's "separate place," and surprising laxity in allowing state legislation based on stereotyped views of women. Only once has the Supreme Court overturned a law making a distinction based on sex. In Adkin's v. Children's Hospital, 261 U. S. 525 (1923), the Court held that the District of Columbia minimum wage act for women was contradictory to the Fifth Amendment. This decision was overruled in 1937 in West Coast Hotel Co. v. Parrish, 300 U. S. 379.

The Supreme Court therefore has adopted the permissive review standard in deciding sex discrimination cases. Unless a statute affects a fundamental interest, the Court utilizes the permissive standard. In recent years, great strides have been taken toward elimination of race discrimination in the law, mainly because the Court has adopted active review for such cases. The burden to show an overriding state interest in classifying a group of individuals by race is tremendous. In An American Dilemma, Gunnar Myrdal notes that both race and sex discrimination have sprung from the same origins, that is, the paternalistic order of society. He contends that the myths built up to perpetuate the inferior status of women and of Negroes were almost identical.12

11 Explained in more detail in footnote 20, page 8.

While these classes have vastly different characteristics *per se*, remedying one group's problems and not the other's problems is inexcusable. Why is there the discrepancy, and how did the area of sex discrimination come to warrant only permissive review?

In 1874, the Supreme Court held that the privileges and immunities clause of the newly passed Fourteenth Amendment did not confer upon women the right to vote.\(^{13}\) Similarly, the privileges and immunities clause did not give women the right to practice law either.\(^{14}\) In 1905, the Court, using now discredited standards of substantive due process, invalidated a New York maximum hours law as an interference with liberty of contract between employer and employee.\(^{15}\) Then between 1908 and 1937 the Supreme Court upheld various state labor laws applicable to women, but not to men. Ironically, the first of these, *Muller v. Oregon*, upheld an Oregon maximum hour law for women in certain industries partly "to secure a real equality of right" for women in the unequal struggle for subsistence.\(^{16}\) In *Muller v. Oregon*\(^ {17}\) the Court combined the arguments on physical capabilities of women\(^ {18}\) and historical patterns of male

\(^{13}\) *Minor v. Happensett*, 21 Wall. 162, 168.

\(^{14}\) *Bradwell v. State*, 16 Wall. 130 (1872); re *Lockwood*, 154 US 116 (1894).


\(^{16}\) *Jane Crow*, op. cit., p. 237.

\(^{17}\) 208 U. S. 412 (1908).

\(^{18}\) Ibid, p. 421.
dominance to come to the conclusion that "she (woman) is properly placed in a class by herself" as a subject for legislation. Later decisions, disregarding the original rationale behind the Muller case, have seized upon the language contained therein, and have extended the doctrine of sex as a basis for legislative classification to remote and unrelated subjects, often denying women an equal share in the benefits and burdens of citizenship. Muller has been cited in support of jury exclusion, differential treatment in licensing occupations, and the exclusion of women from state supported colleges. The original issue,

19 Ibid.
20 Ibid., p. 422. Parenthetically it might be added that Louis D. Brandeis filed the first of the famous "Brandeis briefs" in this case. It contained two pages of legal argument and over 100 pages of sociological facts and statistics showing the evil effect upon women of long working hours. The Court commented that, "the legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs . . . justify special legislation . . . ." The Court, obviously impressed, paid one of its rare tributes to counsel and unanimously sustained the act. Brandeis' legal stand lasted only a short time, but the stereotype of women he portrayed long remained largely unchallenged. But see Mengelkoch v. Industrial Welfare Commission, 284 F. Supp. 950, (C. D. Cal.), vacated and remanded, 393 U. S. 83 (1968). (Cushman and Cushman, Cases in Constitutional Law, 1968, hereinafter cited as Cushman., pp. 553-560.)


22 Most recently; State v. Hunter, 208 Ore. 282, 288, 300 P. 2d 455, 458 (1956).

that of substantive due process, triggered bitter controversy roughly from the time of the famous Slaughter House Cases in 1873 to the 1937 West Coast Hotel decision, which established a temporary resting place for the substantive due process issue.\textsuperscript{24} The principal issue in \textit{Muller}, substantive due process, completely overshadowed the secondary issue in \textit{Muller}, classification of women. "Once a liberal force in constitutional jurisprudence, \textit{Muller} has changed its form and become the basis for the present uncritical permissive review of sex distinctions.\textsuperscript{25} The reasons for passive review of sex distinctions lie in an accident of history.\textsuperscript{26}

In 1948, several women alleged denial of equal protection resulting from a Michigan statute which prohibited (with a few exceptions) the licensing of women as bartenders.\textsuperscript{27} Justice Frankfurter, speaking for the Court, thought the question "need not detain us long." His opinion stated that: "Michigan could beyond a question, forbid all women from working behind a bar . . . . The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes . . . ."\textsuperscript{28} The Court reaffirmed the doctrine of woman's separate place. The \textit{Goesaert}

\begin{flushright}
\textsuperscript{24}\textit{Cushman}, pp. 544-546.
\textsuperscript{25}\textit{Harvard Law Rev.} 1505.
\textsuperscript{26}Ibid at 1504.
\textsuperscript{27}\textit{Goesaert v. Cleary}, 335 U. S. 464 (1948).
\textsuperscript{28}Ibid, p. 465-66.
\end{flushright}
case employed the "reasonable classification" tests, and in so doing, placed the burden of denial of equal protection on the plaintiff. The passive standard of review was reaffirmed for sex discrimination cases at the same time standards for other areas of discrimination were migrating toward the more vigorous active standard.

In the Hoyt v. Florida decision in 1961, a Florida statute providing that women not be called for jury service unless they register with the clerk of the court a desire to serve, was held not violative of the Fourteenth Amendment. The remarkable similarity of content in the Bradwell case of 1873 and the Hoyt case of 1971 is uncanny. In both cases the Supreme Court has expressed its belief in women's "separate place" and in both cases the Court has allowed state legislation to exist that is based upon stereotyped views of women. The essence of each decision can be found at the beginning of this section.

Supporters of women's rights have had several successes in the last five years in the lower courts, and three qualified successes in the Supreme Court. On November 22, 1971, the Supreme Court held in Reed v. Reed that an Idaho law giving preference to males as executors of estates was invalid under the Fourteenth Amendment. The decision was a minor victory. The decision did not, as requested by the plaintiffs and those filing amicus curiae briefs, apply the same criteria to

judging the constitutionality of laws distinguishing on the basis of sex as the Court has applied to laws distinguishing on the basis of race. The decision was once again based upon the "reasonable classification" test that has historically been utilized by the Court. 32

Two more recent Supreme Court decisions are of even greater importance in the area of women's rights. The decision in Frontiero et al v. Richardson, Secretary of Defense et al (72-419) handed down on May 14, 1973 challenged a statutory discrimination in classifying dependents of armed services personnel. The statute provided, solely for administrative purposes, that spouses of male members of the uniformed services are dependents for purposes of obtaining housing and medical benefits, but that spouses of female members are not dependents unless they are in fact dependent for over half of their support. In holding the statute unconstitutional, four justices—Brennan, Douglas, White, and Marshall—declared that sex is an inherently suspect classification and therefore is violative of the Due Process Clause of the Fifth Amendment. 33 This would rank discrimination based on sex with discrimination based on race or national origin. 34 The four justices said, "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination," and as a result, "our statute books


33Frontiero et al v. Richardson, Secretary of Defense et al (72-419), p. i (Slip opinion from U. S. Rep.)

34See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964), (on race), and Korematsu v. United States, 323 U. S. 214 (1944), (on national ancestry.)
gradually became laden with gross (sic) stereotypical distinctions between the sexes, and . . . throughout much of the Nineteenth Century the position of women in our society was in many respects, comparable to that of blacks under the pre-Civil War slave codes.\textsuperscript{35} 

Justice Stewart, in a concurring opinion, relied on the reasoning in Reed v. Reed, 404 U. S. 71, concluding that the statute did work an invidious discrimination in violation of the Constitution, but he declined from classifying sex discrimination as worthy of the suspect test.\textsuperscript{36} Justices Powell and Blackman and Chief Justice Berger agreed that the statute was unconstitutional, but held that in light of the Reed decision and the fact that the ERA is before the States, it would be inappropriate to decide on sex as a suspect classification.\textsuperscript{37} The three opinions show that the women's rights area is in a state of flux with no strong initiatives save the Equal Rights Amendment.

The second important case recently decided by the United States Supreme Court is Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations et al (72-419), which was handed down June 21, 1973. The question at bar was whether or not a Pittsburgh ordinance could ban newspapers from publishing want-ad columns which stated a preference for one sex over the other. The Court held that the Pittsburgh ordinance, in forbidding newspapers to carry sex-designated ad columns for certain

\textsuperscript{35}\textit{Frontiero}, p. i.
\textsuperscript{36}\textit{Ibid}, p. i.
\textsuperscript{37}\textit{Ibid}, p. ii.
of several important facets of the Equal Rights Amendment. First and foremost is the fact that questions of women's rights can be assigned a stature among other conflicting rights. The process of determining where that place lies is largely one for judicial interpretation. The mandate that the ERA entails would be a powerful and sweeping one and would play an important role in determination of the stature of women's rights. The stature of the Equal Rights Amendment will be discussed in further detail in the next section.

The second important inference to be drawn from this decision is taken from the manner in which the Court divided. While four justices declared for the first time that sex is a suspect classification, the four most recent appointees to the Court, disagreed with this reasoning. (Rehnquist, not previously mentioned, wrote a dissenting opinion.) This particular split tends to show a trend adverse to women's rights.

The Supreme Court, unable to adopt any strong and predictable doctrine


39 Ibid., pp. 13-14.

concerning women's rights, has taken a "wait and see" attitude.

One final judicial development that is worthy of note is the decision of the California Supreme Court in the *Sail'er Inn v. Kirby* case. The *Sail'er* decision is the only one to date that has turned exclusively on the active review criteria of suspect classification. The California Court held that a law prohibiting women from being bartenders deprived women of the protection of the Fourteenth Amendment. The Court said, "The instant case compels the application of the strict scrutiny of review, first, because the statute limits the fundamental right of one class of persons to pursue a lawful profession, and second, because classifications based upon sex should be treated as suspect."

At this juncture in time, it would be inaccurate to say that the possibility of gaining substantial equality of rights for women under the Fourteenth and Fifth Amendments is permanently foreclosed. But the current position and trend of judicial decisions, considered in light of the Court's neglect of women's rights over the past hundred years, indicates that large-scale, meaningful, and necessary changes will not come from the courts and equal protection arguments in the near future.

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24 *48 S. P. 2d 529.*

B. SEX DISCRIMINATION AND STATUTORY REMEDIES

Many people still favor abolition of sex discrimination through piecemeal revision of existing laws. Usually, they rely on court decisions as well to end discriminatory practices. Inadequacy of judicial rulings was discussed previously; statutory change approach now deserves some scrutiny. To eliminate sex discrimination in this manner would be difficult for several reasons. First, a concentrated and coordinated effort on the part of all fifty legislatures and Congress would have to take place. Changing these laws would involve great educational efforts for many people to recognize sex discrimination practices.

Secondly, the process would drag on haltingly for many years and it is unlikely that the process of change would be completed in the lifetime of any woman alive today.43

Third, this piecemeal method necessarily presumes that congressional legislation will have to reach deep into state law where most legal discrimination lies. To do so, Congress would have to resort to use of the commerce clause and Section 5 of the Fourteenth Amendment.44

43Emerson, op. cit., p. 883.

44Harvard Law. Rev. 1517. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment read, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This wording is identical to that of Section 2 of the Equal Rights Amendment. The Fourteenth and Fifteenth Amendments gave equal rights to all races with Congress as the general overseer by virtue of Section 5. The Equal Rights Amendment would give equal rights to women, once again with Congress as overseer. (Also see Oregon v. Mitchell, 91 S. Ct. at 266-7, (Black, J.).)
The relationship of these powers to control state action is at best tenuous and may develop unwanted precedents.

Finally, piecemeal reform is what we have done so badly the last century. This approach lacks the necessary clout to achieve equality of rights for women. What is needed is an unambiguous mandate with the prospect of permanence.
C. THE CASE FOR THE EQUAL RIGHTS AMENDMENT

Practically every political act that is controversial or regarded as really important is bound to serve in part as a condensation symbol. It evokes quiescent or an aroused mass response because it symbolizes a threat or reassurance.

-Murray Edelman
The Symbolic Uses of Politics

An amendment to the Constitution is a serious and difficult step. The power and sweep of an amendment can potentially clear off the books every law that discriminates because of sex. The enabling clause as presently written\(^\text{45}\) gives Congress power to make uniform all state laws that would discriminate on account of sex. Coordinating policy among all levels of government is a necessary corollary to any policy to eradicate sex discrimination. This can be done in one strong nationwide campaign of limited duration.\(^\text{46}\)

Claims of similar magnitude, such as freedom from discrimination on account of race, color, national origin, and religion all rest on a constitutional basis. The mandate to end sex discrimination is worthy of constitutional status as well.

Finally, the psychological impact of the Equal Rights Amendment would be tremendous. Equal rights for women can be viewed as part of a broader spectrum of struggle against inequalities that keep some American people from enjoying the full benefits and rights guaranteed

\(^{45}\)Sec. 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

\(^{46}\)Emerson, p. 884.
as inalienable rights to all Americans. While the Equal Rights Amend-
ment cannot guarantee that these rights will be granted in the private
sphere, it would guarantee these rights in the public sphere.
D. THE CURRENT PROPOSAL

A resolution proposing an equal rights amendment has been introduced in every Congress since 1923. The measure has been given serious consideration on four occasions: 1946, 1950, 1953, and 1970. The chart on Page 21 traces the amendment's history from first introduction in 1923 to consideration in 1971.

The resolution had twice previously been passed by the Senate (1950 and 1953), but both times with the so-called "Hayden rider." Senator Hayden's amendment provided that "the provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex." The rider's effect both times was to kill the proposed amendment. As the Senate Judiciary Committee noted, the rider's "qualification is not acceptable to women who want equal rights under the law. It is under the guise of so-called 'rights' or 'benefits' that women have been treated unequally and denied opportunities which are available to men." More recently, in 1970, Senator Sam Ervin successfully offered an amendment of the same genre as the "Hayden rider," providing: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service."

49 116 Congressional Record 17789-91 (daily edition, Oct. 12, 1970.)
Although the Equal Rights Amendment had passed the House by an overwhelming majority, adoption of the Ervin amendment by the Senate effectively blocked passage of the Equal Rights Amendment during the 91st Congress.\textsuperscript{50}

These amendments reflect the two major areas of doubt concerning ERA: "how absolute is the Amendment's central principle that 'equality of rights shall not be denied or abridged by the United States or by any State on account of sex;' and should the Amendment explicitly exempt certain kinds of laws from its basic principle?"\textsuperscript{51}

The Equal Rights Amendment is presently before the States for ratification or rejection. If three-fourths of the states ratify it, it will become part of the United States Constitution. The following section considers what changes will occur in our legal system if the Equal Rights Amendment is ratified.

\textsuperscript{50}It is interesting to note that this issue, which proved so decisive and destructive of the Amendment in 1970, had been discussed and considered settled among the proponents in the 1950 debate. Senator Cain, a supporter, had said that the Amendment would mean that women would be drafted and assigned jobs based on their individual capacities and the needs of the country. With a war just behind them and the specter of an atomic one facing them, Congress could foresee a need for women in the armed forces. Now the idea of compulsory military service for women seems outrageous to some senators. Emerson, \emph{op. cit.}, p. 888.

\textsuperscript{51}Emerson, \emph{op. cit.}, p. 886.
### LEGISLATIVE HISTORY OF THE EQUAL RIGHTS AMENDMENT

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|      |       |       | S. Rep #1150      |                   | 103          | 5073,9593,15999,16681 |
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PART II
THE EFFECT OF THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment is designed to achieve for women equality under the law. Perhaps the greatest area of doubt concerning the ERA stems from the Amendment's central principle of equality. How absolute is this equality? How will the courts rule on cases brought under the ERA? Concerns such as these are widespread and deserve careful analysis. These questions will have to be answered individually by the usual process of constitutional adjudication, but the equality principle can be examined in the context of existing constitutional doctrine.

1. Sex as a Classification

"What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their functional attributes. The boundaries between social policies that are genuinely protective of the familial and maternal functions and those that unjustly discriminate against women as individuals must be delineated."52 Discrimination resting upon characteristics such as strength, intelligence, and the like may be practiced on an individual basis, but not on the basis of sex because one sex has this characteristic to a greater degree than the other sex. "In short, sex is

52 Jane Crow, p. 239.
prohibited as a classification."\(^{53}\)

The Equal Rights Amendment, then, stands for the principle that classification by sex is always a vast overclassification. This principle is derived from two judgements inherent in the decision to eliminate from our legal system discrimination against women. "First, the Amendment embodies the moral judgement that women as a group may no longer be relegated to an inferior position in our society. They are entitled to an equal status with men... (which) can be achieved only by merging the rights of men and women into a 'single system of equality.'"\(^{54}\) A dual system of equality, as noted earlier, always has relegated one class to a subordinate position. This dual system exists today in the law of the United States. Anything short of establishing a single system of equality would maintain the present inferior status of women, with a dual system of sex-based rights and responsibilities.\(^{55}\)

Second, "classification by sex, apart from the single situation where a physical characteristic unique to one sex is involved (as will be discussed below) is always an overclassification."\(^{56}\) Classification by sex places half our population in one category regardless of whether or not a particular individual fits the characteristics intended to be specified in a law. To so classify by sex is to disregard the basic concern of our society for the individual. "As individuals, women

\(^{53}\)Emerson, p. 889.

\(^{54}\)Ibid., 890.

\(^{55}\)Ibid.

\(^{56}\)Ibid.
seek equality of opportunity for education, employment, cultural enrichment, and civic participation without barriers built upon the myth of the stereotyped 'woman'. As women, they seek freedom of choice: to develop their maternal and familial functions primarily, or to develop different capacities at different stages of life. . . . "57

The Equal Rights Amendment must be applied comprehensively and without exceptions to achieve group equality and individual self-fulfillment. This is true for several reasons: First, administrative efficiency has been cited as a reason for sex differentiation when classifying. This rationale of expediency would hardly be countenanced if race or national origin were to be used as classification criteria. The Equal Rights Amendment would make the constitutional judgement that classification by sex is not permissible in the quest for administrative efficiency.58 Other more pertinent criteria must be employed in defining a class. Second, to the extent that exceptions are made, women remain a subordinate class. These exceptions would, as noted in Part I, result in unequal treatment for women in other areas as well.59

Third, "courts would face the difficult threshold problem of determining the applicability of the exceptions . . . ."60 Such judgments could be made only under a system of dual rights and

57 Jane Crow, p. 239.
58 Emerson, p. 891.
59 Ibid.
60 84 Harv. Law. Rev. 1522.
responsibilities by the same legislatures and courts which maintain the present inequitable system.

It is obvious from this analysis that to make exceptions to the basic premise of equality would come close to creating a constitutional redundancy. 61 62 "The constitutional mandate must be absolute." 62

This absolute legal principle has "led to fears that courts would interpret the amendment, not as a requirement for active review, but as a mandate to sweep away all statutory sex distinctions per se, with no exceptions." 63 Such a per se approach could have been adopted under the language of the Fourteenth Amendment regarding racial distinctions, but, "despite judicial hints to the contrary, 64 it has never authoritatively received such an interpretation." 65

The fact is that the Supreme Court could now accomplish many of the ends that are feared would suddenly come about with passage of the Equal Rights Amendment by construction of the Fourteenth Amendment.

61 See especially Ibid., p. 1523.
62 Emerson, p. 892.
63 Harvard Law Rev. 1523.
64 McLaughlin v. Florida. 379 U. S. 184, 198 (1964) (Stewart, J. concurring) (suggesting a per se approach limited to criminal cases.)
To say that the courts and legislatures would follow, under either the Fourteenth Amendment or the Equal Rights Amendment, a per se interpretation, would be an assumption that "the courts and the legislatures will act irresponsibly and capriciously, without regard to the public welfare." 66 Many of the absurd results feared, such as a requirement of public toilet facilities, are "dramatic but are diversions from the major issues." 67 Laws dealing with a physical characteristic unique to one sex would not be precluded. "Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men . . . (because) it does not ignore individual characteristics found in both sexes in favor of an average based on one sex." 68 Only those laws relating to a physical characteristic, not so-called "secondary" biological characteristics and cultural characteristics, would be allowed because these others are found to some degree in both sexes. "Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the Equal Rights Amendments as demonstrating its nonviability." Thus not only would laws concerning wet nurses and sperm donors be permissible, but so would laws establishing medical leave for childbearing (though leave for childrearing would have to apply to both sexes.) Laws punishing

67 Emerson, 893.
68 Ibid.
forcible rape, which relate to a unique physical characteristic of men and women, would remain in effect. So would legislation relating to determination of fatherhood. 69

A question that is sure to arise is how to deal with the statute that is on its face "sex-neutral" but which, in fact, is a discrimination. The problem has been dealt with frequently in other areas. As one court stated:

A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissive. 70

Where "impartial" administration of a statute or regulation would serve only to perpetuate . . . inequities in a different form, that statute cannot be called constitutional. 71 To guard against such encroachments on the guarantees of the Amendment, the courts will have to maintain the strict scrutiny they have given to other important rights.

One further qualification of sex as a classification lies in the fact that the Equal Rights Amendment must take its own stature within the context of all existing constitutional law. Of prime importance to this, the stature of the Equal Rights Amendment, is the constitutional right to privacy which was first expressed in Griswold v. Connecticut. 72

69 Ibid.


72 381 U. S. 479 (1965).
The right was drawn from a "penumbra" cast by more specific rights expressed in the First, Third, Fourth, Fifth, and Ninth Amendments. While the exact place of the right to privacy is not well established within the framework of constitutional law, "it is clear that one important part of the right to privacy is to be free from official coercion in sexual relations." Thus, under current mores, disrobing in front of the other sex is usually associated with sexual relations. Relying on this reasoning, a court recently held that a police search that requires removal of clothing could be performed only by a police officer of the same sex as the person searched. The right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of public institutions, and appropriate segregation of living conditions in the armed forces. The privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex. Opponents of ERA have both magnified concerns over these areas and completely disregarded the impact of the young, but fully recognized, constitutional right of privacy.

This doctrine of privacy, it might be added, would be preferrable

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73 Emerson, p. 901.

74 York v. Story, 324 F. 2d 450 (9th Cir. 1963), cert. denied, 376 U. S. 939 (1964).

75 Emerson, p. 901.

76 Ibid. p. 901-902.
to the doctrine of separate-but-equal. 77 "It could be argued that just as separate schools for Negro and white children by their very nature cannot be 'equal', 78 classification on the basis of sex is today inherently unreasonable and discriminatory." 79 The privacy principle not only is more specific in application of such laws, but also avoids the problems encountered under Plessy v. Ferguson in trying to differentiate the treatment which implies inferiority from that which does not. The privacy principle is also more in keeping with the essential matter of constitutional mechanics of the Equal Rights Amendment, that all differentiation is prohibited.


"In cases challenging statutes under the Equal Rights Amendment the courts will be faced with essentially two alternatives: either to invalidate the statute or to equalize its application to the two sexes." 80 Although it is impossible to know exactly which course the courts will choose, "... it is possible to predict with considerable accuracy what the courts will do in most situations." 81

In reviewing a statute that is under constitutional attack, the

79 Jane Crow, p. 240.
80 Emerson, p. 913
81 See, Note 72, Ibid.
courts will look primarily to the legislative intent of the statutes. But such intent is not always easy to ascertain. When this situation occurs, the courts must provide rough guides to probable legislative intent, and rational results in adjusting statutes. 82

"The first of these interpretive factors is a practical consideration of the importance of the legislation and the feasibility of retaining it in the altered form required by a constitutional mandate." 83 Thus a court would hesitate to invalidate a law pertaining to taxes or voting, because they are crucial to the political system. Also it would not be feasible to extend to men a law prohibiting night work by women. 84 In each type of case the court would strive for rationality.

"Second, the courts are influenced by the proportional difference between what the original enactment was designed to cover relative to how much it can or must constitutionally include." 85 Thus if a new class is to be added, if it is smaller in comparison to the class already included, generally it will be added. But if the reverse is true, the matter will be referred back to the legislature. 86

82 Ibid., p. 914.
83 Ibid.
85 Emerson, p. 915.
86 E.g. Quong Ham Wa Co, v. Industrial Accident Comm., 184 Cal. 26, 192 Pac. 1021 (1920), appeal dismissed 225 E. S. 445 (1921).
"A third factor which strongly influences the courts is whether the statute in question is civil or criminal."\(^{87}\) Courts are very careful to strictly construe penal statutes. "To avoid judicial of creating new crimes beyond those established by the legislature, courts will refuse to extend a criminal law to cover groups of people . . . excluded on the face of the law."\(^{88}\)

Similar to the criminal-civil distinction is a less important and well-defined distinction; the burden benefit distinction. A court is less likely to adopt a construction that extends a burden than one that extends a benefit.\(^{89}\) This generalization must be qualified in that a balancing test must consider whether the new benefit for one class imposes a new burden on another. Where the burden is borne by individuals or small groups the court acts differently than if the burden were to fall on the general public.\(^{90}\)

A final factor is the claim by judges dating back to United States v. Reese\(^{91}\) that courts lack the power to add words to a statute. "An examination of the cases in which courts have refused to reach a given result for methodological reasons suggests that alternative bases exist for most of these decisions, including hostility on the part of the court to the substantive policy embodied in the

\(^{87}\) *Emerson*, p. 915

\(^{88}\) *Ibid.*

\(^{89}\) e.g. *ex parte* Yarborough, 110 U.S. 651 (1884).

\(^{90}\) See e.g. Burrow v. Kapfhammers, 284 Ky. 753, 145 S.W. 2d 106 (1940).

\(^{91}\) 92 U.S. 214 (1875).
These rules viewed as a body of principle seem to show that courts generally try to impute to a statute the action that would have been taken by the legislature had the new constitutional mandate been known. The courts, then, have well established doctrines and experience to handle equal rights problems without arriving at absurd results. The Equal Rights Amendment will find its place within existing constitutional framework.

B. The Amendment in Operation.

Part A on the constitutional stature of the Equal Rights Amendment provides a general framework of ERA's place in Constitutional law, and how ERA will be implemented under a test of constitutionality in court. But much of the debate over the Equal Rights Amendment is concerned with specific laws and the idea of ERA's predictability. The four areas discussed in this section— protective labor legislation, domestic relations law, criminal law, and the military— have raised many serious doubts in people's minds. Much has been written on these topics, ranging from proof of inequalities to sophisticated analysis of particular statutes and regulations. This work is not well suited to repetition of this material. Therefore, only brief and generalized descriptions of the impact under the Equal Rights Amendment in each area will be given.

92Emerson, p. 917. See e. g., Holy Trinity Church v. United States, 143 U. S. 457 (1892) for violation of the Reese rule.
1. Protective Labor Legislation

In years past much legislation was designed to protect women in the labor force.93 Groups favoring equal rights for women did not support the Equal Rights Amendment fearing that "it would deprive working women of important gains achieved only after hard-fought battles in the late Nineteenth and early Twentieth centuries. Most labor groups currently opposing the Amendment invoke the same argument."94 Many changed because:1) it has been realized that under present conditions, this type of legislation has proved to be more oppressive than protective in its effect. 2) Title VII of the Civil Rights Act of 1964,95 which expressly forbids discrimination in employment by sex, has already eliminated much of this type of legislation.96 The table on the following page shows that state protective laws are being gradually phased out.

Title VII provides that it shall be an "unlawful employment practice" for employer engaged in a business affecting interstate commerce, who has twenty-five employees or more, to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin."97 Under the Act, the

93 See, e. g., the Muller discussion, page 7.
94 Emerson, p. 922.
96 Emerson, p. 922.
SIGNIFICANT CHANGES IN STATE PROTECTIVE LAWS SINCE 1966

A. Changes by State Legislatures and State Officials

Repealed hours laws

Arizona  New Jersey
Delaware  New York
Montana  Oregon
Nebraska  Vermont

Extended weightlifting law to men

Georgia

Rulings by Attorney General that state laws are superseded by Title VII or state Fair Employment Laws

District of Columbia  Pennsylvania
Illinois  Rhode Island
Kansas (by Commissioner of Labor)  South Dakota
Massachusetts  Washington
Michigan  Wisconsin
Oklahoma

Exemption from hours laws of those covered by Fair Labor Standards Act or comparable standards

California *  North Carolina
Kansas  Tennessee
Maryland  Virginia

Exemption from hours law if employee voluntarily agrees

New Mexico

No prosecutions now because of uncertainty as to effects of Title VII.

North Dakota

B. Changes by Court Decisions

Hours Laws (cases cited note 132)

California  Missouri
Illinois  Ohio
Massachusetts  Pennsylvania

Weight Laws

California
Ohio
Oregon

* Exemption only partial.
Equal Employment Opportunity Commission (EEOC) is the agency assigned administration of provisions. Remedy for violation is through the EEOC or, failing there, court action.  

By 1971, the Commission handled 5,280 charges of sex discrimination, most relating to employer practices. While the reasoning in cases under Title VII differs from that under the Equal Rights Amendment, "Title VII gives us a preview of the manner in which the Equal Rights Amendment would displace concepts of 'protective' legislation with principles of equal rights." The trend set by Title VII would be accelerated by the Equal Rights Amendment, forcing adoption of genuine protection for workers of both sexes.

2. Domestic Relations Law

"To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation." The two have long been confused, and as Murray and Eastwood put it:

"The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world, is all too common. Underlying this assumption is the unwillingness to acknowledge any value for child care and home-making because they have not been ascribed a dollar value."  

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98 706 (a)-(k), 42 U.S.C. 2000e-5 (a)-(k).


100 Emerson, p. 927.

101 Jane Crow, p. 259.

102 Ibid., p. 241.
Social attitudes such as this are being seriously challenged today. The present legal structure often embodies such anachronisms as the attitude expressed just previously. While these rigid stereotypes are being broken down already, the Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex. Couples would be free to allocate privileges and responsibilities between themselves according to their own individual preferences and capacities. 104

3. Criminal Cases

Most criminal offenses make men and women equally liable by statutory definitions and would not, therefore, be affected by the Equal Rights Amendment. But in laws pertaining to sexual activity, women are often portrayed as frail or weak-willed in relation to sexual activity, or, conversely, a woman engaging in a certain type of sexual activity is considered to be more depraved than a man engaging in the same conduct. A few laws with a sex bias may be allowed because the bias comes from physical realities. Such would be the case in a forcible rape law. Even rape laws, which have singled out one activity from other sexual offenses for purposes of sentencing,

103See, e.g. Uniform Marriage and Divorce Act. 308

104Emerson, p. 953-54; See Emerson, pp. 936-953 (on domestic relations law generally); Cit. Advisory Council on Women, Women 1971, pp 38-52, (on alimony and other support laws); Wanat, pp. 35-43 (on specific state laws)

105Ibid., p. 954.
embody anachronisms that may work to the disadvantage of both sexes.  

For reasons previously noted, courts will not extend to additional classes the included classes in a criminal statute. Instead, the entire law will be stricken. With passage of the Equal Rights Amendment, the task of changing penal codes would fall to the legislatures. This should not be unduly burdensome because: 1) reform proposals such as the Model Penal Code are available and a nationwide campaign of limited duration could easily provide the necessary cooperation for all states to adhere to the new guidelines. Such campaigns are not unprecedented. For example, the Social Security Act 107 established a complex system of administration across the country in less than eighteen months. 108 2) A two year transitional period is provided for in the Equal Rights Amendment between

106 Maryland's death penalty for rape was held to be cruel and unusual punishment in violation of the Eighth Amendment. Ralph v. Worden 438 F2d 786 (4th cir. 1970). "In conjunction with the severe penalties for forcible rape, the defense of consent has developed. The existence of the consent defense (which is unique to rape) has the effect of putting the complainant on trial, for she will usually be subjected to relentless defense examination, in an attempt to impugn her character and suggest that she actually consented to sexual attack. The consent defense and corresponding trial tactics that have the effect of deterring women from making complaints about rape attacks; the Federal Bureau of Investigation estimates that forcible rape "is probably the most underreported crime by victims to police." Uniform Crime Reports, supra note 201, at 15. As a result, some women's rights advocates have argued that women would actually be better protected if rape were prosecuted simply as aggravated assault." Emerson, p. 960.

107 Ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U. S. C.)

108 Emerson, p. 910.
date of ratification and the date the Amendment will take effect. 109

4. The Military

The long history of male dominance in the Armed Services is easy to explain in light of salient, once immutable, facts. Military success once depended upon physical strength, and women who once had no methods of contraception, were frequently if not constantly pregnant; death was not uncommon in childbirth. Neither of these factors is important today, especially in light of the need for personnel in the military in non-combat positions. "Combat soldiers make up only a small percentage of military personnel." 110

Denial of equality in the Armed Forces not only denies to women a responsibility, it also denies them an important facet of citizenship. Professor Norman Dorsen has said:

When women are excluded from the draft— the most serious and onerous duty of citizenship— their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification. 111

The Equal Rights Amendment, then, would require that women be given fair and equal treatment in this most important area.

109 ERA, Sec. 3. This amendment shall take effect two years after the date of ratification.

110 Emerson, p. 977. This is not to say that women would be excluded from combat duty, only that these positions are few in number. Emerson suggests that since all combat is dangerous, degrading and dehumanizing, there is little difference between brutalizing young men and brutalizing young women.

CONCLUSION

Women in this country are beginning to reexamine their place and status with renewed fervor. Outdated principles embodied in the law have been attacked. The Equal Rights Amendment would provide a constitutional basis for the equality sought by women. Judicial change through interpretation of the Fourteenth Amendment is not likely. Piecemeal revision of laws by legislative bodies has proven to be equally inadequate. A constitutional amendment guaranteeing such rights in the tradition of constitutional guarantees protecting races, freedom of expression, and the guarantee of due process is a proper and necessary step. Privately people will be able to behave in any manner they choose. Yet in the all-important sphere of state activity, the Amendment stands for the proposition that men and women are equal under the law.
APPENDICES

The following graphs show the built-in inequality of our system with the most easily measured indication, money. If absolute numbers mean anything, the graph showing the earning gap between men and women would indicate an increasing problem rather than a decreasing problem.
Notice many women work because their husband's incomes are inadequate or barely adequate to support their families.

- **Married**
  - Husband's Income-$7,000 and over
  - Husband's Income-$5,000-6,999
  - Husband's Income-$3,000-4,999
  - Husband's Income-Under $3,000

- **Widowed, Divorced, or Separated**

- **Single**

Of the 37 million women working in 1968, 40% were supporting themselves. Many were raising children in a fatherless home.
WOMEN ARE THREE TIMES MORE LIKELY AS MEN TO EARN LESS THAN $5,000 FOR YEAR-ROUND FULL-TIME* WORK

*50-52 weeks a year, 35 or more hours per week.

Year-round Full Time Workers By Total Money Earnings and Sex, 1968

About three out of five women, but one our of five men who worked year-round full time in 1968 had earnings of less the $5,000. Moreover, 20% of the women, but only 8% of the men earned less than $3,000. At the upper end of the earnings scale, only 3% of the women but 28% of the men who worked year-round full time had earnings of $10,000 or more.

In 1957, the median earnings of year-round, full time women workers were 64% of those of men. By 1966 the proportion had dropped to 58% where it remained in 1967 and 1968. The earning gap amounted to more than $3,000 in 1968, when the median earnings of year-round full-time women and men workers were $4,451 and $7,664 respectively.

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