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Senate

EQUAL RIGHTS FOR MEN AND WOMEN

The PRESIDING OFFICER (Mr. GRAVEL). Under the previous order, the Chair lays before the Senate the unfinished business, which the clerk will state.

The assistant legislative clerk read the title, as follows:

A joint resolution (H.J. Res. 264) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

The Senate proceeded to consider the joint resolution.

Mr. BAYH. Mr. President, the pending order of business is the equal rights amendment, which was dealt a rather harsh blow yesterday. I do not say "harsh" to be critical of those who disagreed with the Senator from Indiana. But, in the judgment of the Senator from Indiana, yesterday was a sad day. Because of yesterday's vote, on behalf of myself and the distinguished Senator from Kentucky (Mr. COOK), I am now sending to the desk an amendment to House Joint Resolution 264. I ask unanimous consent that the distinguished Senator from Michigan (Mr. GRIFFIN), and the distinguished Senator from New York (Mr. GOODELL) and any other Senators who desire to cosponsor it be added as additional cosponsors, now or at an appropriate time later in the day.

The PRESIDING OFFICER (Mr. GRAVEL). Without objection, it is so ordered.

The amendment will be received, printed, and will lie on the table.

Mr. BAYH. Mr. President, yesterday was a sad day. It was a sad day not only for the advocates of the equal rights amendment, but for all those who believe that the Senate should consider its actions carefully and proceed upon important matters in an orderly and rational manner.

It is unthinkable to me that this body could, without any advance warning, and with a minimum of debate, bring to the floor and attach to the equal rights amendment a measure with such dangerous and far-reaching implications as the so-called prayer amendment. I do not intend to detail here today the reasons why I find the prospects of the prayer amendment so restrictive of the fundamental liberties of all Americans. At this moment I will not dwell at length on my opposition to that piece of legislation, but I will do so at some length at a later time.

The dangers were admirably pointed out yesterday, as they have been in the past, by one of our Nation's foremost constitutional authorities in this area, the distinguished Senator from North Carolina.

I have joined with the Senator in the past to indicate my fear of imposing the requirement of prayer—even the so-called nondenominational prayer—on children of different faiths and beliefs. I have indicated before my fear of placing in the hands of Governors and State legislators the decision whether or not our children will pray in the classroom, and when they will pray, and how they will pray. But I do not rise today to debate the merits of the so-called prayer amendment.

I rise, Mr. President, to try to suggest a way that we can bring order and reason back into this debate. I do not believe that we can give fair consideration to the equal rights amendment when we are faced with amendments suddenly brought to the floor on the eve of elections and without anything approaching an adequate opportunity for consideration. I believe it is absolutely clear that we cannot proceed to final consideration of the equal rights amendment until we return in November. I hope that the distinguished majority leader will make it the pending order of business after we return.

In addition, Mr. President, I think we must recognize that the equal rights amendment has been subject to very strong criticism in this body. In addition to the extraneous amendment adopted yesterday, we also adopted the amendment of the Senator from North Carolina dealing with compulsory military service. A number of other amendments have also been introduced, amendments providing additional exemptions from the application of the equal rights amendment. These amendments would provide exemptions designed to protect the "health" or "safety" or "privacy" or "education" or "economic welfare" of women, or "to enable them to perform their duties as homemakers or mothers."

Mr. President, we must recognize that it has all too often been under the guise of protection that women have been discriminated against under the law. And we must recognize that enshrining into the Constitution these specific exemptions would be an affront to the dignity of American women, a demeaning change in the fundamental law of the land.

I do not mean to contend that the precise language of the equal rights amendment as it passed the House of Representatives has any special magic. We must recognize that House Joint Resolution 264 must already be returned to the House, either for approval there or for a conference. And we must recognize that this language has not been revised in some time, indeed, over a period of time which has seen a dramatic evolution in our concepts of constitutional equality.

Mr. President, I am today proposing that we consider a revision of the equal rights amendment, a revision designed to provide most of the affirmative benefits which are sought by its sponsors,

while meeting the objections of its most articulate critics.

Those of us who support the equal rights amendment have done so because we believe that the 14th amendment guarantee of equal protection of the law must be extended to cases involving discrimination on account of sex. Indeed, the record shows that under the 14th amendment the Supreme Court—although often presented with the opportunity—has never invalidated State action discriminating between the sexes. As the distinguished Representative from Michigan, Mrs. GRIFFITHS, the principal sponsor of the amendment in the House, indicated in a letter to all Members of the Senate:

> Most opponents and all supporters of this Amendment agree that the Fourteenth Amendment, properly interpreted, would make the new Amendment redundant. . . ."

The major objective of the sponsors, therefore, has been to assure that the 14th amendment protection of equality is extended to cases of discrimination on account of sex.

The opponents of the equal rights amendment have contended that the current language is excessively restrictive. Their objections are perhaps best summarized by the testimony of Prof. Paul Freund of the Harvard Law School, who takes the position that "not every legal differentiation between boys and girls, men and women, husbands and wives, is of" an "obnoxious character, and that to compress all these relationships into one tight little formula is to invite confusion, anomaly, and dismay." Mr. President, I have argued on the floor over the period of the last week that there was indeed flexibility built into the equal rights amendment. In my view, and in the view of Mrs. GRIFFITHS, the amendment would allow State action differentiating between the sexes in the cases of "overriding and compelling public interest." But yesterday's vote on the amendment offered by the Senator from North Carolina suggests that the Members of this body are not prepared to accept that judgment.

We are then faced with the cold facts of life. In the judgment of the Senator from Indiana, we are not going to have any action, we are not going to be able to succeed at all, if we retain the present terminology of the equal rights amendment. As I said earlier, this is a sad day. But we must face reality, and hopefully we can get something constructive out of the chaos and the tragedy that befell this important work yesterday.

These, then, are the conflicting concerns that face us—insuring the equal protection of the laws to those who have been discriminated against an account of sex, while recognizing the need for a flexible standard in cases where different treatment under the law may be justified. Mr. President, I am today proposing an amendment which I believe would accommodate both of these important objectives. The essence of my amendment would be the incorporation of the specific language of the equal protection clause of the 14th amendment, and the application of that language expressly to cases of discrimination on account of sex. The crucial section of my amendment would read as follows:

> Neither the United States nor any State shall on account of sex, deny to any person within its jurisdiction the equal protection of the laws.

The amendment would also recognize some of the other criticisms voiced against the House-passed version. It would require ratification within 7 years. It would provide for a 2-year delay in effective date rather than a 1-year delay. And it would provide in language identical to the 14th amendment that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article," thus correcting a potential ambiguity noted by Professor Freund and by Dean Louis Pollak of the Yale Law School.

I am asking that the amendment lie on the table that we all may have a chance to study it during the recess. I hope that after the recess we all will agree that this new language gives us the opportunity, once and for all, to strike away the last vestiges of discrimination against the women of our country.

Mr. President my proposed amendment would have the following effects:

First, this amendment would make it absolutely clear that the Congress and the country do not agree with the implication of the Supreme Court's decisions in this area. Many scholars have contended that these decisions were likely to fall, in time, in any case. The Court's 14th amendment standards have evolved dramatically in recent time. But this amendment would remove any doubt whatsoever, by making the will of the Congress and of the States explicit.

Second, I believe that this amendment would accomplish the great bulk of the specific items of reform sought by the proponents of the equal rights amendment. Passage of this amendment—or passage of the equal rights amendment without change—would do no more than encourage and require the courts and the legislatures to take a fresh look at these specific areas of abuse, under a newly clarified mandate. In my judgment, most if not all of the few serious remaining statutory discriminations that would have been eliminated by the equal rights amendment would fall under my amendment.

Third, the amendment would clearly prevent the kind of restrictive interpretation and disruptive application which the critics have feared. By relying upon the language of the equal protection clause, the amendment would incorporate a vast body of history and judicial precedent, a vast body of experience in dealing with the most difficult questions of discrimination. The standards of application under the 14th amendment have developed into a coherent and comprehensive body of law. And in cases involving important personal rights—such as those we are dealing with in the case of discrimination on account of sex—the courts have developed standards involving a painstaking examination of the grounds asserted as requiring the discrimination. There can be no doubt that this amendment would assure the kind of continuity and consistency for which the opponents of House Joint Resolution 264 have been arguing.

Fourth, and most important, this amendment would retain the most essential benefit of the equal rights amendment—the extraordinary symbolic value of a national mandate in the area of discrimination on account of sex. The addition of this amendment to the Constitution would symbolize our dedication to the cause of equal protection for all Americans. It would demonstrate our determination to insure that we are all in fact equal in the eyes of the law.

Mr. President, I do not expect to seek a vote on my amendment today. I ask that it be printed in the RECORD, so that it may be studied by our colleagues over the recess ahead. I would like to get the views of some leading authorities on this specific proposal. We have not yet had an opportunity to do that. I hope that when we return in November we can give this amendment the kind of careful consideration to which this body is accustomed, and I hope that we will determine to add this amendment to the fundamental law of the land.

The text of the amendment is as follows:

AMENDMENT No. 1062

Strike out all after the resolving clause and insert in lieu thereof the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years of the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. Neither the United States nor any State shall, on account of sex, deny to any person within its jurisdiction the equal protection of the laws:

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

"SEC. 3. This article shall take effect two years after the date of ratification."

(In addition to Senators Cook, Griffin and Goodell, Senators Dole, Javits and Kennedy were added as cosponsors later in the day.)