The Need for the Equal Rights Amendment

by Ruth Bader Ginsburg

In spite of a recent start in the direction of legislative change, it is unlikely that there will be a major overhaul of laws that differentiate on the basis of sex unless the proposed equal rights amendment is ratified. The "horribles" raised by opponents of the amendment are specious, and its ratification will not result in a dramatic increase in litigation. The amendment looks toward a legal system in which each person will be judged on individual merit and not on the basis of an unalterable trait of birth that has no necessary relationship to need or ability.

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
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> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
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> Section 3. This amendment shall take effect two years after the date of ratification.

THE NOTION THAT men and women stand as equals before the law was not the original understanding, nor was it the understanding of the Congress that framed the Civil War amendments. Thomas Jefferson put it this way:

> Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.[1]

Midnineteenth century feminists, many of them diligent workers in the cause of abolition, looked to Congress after the Civil War for an express guarantee of equal rights for men and women. But the text of the Fourteenth Amendment appalled the proponents of a sex equality guarantee. Their concern centered on the abortive second section of the amendment, which placed in the Constitution for the first time the word "male." Threefold use of the word "male," always in conjunction with the term "citizen," caused concern that the grand phrases of the first section of the Fourteenth Amendment—due process and equal protection of the laws—would have, at best, qualified application to women.[2]

After close to a century's effort, the suffrage amendment was ratified, according to female citizens the right to vote. The most vigorous proponents of that amendment saw it as a beginning, not as a terminal point. Three years after the ratification of the Nineteenth Amendment, the National Women's Party succeeded in putting before Congress the equal rights amendment that has been reintroduced in every Congress since 1923. On the occasion of the amendment's initial introduction, the executive secretary of the National Women's Party explained:

> [A]s we were working for the national suffrage amendment . . . it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step . . . toward gaining this equality.[3]

Persons unacquainted with the history of the amendment deplore its generality and the absence of investigation concerning its impact. The models of the due process and equal protection clauses should suffice to indicate that the wording of the amendment is a thoroughly responsible way of embodying fundamental principle in the Constitution. Before the amendment was proposed, the National Women's Party, with the aid of a staff of lawyers and expert consultants, tabulated state and federal legislation and court decisions relating to the status of women. Advisory councils were formed, composed of different economic and professional groups of women — industrial workers, homemakers, teachers and students, federal employees. Each council conducted studies of the desirability of equal rights and responsibilities for men and women. Reading debates on the amendment in the law journals of the 1920s is enlightening. The objections still voiced in 1973 were solidly answered then.[4]

Opponents of the amendment suggest the pursuit of alternate routes: particularized statutes through the regular legislative process in Congress and in the states, and test case litigation under the Fourteenth Amendment.[5] Only those who have failed to learn the lessons of the past can accept that counsel.

On the legislative side the cupboard was bare until

1. GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968).
2. See FLEXNER, CENTURY OF STRUGGLE 142-55 (1959).
3. *Hearings on H.R.J. Res. 75 before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. at 2 (1925).
4. Compare Lukens, *Shall Women Throw Away Their Privileges?*, 11 A.B.A.J. 645 (1925), with Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A.J. 117 (1926).
5. See Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RIGHTS CIV. LIB. L. REV. 234 (1971).

1963 when Congress passed the Equal Pay Act. That legislation was hardly innovative. An equal pay requirement was in force during World War II and then quietly retired when there was no longer a need to encourage women to join the labor force.[6] Equal pay was the subject of a 1951 International Labor Organization convention and was mandated by the Rome Treaty that launched the European Economic Community in 1958. Most significantly, mixed motives spurred congressional action. Some congressmen were sold on the bill by this argument: equal pay protects against male unemployment; without access to female labor at bargain prices, employers will prefer to hire men.[7]

The next year, sex was included along with race, religion, and national origin in Title VII of the Civil Rights Act of 1964. This was a significant advance, for Title VII is a most potent weapon against employment discrimination. But sex was added to Title VII via the back door. A Southern congressman, steadfast in his opposition to Title VII, introduced the amendment that added sex to the catalogue of prohibited discrimination. His motive was apparent, but his tactic backfired.[8]

In 1972, in Title IX of the Education Amendments of that year, Congress banned federal assistance to educational institutions that discriminate on the basis of sex. Title IX contains several exceptions, for example, admissions to all private and some public undergraduate schools are exempt, and its enforcement mechanism is weak.

These three measures, the Equal Pay Act, Title VII, and Title IX, are the principal congressional contributions. Not an impressive record in view of the job that remains to be done. A recent government computer search, the solicitor general told the Supreme Court this term, revealed that 876 sections in the United States Code contain sex-based references.[9] Similar searches in some of the states have turned up hundreds of state statutes in need of revision.[10]

Will major legislative revision occur without the impetus of the equal rights amendment? Probably not if past experience is an accurate barometer. Scant state or federal legislative attention focused on the discriminatory statutes identified by the National Women's Party in the 1920s. After Congress passed the equal rights amendment, it remained unwilling to ban sex discrimination in admissions to undergraduate schools, although the 1971 Newman report informed it that "discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community." As a graphic illustration, the 1969 profile of the freshman class at a well-known state university cautions: "Admission of women on the freshman level will be restricted to those who are especially qualified."[11] A candid response came from the Air Force Academy this year: We will enroll women in 1975 if the amendment is ratified, the superintendent said. If the amendment is not ratified, women will have to wait a long time before they can expect to enroll.[12]

What Kind of Revision Can Be Expected?

A preview of the kind of revision that can be expected under the stimulus of the amendment has been provided by legislative analyses in some of the states. These analyses should reassure those who fear intolerable change in the wake of the amendment. They propose extension of desirable protection to both sexes; for example, state minimum wage laws would be extended to men; in no case do they propose depriving either sex of a genuine benefit now enjoyed.[13]

As a sample of laws destined for the scrap heap if the amendment is ratified, consider these: Arizona law stipulates that the governor, secretary of state, and treasurer must be male.[14] In Ohio only men may serve as arbitrators in county court proceedings.[15] In Wisconsin barbers are licensed to cut men's hair and women's hair, but cosmeticians may attend to women only.[16] Georgia law, still faithful to Blackstone, provides:

> The husband is head of the family and the wife is subject to him; her legal civil existence is merged in the husband's, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order.[17]

Another embarrassment from the same state reads: "Any charge or intimation against a white female of having sexual intercourse with a person of color is slanderous without proof of special damages."[18] Legislative inertia keeps laws of this kind on the books. Prof. Thomas Emerson summarized the situation this way: "It is not a weakness but a strength of the amendment that it will force prompt consideration of changes that are long overdue."[19]

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6. See Tobias & Anderson, *Whatever Happened to Rosie the Riveter: Demobilization and the Female Labor Force, 1945-47*, a paper delivered to the Berkshire Conference of Women Historians, New Brunswick, New Jersey, March 2, 1973.

7. See Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. L. REV. 326, 331 (1971). On implementation of the act in the 1960s, see Murphy, *Female Wage Discrimination, A Study of the Equal Pay Act 1963-70*, 39 U. CIN. L. REV. 615 (1970).

8. See *Developments in the Law—Employment Discrimination and Title VII*, 84 HARV. L. REV. 1109, 1166-95 (1971).

9. Brief for Appellees, at 20 n. 17, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

10. *E.g.*, WISCONSIN LEGISLATIVE COUNCIL, REPORT ON EQUAL RIGHTS TO THE 1973 LEGISLATURE (February 1973); TAYLOR & HERZOG, IMPACT STUDY OF THE EQUAL RIGHTS AMENDMENT—SUBJECT: THE ARIZONA CONSTITUTION AND STATUTES (1973); Symposium: *The New Mexico Equal Rights Amendment—Assessing Its Impact*, 3 N. MEX. L. REV. 1 (1973).

11. UNIVERSITY OF NORTH CAROLINA, PROFILE OF THE FRESHMAN CLASS (1969).

12. New York Times, February 4, 1973.

13. See the references in note 10, *supra*. Comprehensive analysis of the purpose and probable impact of the amendment appears in Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872 (1971).

14. ARIZ. CONST. art. 5, §§ 1 and 2. But see ARIZ. CONST. art. 7, § 2.

15. OHIO REV. CODE § 1913.36 (cause may be submitted to the arbitration of three disinterested men).

16. WISCONSIN LEGISLATIVE COUNCIL, SUMMARY OF PROCEEDINGS, SPECIAL COMMITTEE ON EQUAL RIGHTS, September 28, 1972, at 4; Wis. ATTY. GEN. OPINION, 25 A.G. 75 at 78, interpreting Wis. STAT. § 158.01.14(f).

17. GA. CODE ANN. § 53-501.

18. GA. CODE ANN. § 105-707.

19. Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 225, 232-33 (1971).

If one turns to the contribution of the judiciary and litigation under the Fourteenth Amendment, Supreme Court decisions that span 1873 to 1961 tell us this: Until the Nineteenth Amendment, women could be denied the right to vote. Of course, they are "persons" within the meaning of the Fourteenth Amendment, but so are children, the Court observed in 1874.[20] The right to serve on juries could be reserved to men,[21] a proposition the Court declined to re-examine in 1971, although Justice Douglas urged his brethren to do so.[22] Women, regardless of individual talent, could be excluded from occupations thought more suitable to men —lawyering and bartending, for example.[23]

Typical of the attitude that prevailed well into the twentieth century is the response of one of our nation's greatest jurists, Harlan Fiske Stone, author of the celebrated *Carolene Products* footnote that supplied the rationale for the suspect classification doctrine. In 1922, when Chief Justice Stone was dean of Columbia Law School, he was asked by a Barnard graduate who wanted to study law, "Why doesn't Columbia admit women?" The venerable scholar replied in a manner most uncharacteristic of him: "We don't because we don't" [24]

Judges' Performance Poor to Abominable

Recently, two law professors evaluated the judicial record in sex discrimination cases up to 1971. They reported:

> Each of us is a middle-aged, white male—some might characterize us as fairly typical WASPs. . . . Neither of us has ever been radicalized, brutalized, politicized or otherwise leaned on by the Establishment in any of the ways that in recent years have led many to adopt heretical views of various kinds.
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> Each of us, however, was led last year . . . to begin to investigate the ways in which American judges have responded to various types of sex discrimination. Our research has been of the most traditional kind: finding, analyzing, attacking and defending judicial opinions. . . .
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> Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" . . . . [But] "sexism" — the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences — is as easily discernible in contemporary judicial opinions as racism ever was. [25]

In the 1971 term, a new direction was signaled when the Supreme Court responded affirmatively to two complaints of unconstitutional sex discrimination. In *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court held inconsistent with the equal protection clause an Idaho statute that read: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Court relied on the due process clause to hold that an unwed father who wished to retain custody of his children had to be given a hearing of the kind that would be accorded to any mother or any married father. The opinions in both cases were laconic; they provided an uncertain basis for predicting the Court's future course.

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New York Times

Frontiero Should Encourage Litigation

On May 14, 1973, in *Frontiero* v. *Richardson,* 411 U.S. 677, the Court moved forward more swiftly than many had anticipated; in effect, it served notice that sex discrimination by law would no longer escape rigorous constitutional review. The Court's eight-to-one judgment declared unconstitutional a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency but authorized these benefits for female members of the military only if in fact they supported their husbands. The scheme was invalidated insofar as it required a female member to prove the dependency of her spouse. [26]

Four of the justices joined in a plurality opinion by Justice Brennan that declares that "classifications

20. *Minor* v. *Happersett,* 21 Wall. 162 (1874).
21. *Hoyt* v. *Florida,* 368 U.S. 57 (1961).
22. *Alexander* v. *Louisiana,* 405 U.S. 625 (1971).
23. *Bradwell* v. *Illinois,* 16 Wall. 130 (1873); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948).
24. Epstein, Women and Professional Careers: The Case of the Woman Lawyer 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University) (reporting interview with Frances Marlatt, Mount Vernon, New York, lawyer).
25. Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U. L. Rev. 675 (1971).
26. Automatic qualification of wives as dependent, whether or not they are in fact, but requirement of proof of actual dependency of husbands is the prevailing pattern in federal and state employment benefits and social insurance legislation. For examples on the federal level, see Bixby, Women and Social Security in the United States, D.H.E.W. Pub. No. (SSA) 73-11700 (1972); Petition for Certiorari, *Commissioner* v. *Moritz,* No. 72-1298, Appendix E, (U.S. S. Ct. filed March 22, 1973).

based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Adopting a position long urged by advocates of equal rights and responsibilities for men and women, [27] the plurality opinion says that

> since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Justice Stewart offered a one sentence concurrence tersely acknowledging that the statutes in question "work an invidious discrimination in violation of the Constitution." Further enlightenment on the standard of review by which he measures sex differentials in the law has been left for another day.

Also concurring in the judgment, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found it "unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." In his view

> [b]y acting prematurely . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed [Equal Rights] Amendment.

The division of the Court in *Frontiero* may provide stimulating material for dissection in next year's law reviews. For present purposes, these points seem relevant: *Frontiero* is almost certain to encourage increased litigation attacking sex-based differentials in federal and state statutes and regulations on the basis of the Fifth or Fourteenth Amendment. Lower courts may well assume that Justice Stewart "knows [sex discrimination] when he sees it," [28] and accordingly conclude that at least five justices can be relied upon to scrutinize sex classifications closely. Legislative response to *Frontiero* is more uncertain. However, past behavior suggests that Justice Powell's counsel resembles the position of the most political branch: If the equal rights amendment is adopted, the hard task of revision will be undertaken in earnest; absent ratification, comprehensive revision may continue to be regarded as "premature and unnecessary."

Reasoned appraisal of the amendment requires consideration of the realities of life for an increasing population of women in this latter half or the twentieth century. Fifty years ago, women comprised 20 per cent of the labor force. By 1972, they comprised 38 per cent. Approximately 44 per cent of all women sixteen years of age and over were working. Approximately 60 per cent of women workers were married and living with their husbands. Nearly 40 per cent were mothers with one or more children under eighteen Of the 32 million working women in America, approximately 42 per cent worked full time the year round. [29] In sum, over the last fifty years the percentage of working women in the population has approximately doubled, and the projection is that this trend will accelerate.

The "Motherhood Draft" Has Ended

What accounts for this upsurge in women working outside the home? Well over a year before the January, 1973, headline Supreme Court abortion decisions, [30] the then president of the Association of American Law Schools, Prof. Alfred Conard, pointed to a critical factor. In a speech urging law schools to welcome women as enthusiastically as they welcome men, he put it this way—the women's draft had ended:

> Underlying the desire of women to perform legal services, and the demand for legal services performed by women lies a revolutionary change in the lives of women—the repeal of the women's draft. We have all seen the destructive effects of the men's draft—which hung over their heads like the sword of Damocles for eight years, sapping their attention and determination. . . . We ought to realize that for the past two million years women have been subjected to a 25-year draft lottery—the motherhood draft. If they did not choose to be nuns—in or out of habit—they had very little control over the duration and frequency of their years of motherhood.
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> This aspect of women's lives has changed dramatically. . . .
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> As a result of woman's emancipation, we are going to have women play more important roles in the public and commercial life of our country and of the world. [31]

Contrast these remarks of Professor Conard with the yearning for the good old days evident in the recent comment of a New York member of Rotary. When representatives of the National Organization for Women spoke at his club early in 1973, he told them: "I'm a firm believer in nature. If women were intellectually equal to men, wouldn't equality have come about 1000 years ago?" [32]

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27. For earlier recognition that sex is appropriately ranked as a "suspect" criterion, see *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P. 2d 529 (1971); Note, 66 Nw. U.L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971); Note, 86 Harv. L. Rev. 568, 583-88 (1973). *Cf.* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Mode for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 34 (1972).

28. *Cf. Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

29. Statistics from U.S. Dept. of Labor, Bureau of Labor Statistics, U.S. Dept. of Commerce, Bureau of the Census, and U.S. Dept. of Health, Education, and Welfare (Office of Education).

30. *Roe* v. *Wade*, 410 U.S. 113; *Doe* v. *Bolton*, 410 U.S. 179.

31. Extract reported in 16 Law Quadrangle Notes 11 (1971).

32. New York Times, January 19, 1973, at 37, col. 7.

The answer, of course, is that few women had even an outside chance until the era in which we are living. Historically, women have occupied a place in a world belonging to men. But in the thousand years that concerned the Rotarian, most women worked harder in their role than men or women do in the jobs they hold today. Before the mass production age, women's lives were crowded with economic as well as procreative activity. Women labored to supply the market with food and goods now machine cultivated or manufactured. This activity, coupled with shorter adult life spans and the constant burden of childbearing, explains the historic phenomenon. Inferior intellectual equipment? Women in the law school admission test population now outscore men. Physically inferior? The life insurance specialists tell us otherwise.

With the disappearance of home-centered economic activity, and the possibility now open to women to determine whether and when to bear children, perceptive persons of both sexes recognize that there is no justification for confining women to a role of their own.

Some aspects of the traditional arrangement disfavor men, and some exact a toll from both sexes. Women who have paid serious attention to laws that appear to disfavor men agree with the position stated by Sarah Grimke, noted abolitionist and advocate of equal rights for men and women. She said in 1837: "I ask no favors for my sex. All I ask of our brethern is that they take their feet off our necks." [33] Favors rarely come without an accompanying detriment. Too often men of the law fail to grasp this basic point.

Do Women Have the Best of Both Worlds?

In an informal discussion with Harvard students in March, 1973, Justice Stewart wondered why there was so much pressure for the equal rights amendment. [34] He expressed the view that under the Fourteenth Amendment "the female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." How does that "best of both worlds" notion work out in practice?

Consider this illustration. In New York and many other states, women may claim automatic exemption from jury service—"the best of both worlds": a right to serve, but no obligation to do so. The result in New York state courts is that less than 20 per cent of the jury pool has been female. In 1970 a female plaintiff in a civil case challenged the exemption as unconstitutional. The state supreme court judge said in his published opinion: Don't complain to me. Your lament should be addressed to the state of womanhood that "prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping to [civic responsibility]."

Not a very flattering image of the person alleged to enjoy the "best of both worlds"! Apparently, the judge did not consider whether a man, given the opportunity to avoid jury service for the asking, might prefer poker or golf or a day at the races to his civic responsibility. The point should be clear: If women wish to be classed as fully competent adults, they must share responsibilities as well as rights.

One more illustration—an instance of double-edged discrimination of a kind computer printouts of statutes tell us is pervasive. During a marriage that ended tragically after three years, the wife, a schoolteacher, was the principal breadwinner (a position she shared in 1970 with 3.2 million married women living with their husbands, or 7.4 per cent of American families). Her annual income was $10,000; her husband's $3,000. Last summer the wife died in childbirth. The young widower, struggling to care for his infant, maintain his home, and secure more remunerative employment, applied to Social Security for the survivor's benefits he thought were due to him under his wife's account. Those benefits, he was informed, are owed only to a widow. [36] A law that favors women? Who suffered discrimination in this situation—the widowed man, who did not receive the assistance identically situated widowed women receive, or the female wage earner, who paid in as much as her male counterparts but obtained less protection for her family?

Legislation for All Workers Should Be Enacted

A number of "horribles" have been raised in opposition to the amendment. Four of them dominate the literature of amendment opponents.

First horrible. Women will lose the benefit of protective labor laws. Today, challenges to these laws rarely emanate from male employers who wish to overwork women. Since the passage of Title VII, they have come overwhelmingly from blue-collar working women to overcome what they regard as a system that protects them against higher paying jobs and promotions. In the vast majority of Title VII employment discrimination cases, courts have understood these challenges. [37] Legislatures are beginning to abandon disingenuous protection for women and to extend genuine protection to all workers. Models are ample. In Norway, for example, where opposition to "special protection for women only" came predominantly from women's organizations, a 1956 workers' protective act assures safe and healthy conditions for employees of both sexes. Moreover, extension rather than invalidation of laws that benefit only one sex is a route recently traveled by the Supreme Court. In *Frontiero* v. *Richardson,* fringe benefits for married male members of the military were extended to married female members.

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33. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN; ADDRESSED TO MARY PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY 10 (1838).
34. Harv. L. School Rec., March 23, 1973, at 15.
35. *DeKosenko* v. *Brandt,* 63 Misc. 2d 895, 313 N.Y.S. 2d 827 (Sup.Ct. N.Y.Co. 1970).
36. *Wiesenfeld* v. *Secretary of Health, Education, and Welfare,* Civil Action No. 268-73 (D.N.J.); see BIXBY, *supra* note 26, at 11.
37. *E.g., Rosenfeld* v. *Southern Pacific Company,* 444 F. 2d 1219 (9th Cir. 1971).

The National Women's Party put it this way decades ago in 1926: protective legislation that is desirable

> should be enacted for all workers. . . . Legislation that includes women but exempts men . . . limits the woman worker's scope of activity . . . by barring her from economic opportunity. Moreover, restrictive conditions [for women but not for men] fortifies the harmful assumption that labor for pay is primarily the prerogative of the male. [38]

Second horrible. Wives will lose the right to support. Only if our legislatures or courts act capriciously, spitefully, without regard for public welfare, and in flagrant disregard of the intent of the amendment's proponents.[39] In a growing number of states the equal rights amendment will occasion no change whatever in current support law. In these states, and under the amendment in all states, either husband or wife can be awarded support depending on the couple's circumstances. Who pays in any particular family will depend upon the division of responsibilities within that family unit. If one spouse is the breadwinner and the other performs uncompensated services at home, the breadwinning spouse will be required to support the spouse who works at home.

Amendment Enhances the Housewife's Role

Underlying the amendment is the premise that a person who works at home should do so because she, or he, wants to, not because of an unarticulated belief that there is no choice. The essential point, sadly ignored by the amendment's detractors, is this: the equal rights amendment does not force anyone happy as a housewife to relinquish that role. On the contrary, it enhances that role by making it plain that it was chosen, not thrust on her without regard to her preference.

Third horrible. Women will be forced to serve in the military. Only if men are, and assignments would be made on the basis of individual capacity rather than sex. With the draft terminated, it is high time for consideration of the other side of that coin. Women who wish to enlist must meet considerably higher standards than men; women in the service are denied fringe benefits granted men and do not receive equal vocational training opportunities. The reason for higher standards for women was given by an Air Force colonel in a deposition taken in December, 1972. [40] He explained: "We have had and we continue to have roughly twice as many women apply[ing] as we are able to . . . take. . . . We don't have an excess of men over what we can take."

Young women's groups uniformly testified during congressional hearings on the amendment that they did not wish exemption from responsibility for service. Conspicuous among these groups was the 200,000 member Intercollegiate Association of Women Students, a group appropriately characterized as "middle American." [41]

In 1948, long before women and the miltary became an emotion-charged issue in connection with the equal rights amendment, Gen. Dwight D. Eisenhower observed:

> Like most old soldiers I was violently against women soldiers. I thought a tremendous number of difficulties would occur, not only of an administrative nature . . . but others of a more personal type that would get us into trouble. None of that occurred. . . . In the disciplinary field, they were . . . a model for the Army. More than this their influence throughout the whole command was good. I am convinced that in another war they have got to be drafted just like the men. [42]

Final horrible. Rest rooms in public places could not be sex separated. Emphatically not so, according to the amendment's proponents in Congress, [43] who were amused at the focus on the "potty problem." Apart from referring to the constitutional regard for personal privacy, they expressed curiosity about the quarter from which objection to current arrangements would come. Did the people who voiced concern suppose that men would want to use women's rest rooms or that women would want to use men's? In any event, the clever solution devised by the airlines suggests one way out of the problem.

Thirty States Have Ratified the Amendment

Some persons have expressed fear of a "flood of litigation" in the wake of the equal rights amendment. But the dramatic increase in sex discrimination litigation under the Fifth and Fourteenth Amendments in the 1970s is indicative that, if anything, ratification of the amendment will stem the tide. The amendment will impel the comprehensive legislative revision that neither Congress nor the states have undertaken to date. The absence of long overdue statutory revision is generating cases by the hundreds across the country. [44] Legislatures remain quiescent despite the mounting judicial challenges, challenges given further impetus by the Supreme Court's decision in *Frontiero* v. *Richardson*. Ratification of the amendment, however, would plainly mark as irresponsible any legislature that did not undertake the necessary repairs during the two-year period between ratification and effective date.

To date, three fifths of the states have ratified the amendment; these thirty states represent a clear majority of the country's population. One state, Nebraska,

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38. Matthews, *supra* note 4, at 117.
39. S. COMM. ON THE JUDICIARY, *Equal Rights for Men and Women*, S. REP. No. 92-689, 92d Cong. 2d Sess. 17-18 (1972); see CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1972, at 4-5 (1973).
40. Deposition Transcript at 37, 44, 45, *Callahan* v. *Laird*, Civil Action 51-500-M (D. Mass.).
41. See Remarks of Jacqueline G. Gutwillig (Lt. Col. U.S.A. Ret.) in WOMEN IN 1972, at 44, 46 (1973).
42. *Hearings on S. 1614 before the Subcomm. on Organization and Mobilization of the House Comm. on Armed Services*, 80th Cong., 2d Sess., No. 238, at 5563-64 (1948).
43. See S. REP. No. 92-689, *supra* note 39, at 12; Brown, Emerson, Falk & Freedman, *supra* note 13, at 900-902.
44. See, *e.g.*, WOMEN'S RIGHTS PROJECT LEGAL DOCKET issued periodically by the American Civil Liberties Union.

has attempted to withdraw its ratification. But New Jersey and Ohio took the same action with respect to the Fourteenth Amendment, and New York ratified and then withdrew its ratification of the Fifteenth Amendment. Congress at that time evidently concluded that ratification, once accomplished, could not be undone. New Jersey and Ohio were counted to constitute the requisite three fourths for promulgation of the Fourteenth Amendment. New York was counted among the states that ratified the Fifteenth Amendment. [45]

The equal rights amendment, in sum, would dedicate the nation to a new view of the rights and responsibilities of men and women. It firmly rejects sharp legislative lines between the sexes as constitutionally tolerable. Instead, it looks toward a legal system in which each person will be judged on the basis of individual merit and not on the basis of an unalterable trait of birth that bears no necessary relationship to need or ability. As the Federal Legislation Committee of the Association of the Bar of the City of New York explained:

> [T]he Amendment would eliminate patent discrimination, including all laws which prohibit or discourage women from making full use of their political and economic capabilities on the strength of notions about the proper "role" for women in society. Any special exemptions or other favorable treatment required by some women because of their physical stature or family roles could be preserved by statutes which utilize those factors—rather than sex—as the basis for distinction.[46]

45. See Letter Opinion of J. William Heckman, Counsel, Subcomm. on Constitutional Amendments, S. Comm. on the Judiciary, to State Senator Shirley Marsh, Neb. State Senate, February 20, 1973.

46. *The Equal Rights Amendment — As of 1972*, in 11 REPORTS OF COMMITTEES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNED WITH FEDERAL LEGISLATION, Bull. 2, at 38, 41 (1972).

Seminar to be Held in Israel

THE American University Washington College of Law and Howard University Law School will sponsor a seminar on "Investment, Finance, and Trade in Israel" to be held from November 10 to 18, 1973, in Tel Aviv, Kibbutz Na'an, and Jerusalem. Topics to be discussed are "Encouragement and Obstacles to Foreign Investment and the Raising of Foreign Capital," "Floatation of Securities and Trading in Securities," "Government Controls on the Import and Export of Money and Goods," and "Directors' and Officers' Responsibilities under Israeli Law."

The total cost of $560 includes roundtrip air fare from New York City, hotels, and travel in Israel to the stock exchange, brokerage houses, and industrial plants. Further information may be obtained from Prof. Egon Guttman, American University, Washington College of Law, Washington, D.C. 20016.

New Law Libraries Organization

LAW LIBRARIANS from Canada and seventeen states of the United States have formed a new organization, State and Court Law Libraries of the United States and Canada. The organization is conceived as a means whereby libraries that serve state government and courts and are affiliated with the American Association of Law Libraries may exchange information and cooperate with each other and with other organizations in the field.

Twenty-three law librarians from the United States and Canada were present at the organizational meeting held July 3, 1973, during the sixty-sixth annual meeting of the A.A.L.L. in Seattle. Raymond M. Taylor, marshal and librarian of the Supreme Court of North Carolina, was elected chairman of the new organization, and Margaret H. Setliff of the Hawaii Supreme Court Law Library was named vice chairman and secretary.

Persons interested in this organization or who may be eligible for membership, for which there is no charge, may obtain further information from Mr. Taylor at Raleigh, North Carolina 27602.

American Bar Endowment Memorial Fund

The American Bar Endowment created the memorial fund to enable people to honor the memory of friends, relatives, and colleagues. Those memorialized in the period May 15 to July 20 are:

Wilko G. Machetanz
Wm. D. P. Carey
Arthur D. Lynn
Raymond S. Roberts, Sr.
John G. Newitt
John Raeburn Green
Charles A. Hastings
Peter P. Walsh, Jr.
Thomas J. Boodell
Norman Bowersox
Edmund Randoph Preston
Francis G. Hooley
Graydon Reddick
Sam Cleveland
Waldo C. Holden
Victor York
Joseph G. Hodges
John A. Ruth
Ned David Frank
Victor C. Breen
Spessard L. Holland
Glenn Terrell
John Robert Evans
James W. Chambers
Gilbert H. Jertberg
Jack Louis Newman, Jr.
John T. Laycock
Harry S. McCowen
Earl L. Abbott
Charles H. Davidson, Jr.
Earl L. Valentine
John Savord
Alva C. Goodrich
Crawford C. Martin
Frank Blanton
Jim Rowan
Joseph Albert Schimski
Marie E. Zimmermann
Vincent A. Sheely, Jr.
Alvin L. Newmeyer, Sr.
Mio M. Davis
C. Trafton Mendall
Lew Lewis
Benjamin J. Murphy
Joseph H. Hinshaw
W. Wallace Kent
Frank Butler, Sr.
A. O. Harmon
Milton E. Bachmann
John Daggett
H. Alva Brumfield
Albert G. Prutzman
Wolfgang Gaston Friedmann
Hugh Carter "Buzzy" Clayton

A special contribution was made by Jerold E. Weil.