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EQUAL RIGHTS FOR MEN AND WOMEN

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the unfinished business be laid before the Senate.

The ACTING PRESIDENT pro tempore. The joint resolution will be stated by title.

The assistant legislative clerk read the joint resolution by 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 ACTING PRESIDENT pro tempore. Is there objection to the request of the Senator from Montana?

There being no objection, the Senate proceeded to consider the joint resolution.

Mr. BAYH obtained the floor.

Mr. President, I rise to express my enthusiastic support for House Joint Resolution 264, the proposed amendment to the Constitution to guarantee equal rights for men and women.

As the chairman of the subcommittee which has held hearings on this matter, and as one of the principal sponsors, I feel that it is important to set out the interpretation of the supporters of the measure relative to some of the controversial points. This is important in hopes of persuading some to join in support who otherwise would not. I am also sure that the courts at some future date might look to see what certain of us felt the critical points of the amendment should be interpreted to mean.

In my judgment, Mr. President, only by passing the equal rights amendment can we abolish the discrimination which exists today in the eyes of the law on the basis of sex.

For almost one-half a century, we have failed to take action on this amendment and by failing to act have allowed the women of our country, in many respects, to suffer the burdens of second-class citizenship—burdens which by no reasonable explanation can be justified or should be tolerated.

This proposed amendment provides that—

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have the power, within their respective jurisdictions, to enforce this article by appropriate legislation.

The language of the amendment warrants careful study, for there is considerable controversy over what it does or does not mean. It would not eliminate all the differences between the sexes.

Congressional enactment would not and should not eliminate the natural physiological differences between the sexes. But Federal, State, and local governments can be prohibited from imposing legal distinctions based on sex. That is exactly what the equal rights amendment is designed to do—no more, no less.

As Prof. Thomas I. Emerson, of the Yale Law School, pointed out so eloquently at the recent Judiciary Committee hearings:

The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based on the irrelevant factor of sex.

LEGISLATIVE HISTORY

Mr. President, some complaints have been heard that this amendment has been presented without adequate study. No amendment has been more thoroughly studied than this one. The amendment itself is not new. Resolutions proposing this amendment have been introduced in every Congress since 1923. In earlier years, hearings were held by the House Judiciary Committee in 1948, and by the Senate Judiciary Committee in 1956. The amendment was reported favorably by the Senate Judiciary Committee in the 80th, 81st, 82d, 83d, 84th, 86th, 87th, and 88th Congresses.

In addition, the bill has debated twice previously by this body, in 1950 and 1953. However, both times this measure was passed it had been amended by the addition of the so-called Hayden rider. That rider provided that the amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon person of the female sex." All supporters of the amendment agreed that the rider effectively destroyed the intended result of the amendment. For it is under the guise of "rights and benefits" that women have often been deprived of rights which are available to men.

In other words, the term "rights and benefits," although well-intentioned phraseology, actually has served to penalize women and deny them rights.

It is for this reason that in the 86th Congress, after the Hayden rider had again been added during the floor debate, sponsors of the bill agreed to recommit the bill to committee, rather than have it enacted in that form.

More important, there has been significant new action in this Congress. The Subcommittee on Constitutional Amendments, which I serve as chairman, held 3 days of extensive hearings on the amendment—on May 5, 6, and 7, 1970. We heard 42 witnesses, representing all possible points of view about the amendment, and compiled a record of printed hearings comprising almost 800 pages. The Subcommittee on Constitutional Amendments reported the measure favorably to the full Judiciary Committee on July 28, 1970.

But that is not the full extent of study in this Congress, Mr. President. The Judiciary Committee held a series of additional hearings, including comments from a series of a distinguished law professors.

This year for the first time this amendment was debated on the floor of the House of Representatives. And the way in which it was brought to the floor in the House indicates the wide-spread support that this proposal has across the country. Since the House Judiciary Committee had never reported the joint resolution, Representative GRIFFITHS filed a discharge petition and obtained the requisite number of signatures. The bill was brought before the House on August 10, 1970, and passed by the overwhelming vote of 350–15.

So, Mr. President, I think that this record of floor action and at least four separate sets of hearings clearly refutes the charge of inadequate consideration of this bill. This measure has been before us and the subject of general discussion for more than 47 years. Now is the time for action.

Now is the time to stop pretending that we are in favor of women, widows, and children and to actually give them more equal treatment. Representative GRIFFITHS had to resort to the parliamentary discharge petition, and the majority leader had to ask that that measure be kept on the calendar, rather than being sent back to committee, because only by such tactics can we prevent a few people who are opposed to this measure from keeping us from having a chance to discuss it at all.

Of course, the record of committee study and previous floor action does not mean that there is no need for debate in this body. I welcome the opportunity for debate. I know that all of its supporters do, as well. It is incumbent upon this body as a whole to consider carefully all the issue raised by the joint resolution. The amendments of the Senator from North Carolina should be carefully considered. No change should be made in the Constitution without complete study and full debate. But I think that when my colleagues study this proposed amendment and the record of the hearings which have been held, they will conclude along with me that it is the Senate's turn to act. It is time to assure equality of legal rights for all our citizens.

NEED FOR AMENDMENT

Some opponents of the equal rights amendment argue that it is unnecessary. They feel that the 14th amendment together with a series of statutes have effectively eliminated the type of discrimination which the equal rights amendment would make unlawful. I disagree.

Let there be no doubt about it. We have made considerable progress in recent years. Especially in the last few years the courts have taken great strides toward providing the kind of equality I believe is necessary. I believe that if given enough time the Supreme Court would eventually hold that the equal protection clause of the 14th amendment demands the kind of equality between the sexes which the equal rights amendment would guarantee. But that process would take far too long in my judgment. As Professor Emerson pointed out, the Congress should act now because "There is, in short, a certain amount of legal deadwood which must be cleared away before the courts will be prepared to make clearcut and rapid progress."

Mr. President, inasmuch as our distinguished colleague, the Senator from North Carolina, has challenged the assertions contained in Mrs. GRIFFITHS' letter read by our majority leader, I ask Senators to read the case of *Hoyt* v. *Florida,* 368 U.S. 57 (1961), which involved a Florida statute which did not treat women equally in relation to their availability for jury service is concerned. I think if anyone reads that case and places a reasonable interpretation upon it, he would come to the contrary conclusion.

It seems to me that the Supreme Court has never interpreted the 14th amendment as treating women as truly equal.

A three-judge panel in *White* v. *Crook,* 251 F. Supp. 401 M.D. Ala. (1966), struck down an Alabama statute denying women the right to serve on juries. That case was not appealed to the Supreme Court, and the Supreme Court has not spoken on the matter since then.

The case of Phillips against Martin-Marietta is presently before the Court on certiorari. But if we look at the Government's argument against Martin-Marietta, they do not make their case under the 14th amendment. They make a case based upon title VII of the Civil Rights Act of 1964. They do not make it on the right of women to be treated as equal persons under the 14th amendment.

I cannot see how anyone conversant with the law can look at the Hoyt case and deny the fact that there the Supreme Court of the United States permitted a State statute to stand which, in essence, denies women the same right and opportunity to serve on juries as men. This will come out in the debate, I am sure, in greater detail.

Mr. President, the courts have not been alone. In 1963, Congress passed the Equal Pay Act. It provides that no employer subject to the act shall discriminate in salary "because of sex between different employees for equal work on jobs the performance of which requires equal skill, effort, and responsibility." Another important step was taken in title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, in addition to race and national origin.

It was this section of the Civil Rights Act of 1964 on which the Government bases its contention that Martin Marietta discriminated against Mrs. Phillips. The Supreme Court has now granted certiorari in that case. As I read the 14th amendment's language, it should encompass women. But just because it ought to does not mean that the court has not interpreted it in this manner. Hoyt was decided by the highest court in the land.

The State legislatures have also made great forward strides in recent years. Many of them have worked hard to eliminate discrimination against women in terms of limitations on hours and conditions of work, minimum wages, the age of legal majority, jury service, and many other areas.

Indeed, we have made progress, through Federal and State legislation, through judicial decisions, and through executive action. But much remains to be done.

Let me provide only a few examples. If we are really concerned about these mothers and widows and children, let us look at a few examples of the laws that exist today and see how they treat these women and widows and children.

Until 1966, three States excluded women from juries altogether. In one State, women—but not men—must register specially to be eligible to serve on juries.

In one State, there is a statute allowing women to be committed for up to 3 years in the reformatory for offenses such as "drug using" and "habitual intoxication," although men cannot be sentenced to more than 30 days for drunkenness. That hardly seems like equality.

In at least eight States women cannot contract or sign leases until they are 21, while men can do so at 18.

If women mature at an earlier age than men, why should we give the opposite right to men in these States where men are permitted to contract at the age of 18 and women are not permitted until the age of 21?

California and four other States require a married woman to obtain a court order before establishing an independent business. Eleven States place special restrictions on the right of a married woman to contract. In three States, a married woman cannot become a guarantor or surety.

Women continue to be discriminated against in admissions to public colleges. In the fall of 1968, only 18 percent of the men entering public 4-year college had received high school grade averages of B-plus or better.

But 41 percent of the freshmen women had attained such grades. One State university has published an admissions brochure saying that "Admission of women on the freshman level will be restricted to those who are especially well qualified." There was no such requirement made for men.

Sex discrimination still exists in the labor laws of every State in the Union except Delaware. And despite contrary decisions under title VII of the 1964 Civil Rights Act by the Equal Employment Opportunity Commission, two Federal appeals courts, and several State attorneys general, a recent survey showed that 51 percent of major employers continue to enforce these restrictions.

Thirty-nine State and the District of Columbia impose limitations on the number of hours worked by women. These provisions often preclude women from occupying supervisory jobs requiring overtime.

This is a specific example of what I mentioned a moment ago.

These so-called protective laws which are suppose to give special privileges and rights to women are really "privileging" them right out of meaningful advancement and opportunities in the employment market.

During the hearings the committee was told that 26 States have laws or regulations which completely bar adult women from certain occupations or professions. For example, in nine States, women are not allowed to mix, sell, or dispense alcoholic beverages.

One witness pointed out that the weight-lifting laws in New York only "protect" women from lifting weights in foundries.

As Prof. Norman Dorsen of the New York University Law School said:

> The theory, apparently, is that some mystical essence in foundry weight lifting will injure women, while lifting the same weights in other industries, will not.

Mr. President, those are a few specific examples of some of the discrimination that is going on. I will not bother the Senate with a further list of detailed acts of discrimination, but it is going on. Chapter and verse will come out in the RECORD.

Mr. President, it is clear that there is a legal need for the equal rights amendment. But to my mind the most important reason for enacting this amendment is its symbolic value. The amendment will not eradicate, immediately upon passage, all the unduly discriminatory habits and customs of this country. No amendment or statute could immediately solve the whole problem of unfair discrimination based on sex. The bulk of the prejudice and unfairness against women does not stem from the command of specific statutes. It is much more subtle. It comes from socially engrained ideas about the "proper role of women."

We want to make sure women have the dignity and legal status to which they are entitled. As the Senator from Kentucky pointed out, it is a proper role for women to pay taxes, it is a proper role to serve in the Armed Forces, in philanthropic agencies, and to nurse the sick and administer to the poor, and it is a proper role to provide all sorts of services to the country. Those are proper roles. But many males believe that this "proper role" should keep women from developing their full potential.

But I believe that passage of this amendment will go a long way toward providing the kind of dignity and legal status to which every American is entitled. It would prod the courts into taking long-overdue action. It would prod many employers into reevaluating their employment practices, to see whether they, too, hire, assign work, and determine pay scales on the basis of sex, instead of making those decisions on the basis of an honest evaluation of each individual's personal abilities.

The addition of this amendment to the Constitution will symbolize the dedication of this country to providing true equality for all. It will show the world that all our citizens are in fact equal in the eyes of the law. We must not minimize the importance of such symbolic action. Even if there were no State discrimination which would be made illegal by the passage of this amendment, I would still be an ardent proponent.

For the past hundred years we have been in the midst of a peaceful revolution, to make sure that all our citizens, whether or not part of a minority, are truly equal. An explicit statement in our Constitution that both sexes are equal before the law is long overdue.

EFFECTS OF THE AMENDMENTS

Some critics, Mr. President, have charged that this amendment should not be passed by this body because it would cause chaos in the courts, and upset many relationships in our society. I strongly disagree. When this joint resolution was brought before the House of Representatives, Representative GRIFFITHS explained exactly what the amendment would and would not do. I ask unanimous consent to have an extract from her statement printed in the RECORD at this point in my remarks.

There being no objection, the excerpts were ordered to be printed in the RECORD, as follows:

STATEMENT BY MRS. GRIFFITHS

What will be the effect of the amendment?

The amendment would restrict only governmental action, and would not apply to purely private action. What constitutes "State action" would be the same as under the 14th amendment and as developed in 14th amendment litigation on other subjects. In 1964 Civil Rights Act granted far more rights to women and other minorities that this amendment ever dreamed of. That act applies against private industry. This amendment applies only against government.

Special restrictions on property rights of married women would be unconstitutional; married women could engage in business as freely as a member of the male sex; inheritance rights of widows would be same as for widowers.

Women would be equally subject to jury service and to military service, but women would not be required to serve—in the Armed Forces—where they are not fitted any more than men are required to so serve.

The real effect before this amendment is finally passed would probably be to permit both sexes to volunteer on an equal basis, which is not now the case.

Where the law confers a benefit, privilege or obligation of citizenship, such would be extended to the other sex, i.e. the effect of the amendment would be to strike the words of sex identification. Thus, such laws would not be rendered unconstitutional but would be extended to apply to both sexes by operation of the amendment. We have already gone through this in the 15th and 19th amendments.

Examples of such laws include: minimum wage laws applying only to women; laws requiring lunch periods and rest periods only for women; laws which permit alimony to be awarded under certain circumstances to wives but not to husbands would permit the Judge to determine who gets the alimony. Social security and other social benefits legislation which give greater benefits to one sex than the other would extend the benefits to the other sex.

Any expression of preference in the law for the mother in child custody cases would be extended to both parents—as against claims of third parties. Children are entitled to support from both parents under the existing laws of most States. Child support laws would be affected only if they discriminate on the basis of sex. The amendment would not prohibit the requiring of one parent to provide financial support for children who are in the custody of the other.

Where a law restricts or denies opportunities of women or men, as the case may be, the effect of the equal rights amendment

would be to render such laws unconstitutional.

Examples are: hours and weight lifting laws but four States have repealed "so-called" protective legislation which restricts women: Delaware has repealed all restrictive legislation in 1967, and there has never been a lawsuit. The idea that this would cause unlimited lawsuits, is ridiculous. Georgia has repealed its hours law. Oregon and Vermont have repealed their hours laws. Fifteen States have declared such laws unenforceable either through action of their supreme court or by some official of the government: Arizona, District of Columbia, Maryland, Kansas, New Mexico, Michigan, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, North Dakota, Tennessee, Virginia, and Wyoming.

And let me say that there has never been an hours laws which keeps a woman from working more than 40 hours a week. This is just not true. The law prohibits an employer from employing her. She can work 16 hours a day, and there is nobody that protects that woman—certainly not the AFL–CIO.

Separation of the sexes by law would be forbidden under the amendment except in situations where the separation is shown to be necessary because of an overriding and compelling public interest and does not deny individual rights and liberties.

For example, in our present culture the recognition of the right to privacy would justify separate restroom facilities in public buildings.

The amendment would not change the substance of existing laws, except that those which restrict and deny opportunities to women would be rendered unconstitutional. In all other cases, the laws presently on the books would simply be equalized, and this includes the entire body of family law. Moreover, this amendment does not restrict States from changing their laws. This law does not apply to criminal acts capable of commission by only one sex. It does not have anything to do with the law of rape or prostitution. You are not going to have to change those laws.

Mr. BAYH. The statement points out eloquently what this measure will do and what it will not do. One particular passage of importance, I think, is the discussion of the draft. I do not agree with the contention of some persons that if this measure becomes law women will automatically be drafted.

As Mrs. GRIFFITHS pointed out, in some cases the existing legal distinctions based on sex will be retained because of "an overriding and compelling public interest." I think that such an interest is present here. Combat duty is more dangerous and demanding than any other job. Because combat demands absolutely unique abilities, Congress might justifiably decide that women are not physically suited for it, just as it has decided that men without the requisite physical characteristics are not suited. And since all soldiers must be trained for combat duty, there is no reason to believe that women would be drafted any more than men who are not considered, in the judgment of Congress, to be suited, are drafted. The only likely effect of the amendment would be to prevent Congress from setting arbitrary limits on the number of women who may enlist, unless those limits are directly related to the proven needs of the military. The amendment would thus allow those women who wanted to serve to volunteer.

Some have charged that this amendment would end the benefits that women, particularly in their role as wives and mothers, enjoy. However, the purpose of the amendment is not to cut down benefits accorded to only one sex, but to extend them to both sexes. Prof. Norman Dorsen of the New York University Law School put it this way:

There is abundant evidence that if the amendment is ratified it would result in the general extension of certain benefits to men that now are available only to women, rather than invalidating them altogether.

I cite but one example, but it is of significance to all of us. What do we do when we have broken families? There has been much discussion of the problem of alimony. Some say if this measure passes it will prevent the proper support of people from broken homes.

The passage of the equal rights amendment would not make alimony unconstitutional. It would only require a fair allocation of it on a case-by-case basis. In the great bulk of cases, women would still receive alimony or support payments. I see no reason not to make all men eligible for alimony, as is already the case in nearly one-third of the States. A man might justifiably collect, for example, if the man were disabled and unable to work, and the woman was independently wealthy.

We are suggesting that we should make uniform the practice presently followed in one-third of the States. In those States the questions of who should provide alimony and child support, are decided on a case-by-case basis. In most cases the man would provide it, but in the case I mentioned earlier, if the man were crippled and unable to work, and if the woman has independent sources of income, it seems to me the judge ought to be able to take that into consideration.

One of the most eloquent discussions of the impact of this amendment on family law was given before the full committee hearings by Professor Doresen.

Mr. President, I ask unanimous consent that excerpts from Professor Doresen's testimony relative to family law be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF PROF. NORMAN DORSEN BEFORE THE SENATE JUDICIARY COMMITTEE ABOUT EFFECTS OF THE EQUAL RIGHTS AMENDMENT ON FAMILY LAW

Concern has been voiced that women would lose their right to support and alimony if the Equal Rights Amendment passes. There are several answers to this concern. First, as already noted, the right to alimony and support can be extended to men by legislative act or as a matter of interpretation of the Amendment. Indeed, in one-third of the states alimony can be awarded to either spouse, and is based on the circumstances of the particular case, such as relative economic needs, duration of the marriage, and relative contributions to the marriage.

As for the right to support, although it has been much relied on, it is of somewhat illusory value to women. In the first place, in most jurisdictions not until the parties are separated, or sometimes even divorced, does a wife have the right to get a court order for a specific amount of support money. See H. H. Clark Law of Domestic Relations 181, 186 (1968). More important, the chief legal remedy for the wife during marriage—the ability to purchase household "necessaries" and charge them to the husband—is of far less value than is generally believed. As one authority has stated:

"The doctrine of necessaries may once have been an effective way of supporting wives and children (though one doubts it). Today, however, it is hedged about with so many limitations that few merchants would wish to rely on it. More importantly, it is of least value to those most in need of support, those wives and children too poor to be able to get credit. For these reasons the doctrine is of little practical value in the solution of the non-support problem." Clark, supra at p. 192.

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.[1] The action by the Commissioners, a respected and prudent body, deserves special consideration.

Their approach—based on individual circumstances and needs—underlies the Equal Rights Amendment also. Put another way, laws which differentiate on the basis of sex are unjust because they arbitrarily treat all members of a class without looking at individual qualifications. State labor laws are unjust and do not protect women because they arbitrarily assume all women have stereotyped and uniform characteristics, which many individual women do not have. Alimony and support laws also have unjust consequences for both men and women when they assume that all women are weak, dependent, caretakers of children. Just as some men may need alimony, some women may prefer to pay maintenance to allow their husbands to be caretakers of children. In this connection, it is worth observing that several states already require a wife to support a husband unable to support himself.

The Uniform Marriage and Divorce Act eliminates definitions based on sex and substitutes those based on function. This is what the Equal Rights Amendment is intended to do. By passing it, we will help

[1] Section 308, which deals with maintenance, is typical of the Act's approach:

(a) In a proceeding for dissolution of marriage or legal separation . . ., the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property, including marital property aportioned to him, to provide for his reasonable needs, and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in such amount and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, . . . and his ability to meet his needs independently . . .; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age, and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

insure more genuine protection for those who really need it, and end the many injustices women still face.

Mr. BAYH. Mr. President, protective labor legislation is also an issue in this debate. It has been said that women workers would be exploited if this legislation were nullified by passage of the equal rights amendment. Of course, protection of workers against unethical or unhealthy labor practices is of the utmost importance. Therefore, we were especially careful to explore this charge carefully at our hearings.

Mr. President, I ask unanimous consent to have printed in the RECORD at this point in my remarks the complete statement of Professor Dorsen relating to the problem of protective labor legislation.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF PROF. NORMAN DORSEN BEFORE THE SENATE JUDICIARY COMMITTEE ABOUT THE EFFECTS OF THE EQUAL RIGHTS AMENDMENT ON LABOR LEGISLATION

I would like to turn now to the problem most frequently stressed by those opposing the Amendment—the alleged impact on labor laws that protect women but not men. The fact is that the effect of the Amendment on protective labor legislation provides no sound basis for opposing it.

There are three interrelated points here. First, the crazy quilt of existing state protective laws reveal graphically that there is no consensus on what is needed protection for either men or women, and that much of the legislation, instead of providing solutions to the real problems of women workers, actually "protect" them out of jobs they are perfectly capable of fulfilling. Second, under Title VII of the Civil Rights Act of 1964 much state legislation of this type is being invalidated and will be of no long term importance. Third, such laws that confer genuine benefits can and should be extended to men under the Equal Rights Amendment.

First. The pattern across the country of state laws shows that there is no coherent system of protection provided for women. For instance, while women are allowed chairs for rest periods in 45 states, they are given job security for maternity leaves of absence in *no* state and maternity benefits under temporary disability insurance laws in only two states. Women are even excluded from temporary disability benefits for pregnancy leaves in these two states.

Furthermore, in the benefit areas most people would consider most important—a minimum wage and a day of rest—men do receive substantial protection already. Only seven states have minimum wage laws for women only, but twenty-nine states, plus the District of Columbia and Puerto Rico, cover both men and women. More important, the federal minimum wage law covers both men and women at *higher* rates than all state laws except one (Alaska).

In contrast, maximum hour laws are a major area where men are not covered. Thirty-eight states cover women only, and three states cover men and women. Since the Supreme Court has upheld the validity of maximum hour legislation for both sexes since 1941, one can only suspect that unions have not pushed for maximum hour legislation, given their success in obtaining nationwide minimum wage laws for both sexes. This analysis would give credence to the EEOC and federal court decisions which have concluded that hour laws have been used as an excuse to keep women out of better-paying jobs.

Opponents of the Equal Rights Amendment often neglect to note the twenty-six states which altogether prohibit women from performing certain jobs. When forty states allow women to be barmaids, but ten bar them from this employment, can anyone seriously propose that women are thereby protected in those ten states? If anyone is protected, it would appear to be male bartenders.

Similar explanations suggest themselves regarding the eighteen states proscribing night work, and the six states prohibiting work for periods before and after childbirth. Women have not campaigned to obtain these "protections." This is for a very good reason. Women in fact do night work all the time. Nurses, telephone operators, airline reservationists, and scrub women have not been protected from night work. Pregnant women, too, often choose to work right up to the birth date. Who ever heard of a housewife being allowed time off from her housework and small children just because she was pregnant, or of a state law which prohibited her from working.

Weight laws also are of doubtful protection for women. There are only four states with weight limits applicable to all jobs, and these limits are set so low that, if literally applied, they would prohibit women from doing any serious labor, including carrying an unborn child. In the remaining few states with weight limits, they apply only to certain industries. In New York, for instance, women are "protected" from lifting weights only in the foundries. The theory, apparently, is that some mystical essence in foundry weight lifting will injure women, while lifting the same weights in other industries will not. Possibly it is the male workers in foundries who are being protected—from job competiton.

Thus, when all of the state laws applying only to women are examined closely, it becomes clear that they do not provide a coherent system of meaningful protection. Nor do they deal with the real problem for women—exploitation by being underpaid and funneled into the lowest-paying, most menial jobs of our society. State labor laws have never dealt with this problem. Furthermore, the premise that real protection can be based on legislating by sex is fallacious.

Sex is an insufficient criterion to predict with accuracy who needs what protection. If injury due to lifting weights is a problem the answer is to forbid employers to fire individuals—both men and women—who refuse to lift weights above a safe limit. If some men and some women don't want to work overtime, laws should be passed forbidding employers to fire those who refuse overtime; both men and women who do want overtime pay should not be penalized.

In short, analysis of state laws that apply exclusively to women does not establish that they protect women in any important way. In fact, these laws do not protect women in the one area clearly applicable to women only—maternity benefits and job security; they are ineffective in dealing with the exploitation of women through lower pay than men; and they are used to discriminate against women in job, promotion, and higher-pay opportunities. They do not furnish a reliable basis for opposition to the Equal Rights Amendment.

Second. In light of the above it is not surprising that the Equal Employment Opportunity Commission, the federal agency charged with interpreting and administering Title VII, has concluded that state "protective" laws were superseded by Title VII and could not lawfully be enforced. The Commission stated that:

"Such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or 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, preferances, and abilities of individual females and tend to discriminate rather than protect." 29 C.F.R. § 1604.1(b).

The federal courts are apparently moving in the same direction. These federal district courts—including one within the last month—have now squarely held that Title VII supersedes such restrictive state laws. In addition, both the Fifth and Seventh Circuits have held that company-imposed restriction paralleling state laws—that is, placing private weight limits on women's jobs—also violate Title VII. For instance, in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 288 (5th Cir. 1969), the court set a stringent standard for establishing a "bona fide occupational qualification" exception to Title VII. This is the exception under which employers have argued that state laws allow them to discriminate against women workers. The *Weeks* court held that:

The employer has the burden of proving that he has reasonable cause to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Some states have also taken action under Title VII. Delaware has repealed all its labor laws for women only. So far, there has been no outraged cry from women workers. Five states have repealed their hours laws; in six states and the District of Columbia, the Attorneys General have ruled that state laws are superseded by Title VII or state fair Labor Standards Act are exempted from the state laws; in two states, there are no prosecutions under state laws; in two states, there are exemptions from laws if the employee voluntarily agrees; and in one, the weight lifting regulation has been extended to men. In other words, twenty-two states and the District of Columbia have already repealed or greatly weakened the effect of the state labor laws on women.

Given this action of the EEOC, of the Federal courts, and of the States, can we really say that the impact of the proposed amendment on State labor laws furnishes any basis for opposition to it? We must recognize that these laws are already invalidated or being invalidated. It appears that opponents of the amendment are trying to erect bridges which were crossed five years ago, when Title VII went into effect.

Third and finally with respect to State labor legislation. There is abundant evidence that if the amendment is ratified it would result in the general extension of certain benefits to men that are now available only to women rather than invalidating them altogether. I recognize that this issue has been the subject of some controversy before the Committee. Nevertheless, I suggest there is ample precedent already on the books to substantiate the conclusion that the fears of wholesale elimination of benefits for women are unwarranted.

In the first place, until Title VII the EEOC has consistently held that laws giving women benefits—such as a lunch break—must be extended to men. The Seventh Circuit has indicated it would be the same, when it held in *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969), that the company-imposed weight limit could be validly extended to men under Title VII, provided the company allowed members of either sex to show he or she could perform the job in question. And Georgia took a similar approach to its weight-lifting regulation, which was extended to men and rephrased to prohibit "strains or undue fatigue" rather than a set weight limit.

In other areas of the law, courts have also indicated a willingness to extend benefits to a class of people unconstitutionally excluded from the benefit, rather than voiding the law under which the class was im-

properly excluded. As long ago as 1880, in *Neal* v. *Delaware,* 103 U.S. 370, the Supreme Court ruled that a state constitution giving whites only the vote was not void under the Fifteenth Amendment, but rather that the right to vote must be extended to blacks. Likewise, in *Levy* v. *Louisiana,* 391 U.S. 68 (1968), when a Louisiana statute denied illegitimate children the right to recover for their mother's wrongful death, the Supreme Court held that the Fourteenth Amendment required the extension of protection to them rather than voiding the legitimate children's right to recover.

Clearly, if the courts have authority to extend benefits to an excluded class under the Fourteenth and Fifteenth Amendments, they will have the same authority to extend benefits under the proposed Equal Rights Amendment. Moreover, courts have a general obligation to interpret instruments reasonably. If this means granting a day of rest to men, rather than destroying this right for women, the courts should and presumably will follow that path, especially in view of the very ample expression of opinion by members of the Congress and witnesses that some protective laws should be extended to both sexes rather than voided.

Finally, with respect to this problem, we should not lose sight of the fact that the Congress and state legislatures will have the opportunity to enforce the Amendment and fashion its general command to specific situations in a comprehensive and reasonable manner.

Mr. BAYH. Mr. President, to my mind these arguments effectively refute the charges that the equal rights amendment would disrupt family law and protective labor legislation in the States. I would also, however, like to call to the attention of the Senate the probing analysis of Prof. Thomas I. Emerson of the Yale Law School. He described the effect of the amendment on our legal system as follows:

First, the courts are entirely capable of laying down the rules for a transitional period in a manner which will not create excessive uncertainty or undue disruption. Actually the courts face similar problems every time they hold that part of a statute is unconstitutional, and they have developed detailed rules for handling these issues under the concept of "separability" (or "severability"). The essential question is whether the legislature would have intended the statute to stand in its modified form. In making this decision the courts have the aid of legislative history, which can be supplied in this case. There is no reason to suppose, therefore, that formulation of a coherent legal theory applicable to the Equal Rights Amendment is too complex or too difficult for the legal system to cope with.

Second, there has been a great deal of talk that passage of the Equal Rights Amendment will cause vast changes in many features of our national life. I am inclined to feel that the alarms and warning are, as usual, overplayed. Whether that be the case or not, however, if such great changes do occur it will be only because they are necessary. Those opponents of the measure who stress this aspect of the Amendment are acknowledging that widespread discrimination against women persists throughout our society.

Third, it has been argued that adoption of a constitutional amendment will bring about, almost inadvertently, drastic alterations in important institutions of society before there has been time to work out the major policy changes required by the new provision. The example most frequently given is the Selective Service system. But one need not conclude that, in those few areas where major new policy must be formulated, there is not adequate time in which to do it. If Congress adopts the Equal Rights Amendment it will surely have full opportunity during the period of ratification by the States to take up amendments to the Selective Service Act. Other areas of our law, such as the marriage and divorce laws, may need similar attention from State legislatures. It is not a weakness but a strength of the Amendment that it will force prompt consideration of some changes that are long overdue.

Mr. President, I think that I have shown that there is indeed a great need for the equal rights amendment. We must make it abundantly clear for future years that we will not tolerate discrimination based on sex, instead of the attributes of each individual. I think, further, Mr. President, that there is ample evidence to show that this measure has been fairly and completely studied. It is legally sound. As Professor Emerson concluded:

My conclusion from this survey of the legal problems raised by the Equal Rights Amendment is that the method chosen is the proper one and the instrument proposed is constitutionally and legally sound. I urge the Senate to accept the pending Resolution and submit the Amendment to the States for ratification.

I can only repeat what Professor Emerson said. The amendment is needed. It is sound. It has been passed by the House. Now it is time for this body to act.