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EQUAL RIGHTS FOR MEN AND WOMEN

Mr. BAYH. Mr. President, the noble principle of "equal justice under law" which has guided this country for almost two centuries has, in fact, never been fully realized. We have, it is true, eliminated some forms of invidious discrimination from our midst. But, despite our past efforts, our system is flawed by shameful, inexcusable, morally reprehensible and socially outmoded discrimination against the women of this country.

Perhaps no single statement more eloquently describes the magnitude of sex discrimination in our country today than the one made by Congresswoman SHIRLEY CHISHOLM when she testified before the Senate Subcommittee on Constitutional Amendments, which I am privileged to serve as chairman. The Congresswoman said:

> I have been far oftener discriminated against because I am a woman than because I am black.

The testimony which was presented to Congress in three very recent sets of hearings confirms what Mrs. CHISHOLM said: persistent patterns of sex discrimination permeate our society today.

The joint resolution now before the Senate proposes an equal rights amendment to the U.S. Constitution. The amendment, after ratification by the States, would provide that all Americans men and women alike, shall be treated equally before the law. The proposed amendment, already approved overwhelmingly by the House of Representatives and reported favorably by a 15 to 1 vote in the Senate Judiciary Committee, is a long overdue and fully appropriate means to establish, at last, the just rights of the 51 percent of Americans who happen to be born women.

The proposed amendment is straightforward. It provides in its operative part that—

> Equality of rights under the law shall not be denied or abridged on account of sex.

The goal is to insure that the Federal Government, the State governments, and local governments treat each person, male, and female, on the basis of his or her individual abilities and characteristics—and not on the basis of arbitrary sexual stereotypes as is now all too often the case. The principle on which the amendment is based is one on which we should all be able to agree: a person's sex should not be a factor in determining one's rights under the law.

Mr. President, the social and economic cost to our society as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty. In a great country like ours, dedicated to the dignity and freedom of the individual, we cannot allow sex discrimination to persist.

THE NEED FOR THE EQUAL RIGHTS AMENDMENT

Mr. President, one of the questions raised when the equal rights amendment is discussed is whether the amendment is really needed. My unequivocal answer is "yes." A great many very distinguished persons and organizations agree with me.

Both major political parties have repeatedly supported this proposal in their national party platforms. It has received the endorsement of Presidents Eisenhower, Kennedy, Johnson, and Nixon. Both the Citizens' Advisory Council on the Status of Women, created by President Kennedy, and the President's Task Force on Women's Rights and Responsibilities, created by President Nixon, have recommended in strongest terms approval of the amendment. At least 11 States, California, Connecticut, Delaware, Florida, Louisiana, Maryland, Minnesota, Nebraska, New York, North Dakota, and Pennsylvania, have taken official action in support of the amendment. The House of Representatives, on October 12, 1971, approved the amendment 354 to 23. Over half the Members of the Senate sponsor the equal rights amendment. Moreover, an impressive list

of organizations have recorded their support of the equal rights amendment. Among them are the following:

American Association of College Deans.
American Association of University Women.
American Association of Women Deans and Counselors.
American Association of Women Ministers.
American Civil Liberties Union.
American Federation of Soroptimist Clubs.
American Home Economics Association.
American Jewish Congress.
American Medical Women's Association.
American Newspaper Guild.
American Nurses Association.
American Society of Microbiology.
American Society of Women Accountants.
American Society of Women Certified Public Accountants.
American Women in Radio and Television.
Association of American Women Dentists.
B'nai B'rith Women.
Church Women United.
Common Cause.
Council for Chistian Social Action, United Church of Christ.
Council for Women's Rights.
Ecumenical Task Force on Women and Religion (Catholic Caucus).
Federally Employed Women.
General Federation of Women's Clubs.
Intercollegiate Association of Women Students.
International Association of Human Rights Agencies.
International Brotherhood of Painters and Allied Trades.
International Brotherhood of Teamsters.
International Union of United Automobile, Aerospace & Agricultural Implement Workers, UAW.
Interstate Association of Commissions on the Status of Women.
Ladies Auxiliary of Veterans of Foreign Wars.
League of American Working Women.
National Association of Colored Women.
National Association of Negro Business and Professional Women's Clubs.
National Association of Railway Business Women.
National Association of Women Lawyers.
National Coalition of American Nuns.
National Education Association.
National Federation of Business and Professional Women's Clubs.
National Organization for Women.
National Welfare Rights Organization.
National Woman's Party.
National Women's Political Caucus.
Professional Women's Conference.
St. Joan's Alliance of Catholic Women.
Unitarian Universalist Women's Federation.
United Automobile Workers.
United Methodist Church—Women's Division.
Women's Christian Temperance Union.
Women's Equity Action League.
Women's International League for Peace and Freedom.
Women's Joint Legislative Committee for Equal Rights.
Women United.

Finally, a number of distinguished constitutional scholars have testified in support of the equal rights amendment, including Prof. Norman Dorsen of New York University, Prof. Thomas I. Emerson, Lines professor of law at Yale Law School, and Leo Kanowitz, professor of law at the University of New Mexico. Moreover, the Association of the Bar of the City of New York, through its Committee on Civil Rights and Special Committee on Sex and Law has urged "Adoption of the equal rights amendment as the best means of establishing equality before the law.

And the American Bar Association recently adopted a resolution which "Supports constitutional equality for women, and urges extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

One cannot help being impressed by the broad base of political, public, and scholarly support for the equal rights amendment. The support would not be so great if the amendment were not greatly needed.

True it is, Mr. President, that some legislative progress has been made toward equal rights but not enough to wipe out all discrimination against women in State and Federal law. Congress approved title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment unless sex is a "bona fide occupational qualification." Congress approved the Equal Pay Act which assures that many persons who do equal work receive equal pay regardless of sex. But these laws fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly.

The Supreme Court has been slow to move, too; recently, for the first time, it did invalidate a State law which discriminated against women, but it did so in a way which left the burden of proof on each woman plaintiff to show that the law is unreasonable. The Court has consistently refused to apply the 14th amendment to discrimination based on sex with the same vigor it applies the amendment to distinctions based on race.

In the States, progress has been mixed. Some States have made diligent efforts to revise outmoded and discriminatory laws, and three States—Illinois, Pennsylvania, and Virginia—have recently approved State constitutional provisions banning sex discrimination. But in other States, there has been no progress whatsoever.

On the whole, sex discrimination is still much more the rule than the exception. Much of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education, and other areas.

Specific examples of sex discrimination are legion, and have been brought to the attention of Congress many times, through hearings on the equal rights amendment and on other legislation. I would like today to touch on just a few of the most well-known and far-reaching examples of invidious sex discrimination.

Difficult as it is to believe, women are sometimes denied even the basic rights and responsibilities of citizenship in the United States today. Until 1966, for example, three States excluded women from juries altogether. And today there is still at least one State which requires women, but not men, to register specially to be eligible to serve on juries.

There is also invidious discrimination against women in the criminal laws of some States. One State has a statute allowing women to be jailed for 3 years for habitual drunkenness, while a man can receive only 30 days for the same offense. In two States, the defense of "passion killing" is allowed to the wronged husband, but not to the deceived wife. And in another State, female juvenile offenders can be declared "persons in need of supervision" for noncriminal acts until they are 18, while males are covered by the statute only until age 16.

Governmental action also contributes significantly to sex discrimination in education. Approximately 75 percent of the college students in the country attend publicly supported institutions. These colleges and universities have a crucial role in determining employment opportunities for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country. As an independent report prepared for the Department of Health, Education, and Welfare this year stated:

> Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.

Discrimination in admission to college is widespread. In 1968, only 18 percent of the men entering public 4-year colleges had a high school grade average of B+ or better. But 41 percent of the freshmen women had attained such grades. In 1969 one State university published an admissions brochure which stated:

> Admission of women on the freshman level will be restricted to those who are especially well qualified.

Another State university admitted women only for summer school sessions, and never to the regular academic curriculum, unless they are related to employees or students and wish to pursue a course of study otherwise unavailable.

Discrimination in admission to graduate schools is, if anything, even more widespread, despite the fact that women's undergraduate grade point averages are higher than men's. Testimony before the House Special Subcommittee on Education in 1970 revealed, for example, that the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929–30 and 1965–66—while male applications increased by only 29 percent. The percentage of women applicants who were accepted actually declined during the same period. And while women received 55 percent of the bachelors degrees awarded in all fields in 1968–69, women received only 37 percent of the masters degrees, only 13 percent of the doctorates, and only 4 percent of the professional degrees.

Discrimination against women does not end with admission; it pervades every level of the teaching profession. While 75 percent of the teachers in public elementary and secondary schools are women, only 22 percent of the elementary

school principals and only 4 percent of the high school principals are women. At the college level, statistics show that while almost half of the male teachers become full professors only 10 percent of the female teachers are granted that status.

The business and labor laws of some States discriminate invidiously against women. Some States place special restrictions on the right of married women, but not married men, to contract or to establish independent businesses or to become a guarantor or a surety. Perhaps even more astounding, in 1970, 26 States had laws o regulations which prohibited the employment of adult women in specified occupations or industries which were open to adult men.

Most States have enacted so-called protective labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a woman can lift or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. Speaking of such restrictive laws as a whole, the Equal Employment Opportunities Commission states in its guidelines on sex discrimination:

The Commission believes that [State laws which restrict or limit the employment or conditions of employment of females] although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect.

Partially because of these laws, and also because of other sorts of sex discrimination, working women are at a great disadvantage in the private sector. The median salary income for women is only 59.5 percent of that earned by men and in recent years the gap between male and female median incomes has been widening.

Sex discrimination is clearly present even in Government employment, which in total accounts for more than 20 percent of the labor force. For example, although women constituted 34 percent of all full-time white collar Federal Civil Service Employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four highest grades. And sex discrimination in Government has an effect even greater than the numbers involved, for private employers often look to Government as a model for employment practices.

It is sometimes argued that all of the discriminatory laws and practices which exist could be eliminated without a constitutional amendment. If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding state interest," then part of the reason for the amendment would disappear. But the Court has persistently refused so to hold. Indeed, the Court has upheld many laws which plainly discriminate against women.

Its first significant case involving sex discrimination was *Bradwell* v. *Illinois*, 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. The Court relied on the privileges and immunities clause of the 14th amendment and not the equal protection or due process clauses, to uphold the law. Two years later, the Court held that the 14th amendment did not confer on women citizens the right to vote, in *Minor* v. *Happersett*, 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

Later, the Court began to apply a standard of "reasonableness" to laws which discriminated on the basis of sex. This test was employed to uphold against constitutional attack labor laws which apeared to have little if any reasonable justification. A good example is the case of *Goesart* v. *Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court in Goesart assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied.

Mr. President, the hypocrisy of that law is a good example of the discrimination we are trying to eradicate. What reasonable grounds can a State have for suggesting that those female citizens are more in need of protection from lecherous male customers that are employed behind the bar than if those who serve drinks in front of the bar, and thus be protected? It is ridiculous. The double standard is obviously discriminatory and even more obviously should be swept away.

More recently, in *Hoyt* v. *Florida*, 386 U.S. 57 (1967), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the 14th amendment, since it was reasonable "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."

The Court said nothing at all about the fact that a man who has custody of young children might face the same difficulties as a woman.

Last year the Supreme Court for the first time struck down a law which discriminated against women. In *Reed* v. *Reed*, 40 U.S.L.W. 4013 (1971), the Court invalidated a State law which arbitrarily favored men over women as administrators of estates. But the Court did not overrule such cases as Goesart and Hoyt, and it did not hold that sex discrimination is "suspect" under the 14th amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable." And that is a difficult burden to carry, indeed. As the Association of the Bar of the City of New York pointed out in its recent report:

[t]he 1971 *Reed* case indicated no substantial change in judicial attitude.

Passage of the equal rights amendment will make it clear that the burden is not on each woman plaintiff to show sex discrimination is "unreasonable"; the amendment will, instead, assure all men and women the right to be free from discrimination based on sex.

Of course, it would theoretically be possible for Congress and each State to revise their laws and eliminate those which discriminate against women. But without the impetus of the equal rights amendment, that process would be far too haphazard and much too slow to be acceptable. We cannot afford to wait any longer for Congress and each of the 50 State legislatures to find the time to debate and revise their laws. As in other areas where the Constitution has been amended, there is an imperative for immediate action. The Nation has waited too long already—it has been 49 years since the equal rights amendment was first introduced; and it has been over a hundred years since the 14th amendment was ratified; and it has been close to 200 years since our Nation was founded. For all this time, invidious sex discrimination has plagued our society. Only a constitutional amendment can provide the legal and practical basis for the necessary changes.

After 200 years of history, the time has come to sound the death knell and signal the end of discrimination against a class of Americans who happen to constitute a majority of the citizenry of this land.

Finally, we cannot overlook the immense symbolic importance of the equal rights amendment. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land.

For all these reasons, Mr. President, I believe that the need for the equal rights amendment is undeniable.

THE EFFECTS OF THE EQUAL RIGHTS AMENDMENT

Let me turn now to the effect that the equal rights amendment—in its unamended form, as passed by the House—will have. I have already outlined the general principles on which the amendment rests: All levels of government must treat each person, male or female, as an individual, and not on the basis of sex. The amendment affects only gov-

ernmental action; it does not affect the private action or the social relationships between men and women. And the amendment only requires equal treatment of men and women as individuals; thus, it does not require any level of government to establish quotas for men or women in any of its activities. In short, the amendment simply prohibits discrimination on the basis of sex.

The separate views of Congressman EDWARDS and 13 other members of the House Judiciary Committee in the House report on the equal rights amendment state concisely and accurately the understanding of the proponents of the amendment. I would like to read some excerpts from that report:

The basic premise of House Joint Resolution 208 in its original form is a simple one. As stated by Professor Thomas Emerson of Yale University, one of the Nation's foremost authorities on constitutional law, the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.

The existence of a characteristic found more often in one sex than the other does not justify legal treatment of all members of that sex different from all members of the other sex. The same is true of the functions performed by individuals. The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex.

The main reason underlying the basic concept of the original text derives from both theoretical and practical considerations. The Equal Rights Amendment (H.J. Res. 208) embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society with the individual, and with the right of each individual to develop his own potentiality.

The legal principle underlying the Equal Rights Amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the medical cost of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

Just as the principle of equality does not mean that the sexes must be regarded as identical, so too it does not prohibit the States from requiring a reasonable separation of persons of different sexes under some circumstances. In this regard, two collateral legal principles are especially significant. One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.

Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

With respect to other constitutional considerations, it should be noted that (H.J. Res. 208) would apply only to governmental action, and not to private or individual action. In this regard, as well as in some of its other features, (H.J. Res. 208) is similar to those provisions of the 14th Amendment which are directed against racial, ethnic, and religious discrimination. Thus, in interpreting (H.J. Res. 208) the courts would have available a substantial body of case law which would be used as a guide when relevant. At the same time much as the struggle of women for equality is comparable to that of racial, ethnic, and religious minorities, there are some differences which the courts could also take into account in appropriate cases.

Because a great deal of controversy has arisen over the impact of the equal rights amendment in specific areas, I would like to comment briefly on the likely effect of these general principles on such areas.

First let me speak about military service. It seems clear that the equal rights amendment will require that women be allowed to volunteer for military service on the same basis as men; that is, women who are physically and otherwise qualified under neutral standards could not be prohibited from joining the service solely on the basis of sex. This result is highly desirable for today women are often arbitrarily barred from military service and from the benefits which flow from it: For example, educational benefits of the GI bill; medical care in the service and through veterans' hospitals; job preferences in Government and out; and the training, maturity, and leadership provided by service in the military itself.

There could be no question about the fact that women could make and have made substantial contributions in the service of our country. Yet, the hard fact is that today even as a volunteer in our Armed Forces a woman must meet a substantially higher standard than her male counterpart before being permitted to volunteer.

It seems likely as well that the equal rights amendment will require Congress to treat men and women equally with respect to the draft. This means that, if there is a draft at all, both men and women who meet the physical and other requirements, and who are not exempt or deferred by law, will be subject to conscription. Once in the service, women, like men, would be assigned to various duties by their commanders, depending on their qualifications and the service's needs.

Of course, the amendment will not require that all women serve in the military any more than all men are now required to serve. Those women who are physically or mentally unqualified, or who are conscientious objectors, or who are exempt because of their responsibilities—for example, certain public officials; or those with dependents—will not have to serve, just as men who are unqualified or exempt do not serve today. Thus the fear that mothers will be conscripted from their children into military service if the equal rights amendment is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service. For example, Congress might well decide to exempt all parents of children under 18 from the draft.

The members of the House Judiciary Committee, quoting from the report of the Senate Judiciary Committee on the equal rights amendment in 1964, said the same thing this fall:

It could be expected that women will be equally subjected to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the government would not require that women serve where they are not fitted just as men [are not required to serve where not fitted.]

Congresswoman MARTHA GRIFFITHS, the primary sponsor of House Joint Resolution 208, said on the floor:

The draft is equal. That is the thing that is equal. But once you are in the Army you are put where the Army tells you where you are going to go.

Congressman EDWARDS, who had chaired the House subcommittee hearings on the equal rights amendment, put it this way:

Women in the military could be assigned to serve wherever their skills or talents were applicable and needed, in the discretion of the command, as men are at present.

This is the same view expressed by witnesses at the hearings and by other interested parties. For example, the National Association of Women Lawyers has stated their view that, under the equal rights amendment, females "would be subject to the draft on the same basis as young men" and "women in the military would receive the same benefits and veteran's preferences, employment, education skills learned in the service."

Second, I would like to discuss State legislation which will be affected by the equal rights amendment. A number of States have laws which restrict or limit the occupations or conditions of employment of females, but not of males. These laws are often called protection, but in practice many of them discriminate against women by making it difficult and sometimes impossible for a fully qualified woman to obtain certain jobs, often highly desirable ones. Because of title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment in certain instances where sex is not a "bona fide occupational qualification" these laws are not nearly as great a barrier to fair employment for women as they once were. Nevertheless, some States retain their laws.

Most of the so-called protective laws were passed to protect women from exploitation in another era, and they represented hard won progress. But today, some are merely restrictive, and because they apply only to women confer no real benefit. For example, some States have laws which absolutely prohibit women, whether qualified or not, from certain jobs—jobs which are open to men. The

bar-tending prohibition previously referred to is an example of this type of law. Other States have weight lifting laws applicable only to women which effectively deny fully qualified women certain jobs, even though the weight which is prohibited has no relevance to the job. Such laws often do not take into consideration the fact that some women may be able to lift as much weight as some men. Still others have laws limiting the hours women may work—and these sometimes prevent women from gaining promotions to supervisory positions. As the Equal Employment Opportunity Commission has found, such laws "do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect."

State laws limiting hours of work have a particularly bad effect on our society. Some suggest that to wipe away all of the discrimination against women in employment and remuneration would cause large numbers of mothers to leave home, thus exposing their children to an unstable family situation. This is not true. The fact is that today millions of women are working; millions of women are working to try to support their families, either independently or in conjunction with their husbands.

No measure we pass is ever going to reverse that. Those who oppose the equal rights amendment too often overlook the fact that 40 percent of all the women who work today are the sole support of their children. To limit them to 8 hours a day and 40 hours of work a week means they are denied time and a half pay and double time for overtime work. It denies them the opportunity to work up the ladder of managerial responsibility because nobody gets into a managerial position if limited to 8 hours a day.

Mr. President, some say these laws are to protect women. I disagree. They discriminate not only against women but also against the children of the hundreds of thousands of women who work and are the sole support of their families.

Ratification of the equal rights amendment will result in equal treatment for men and women with respect to the labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit which offer real protection will, it is expected, be extended to protect both men and women. Examples of laws which may be expanded include laws providing for rest periods or minimum wage benefits or health and safety protections. Men are now sometimes denied the very real benefits these laws offer. As Prof. Leo Kanowitz has pointed out—

> The fears of some opponents of the [Equal Rights A]mendment that its adoption would nullify laws that presently protect women only are thus unfounded—since the equality of treatment required by the [A]mendment can be achieved by extending the benefits of those laws to men rather than by removing them for women.

The Association of the Bar of the City of New York pointed out in discussing laws requiring rest periods for women only, that they "may be extended to both sexes without burden or disruption."

A closely related question is whether laws found unconstitutional under the equal rights amendment will be struck down or extended to cover both men and women. This question extends beyond the area of labor legislation. Of course, the legislatures of the several States will have the primary responsibility for revising those laws which conflict with the equal rights amendment. Indeed, the purpose of delaying the effective date of the equal rights amendment for 2 years after ratification is to allow legislatures—particularly those which meet only in alternate years—and agencies an opportunity to review and revise their laws and regulations. As stated above, it is expected that any labor law, or other legislation, which is truly protective will be extended to include both sexes, while laws which are restrictive will become null and void.

In those situations where a court finds a State or Federal law in conflict with the equal rights amendment, the legal infirmity will be cured either by expanding the law to include both sexes or nullifying it entirely. As I have said, it is expected that those laws which are discriminatory and restrictive will be stricken entirely as the court did in *McCrimmon* v. *Daley,* 2 FEP Cases 971 (N.D. Ill. March 31, 1970) which involved a law banning women from a certain occupation. On the other hand, it is expected that those laws which provide a meaningful protection would be expanded to include both men and women, as for example minimum wage laws, see *Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368 (E.D. Ark. 1970), or laws requiring rest periods—see Equal Employment Opportunities Commission Case No. 6-8-6654 (June 23, 1969), 1 CCH Employ. Prac. Guide 6021.

There can be no question that the courts, upon holding a statute unconstitutional, can expand the scope of the statute if necessary to cure its legal infirmity. As Mr. Justice Harlan said, concurring in *Welsh* v. *United States,* 398 U.S. 333, 361 (1970):

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

The Supreme Court has applied this principle in many cases. In 1880, for example, the Court extended a State statute limiting jury service to "electors" to include blacks enfranchised by the 14th and 15th amendments rather than striking the law down. *Neal* v. *Delaware,* 103 U.S. 370 (1880). In *Sweat* v. *Painter,* 339 U.S. 637 (1950), and *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950) the Court held that State laws restricting access to State institutions of higher education on the basis of race were unconstitutional; it expanded the laws so that black students had equal access. And in *Levy* v. *Louisiana,* 391 U.S. 68 (1968), the Court extended to illegitimate children the right, restricted by a State statute to legitimate children, to recover wrongful death benefits.

Let me touch, finally, on a few other areas where the equal rights amendment may have some impact. The general principles I have discussed will govern in all areas. With respect to criminal law, for example, the amendment will prohibit a State from providing for different punishments for men and women who commit the same crime, see *Commonwealth* v. *Daniel,* 430 Pa. 642, 243A. 2d 400 (1968). But the amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men.

One of the tragedies is that some of our criminal laws, which are to protect all society, treat and punish women more harshly for committing the same crime that a man might commit. At this moment I recall two or more States which permit self-defense in a crime of passion when a man slays his spouse upon finding her in a compromising situation.

In two States, the defense of "passion killing" is allowed to the wronged husband, but not to the deceived wife: Hardly equal treatment under the law. In another State, female juvenile offenders can be declared "persons in need of supervision" for noncriminal acts until they are 18, while males are covered by the statute only until age 16. Hardly equal treatment under the law. One State has a statute allowing women to be jailed for 3 years for habitual drunkenness, while a man can receive only 30 days for the same offense.

With respect to education, the equal rights amendment will require that State supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The amendment would not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population; rather admission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. A similar result may be expected with respect to the distribution of scholarship funds.

This is certainly not the case today. The total number of scholarships is significantly lower for women. In addition, the per pupil loan or scholarship, on the national average for educational benefits is much lower for women than for men.

Mr. President, State schools and colleges currently limited to one sex would have to allow both sexes to attend. Employment and promotion in public schools would, as in the case of other governmental action, have to be free from sex discrimination.

It should also be noted with respect to education that the amendment would not require that dormitories or bathrooms be shared by men and women.

This is another of the issues that has been raised to try to divert our gaze from the real purpose and effect of this amendment.

As I have explained, the amendment does not prohibit the separation of the sexes where the right of privacy is involved. As the Association of the Bar of the City of New York pointed out in its report—

> [t]he constitutional right of privacy could be used to sanction separate male and female

facilities for activities which involve disrobing, sleeping and personal bodily functions.

The equal rights amendment may also have an effect on those State laws affecting domestic relations. In this area, as elsewhere, the amendment will prohibit discrimination based on sex. This will mean that State domestic relations laws will have to be based on individual circumstances and needs, and not on sexual stereotypes.

The report of the Association of the Bar of the City of New York accurately describes the amendment's effect in this area and I would like to read some excerpts from it:

The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. The support obligation of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare.

Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.

Although courts still probably would be reluctant to interfere in the allocation of support between husband and wife in an ongoing marriage, upon the dissolution of marriage, both husbands and wives would be entitled to fairer treatment on the basis of individual circumstances rather than sex. Thus alimony laws could be drafted to take into consideration the spouse who had been out of the labor market for a period of years in order to make a non-compensated contribution to the family in the form of domestic tasks and/or child care.

Prof. Norman Dorsen put it this way in his testimony:

The National Conference of Commissioners on Uniform State Laws recently adopted a Uniform Marriage and Divorce Act which takes an approach similar to that contemplated by the Equal Rights Amendment. It provides for alimony or maintenance for either spouse, and child support by either or both spouses, by defining all duties neutrally in terms of functions and needs of the people involved, rather than in terms of their sex. The action by the Commissioners, a respected and prudent body, deserves special consideration.

In sum, there is no reason to fear that the equal rights amendment will have undesirable effects on the rights of men and women under State domestic relations laws.

CONCLUSION

Mr. President, the measure before us is as important as any which the Senate has considered since I have been privileged to represent the people of Indiana in this body. The equal rights amendment was first introduced in 1923, and it has been studied exhaustively again and again. In the last 2 years, three sets of hearings have been held, and they show the need for the amendment and the desirable effects the amendment will have. The House of Representatives has overwhelmingly approved the amendment, as has the Senate Judiciary Committee. The time has come for the full Senate to act.

There will be, I am sure, attempts to water down the equal rights amendment. I will oppose these efforts. I believe—and I am sure the men and women of America believe—that equality of rights must mean equality of responsibilities, or else it is a charade. We must move now and move forcefully for equality under law regardless of sex.

And we must not, Mr. President, allow fallacious arguments concerning the cost of equality to deter us. For the cost of inequality is truly too high to bear. Not only is there the great personal and social cost, there is also the economic loss which results from underutilization of the talents of women of this country. Nobel Prize winning economist Paul Samuelson, of MIT, has said:

Economics suggests that the removal of discrimination will pay its own way, adding to GNP about what it costs.

Mr. President, the magnitude of the evil of sex discrimination is plain. It cannot be denied. Nor can it be denied that the best way to remedy this blight on the American dream is by a constitutional amendment. It is time to resolve that the women of this country shall no longer be subject to second-class citizenship. It is time to resolve that they, like their fathers, husbands, and sons, and every American, are first-class citizens of this great Nation.