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STATEMENT OF PAULI MURRAY

ON THE EQUAL RIGHTS AMENDMENT (S. J. RES. 61) SUBMITTED TO THE SENATE JUDICIARY COMMITTEE SEPTEMBER 16, 1970

My name is Pauli Murray, and I am a professor of American Studies at Brandeis University. I am an attorney holding a degree of Doctor of Juridical Science from Yale University School of Law and my field of concentration for almost thirty years has been constitutional law in the field of human rights. 1/ Since 1962 when I served on the Committee on Political and Civil Rights of President Kennedy's Commission on the Status of Women, I have devoted my studies to the constitutional rights of individuals not to be discriminated against because of sex and have written extensively in this field. 2/ I have also joined with other attorneys in litigation before the Federal Courts to test the constitutionality of laws and practices which make legal distinctions on the basis of sex.

As a Negro and a woman I have labored under the double handicap of of discrimination because of race and discrimination because of sex. Having spent nearly fifty years of my life trying to overcome the disabilities and sense of inferiority imposed upon me by reason of my race, I cannot afford another fifty years trying to overcome similar disabilities imposed upon me because of my sex. During the past ten years I have watched almost an entire generation of older women who were responsible for winning the long struggle for women's suffrage pass off the scene before they could win their lifelong struggle for constitutional equality. It is in memory of women like Mary McLeod Bethune, Eleanor Roosevelt, Elsie Hill, Betsy Graves Reyneau and others that I urge the United States Senate to approve the Equal Rights Amendment as adopted by the House of Representatives without change, so that it may be submitted to the States for ratification.

My own life spans the second half century of the Emancipation of Negroes and the first half century of the political emancipation of women in the United States. My parents were born during the Reconstruction; my grandmother was born in slavery, the progeny of rape by a white master of his octoroon slave. For nearly sixty years I have carried the burden of proof as to my competence and proficiency in a society which has both explicitly and implicitly been dominated by the ideas that Blacks were inherently inferior to Whites and Women were inherently inferior to Men. My whole personal history has been a struggle to meet standards of excellence against barriers which were placed ever higher as fast as I overcame the last one.

When I graduated from Hunter College in 1933, I faced the barrier of unemployment and the stigma of WPA whom many referred to as "boondogglers." I was among the last to leave the WPA rolls because Negroes were unable to find jobs in private industry. When I sought graduate training at the University of North Carolina in 1938---in the state in which I grew up and in which my family

were taxpayers---my application was rejected because of race. My experiences with segregation and other manifestations of racism led me to seek a career as a civil rights attorney and in 1944 I graduated from Howard University School of Law, cum laude, first in my class and winner of a Rosenwald Fellowship which specifically stated "for graduate study in law at Harvard University."

When I applied to Harvard University, however, after the submission of my picture and records, I received a letter from the late Professor T. R. Powell, then Chairman of the Committee on Graduate Studies at Harvard Law School, stating "Your picture and the salutation on your college transcript indicate that you are not of the sex entitled to be admitted to Harvard." Since Harvard Law School was one of the few major law schools in the country which offered a graduate program in law during World War II, I was compelled to travel across the country to the University of California, Berkeley, reduce my fellowship funds through unanticipated travel and out-of-state tuition fees, and instead of devoting my entire energies to graduate scholarship as the Fellowship grant had intended, I found it necessary to do part-time work as a waitress in order to recoup my financial deficit. Within these limitations I was not able to complete the work necessary to qualify for my doctorate, and it was not until twenty years later that I was able to achieve the J.S.D. degree at Yale University.

In short, although my motivation, energy and effort to meet the highest standards of performance have been operative throughout my life, I have experienced numerous delays in my career, not for the traditional reasons given for the failure of women to develop on par with men in our society(marriage, childrearing etc,) but by a combination of individual and institutional racism and sexism---Jim Crow and Jane Crow.

Although today I am a university professor and member of the legal profession holding its highest academic degree, the road over which I have travelled is the experience of most Negro women in America. Born in genteel poverty, I have shared the experience of domestic workers, service workers, lower paid clerical workers, social investigators in the Department of Welfare in New York City and as a former Consultant to the Equal Employment Opportunity Commission, have intimate knowledge of the problems of race and sex discrimination, particularly in employment opportunity. I have also read the testimony presented on the Equal Rights Amendment before the Subcommittee on Constitutional Amendments chaired by Senator Birch Bayh on May 5, 6 and 7, 1970 as well as the statements submitted to the full Committee on September 9, 10, 11 and 15. As a constitutional lawyer, a woman and a Negro I can say with conviction that Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment.

All that has been said about the frustrations and deprivations of American women generally because of discrimination by reason of sex can be said with special force about the position of Black women. If human dignity is the objective

of the law which guarantees individual rights, then Negro women as a group historically have suffered the most violent invasions of that personal dignity and privacy which the law seeks to protect. During the slavery era in the United States, it was held by some courts that the rape of a black slave woman was not a criminal act but a trespass on and injury to the property of another person for which the master might recover damages. There was no recourse if the forcible rape was perpetrated by the owner of the slave woman. Thomas R. R. Cobb, a pro-slavery lawyer from Georgia, published a treatise on slavery in 1858 in which he offered the rationale for this rule:

> lst. The law, by recognizing the existence of the slave... thereby confers no rights and privileges except such as are necessary to protect that existence. All other rights must be granted specially. Hence, the penalties for rape would not and should not, by such implication, be made to extend to carnal forcible knowledge of a slave, the offence not affecting the existence of the slave, and that existence being the extent of the right which the implication of the law grants. 2nd. Implications of the law will always be rebutted by the general policy of the law, and it is clearly against the policy of the law to extend over to this class of the community, that character of protection which many of the penal statutes are intended to provide for the citizen. 3/

The penalty for rape or attempted rape on any white female by a slave or a free Negro, however, was death. 4/ Under the law of Kansas Territory in 1855, a Negro male convicted of rape on a white woman was punished by castration. 5/ A white man guilty of the same offense was subject to imprisonment for five years.

The relevance of this historical reference to the Equal Rights Amendment is that the Negro woman has suffered more than the mere addition of sex discrimination to race discrimination. She has suffered the conjunction of these twin immoralities which produced an aggravated condition of degraded status from which she has not yet recovered. For while slavery has been abolished and citizenship has been recognized by virtue of the Thirteenth and Fourteenth Amendments, the Negro woman remains on the lowest rank of social and economic status in the United States. The Black male, at least, can identify with and aspire to the dominance of his white counterpart. The black female has experienced neither the "protections" which the opponents of the Equal Rights Amendment are so zealous to preserve nor the idealizations of "womanhood" and "motherhood" which the society includes in its mythology. For example, in June 1969, 44 per cent of working nonwhite women (93 per cent of whom are Negroes) were private household workers or service workers outside of the home. In 1967, the median wage of female year-round full-time private household workers, about half (47%) of whom were nonwhite, was $1, 298.

These workers are wholly excluded from the state "protective" labor laws as well as from the federal Fair Labor Standards Act. So the controversy over the state protective labor legislation applicable to women only has little meaning for a large sector of the Negro female working population. 6/

A more complete statement on the deprived position of the Black woman and the discrimination which persists against her in federally-funded programs as well as in private industry is attached hereto and made a part of this statement in the form of testimony which I presented before Congresswoman Edith Green's Special Subcommittee on Education in support of Section 805 of H. R. 16098, on June 19, 1970. This statement contains data from the U. S. Labor Department, Women's Bureau, as well as an appended article by Sonia Pressman, Senior Attorney in the Office of General Counsel; Equal Employment Opportunity Commission, and an expert on the legal implications of race and sex discrimination. I respectfully urge that the members of this Committee read this document.

The conjunction of race and sex discrimination directed toward a Negro woman has a special quality of virulence which becomes almost unbearable. My personal experience and observation leads me to believe that when the dominant white male is afflicted by racism and sexism, albeit unconscious, his hostility toward the Negro female who asserts her rights as a person is unbounded. It is as if his superior position is threatened on two fronts simultaneously and he finds it necessary to resist with greater intransigence than if he were required to yield only a single symbol of dominance. In her struggle for survival with dignity, therefore, the Negro woman stands almost alone and must appeal to the fundamental law of the land to give her a footing upon which to build some semblance of stability for herself and for her children.

Moreover, unless and until the Black woman is accorded the respect of her personhood which is the natural birthright of every individual, the position of all women in the United States is compromised and threatened. There is hardly a member of this Congress who, if he has eyes to see, has not seen upon the face of an aging Negro woman domestic or service worker a look of quiet desperation, or sometimes of grim endurance, and upon the faces of younger, more militant Black women a fury which is almost unbounded. In my view, the tragedy of Angela Davis, is that she saw the hypocricy of our male-dominated society and not its promise. She lacked the capacity to endure the thousands of crude as well as oblique indignities to which a Negro woman is subjected in the United States and which go unapprehended and unpunished.

In view of the exhaustive discussion on the legal and constitutional implications of the proposed Equal Rights Amendment, I will not impose further on the time of this Committee by repetition of arguments and data already presented. I wish to associate myself particularly with the statements presented by my colleagues, Marguerite Rewalt, Robert Braucher of Harvard Law School, Leo Kanowitz of the University of New Mexico Law School, Thomas I. Emerson of Yale Law School, and Norman Dorsen of New York University Law School.

I do, however, wish to state that for the past eight years I have been deeply involved in attempting to implement the constitutional rights of women through alternatives to the Equal Rights Amendment. In 1962, at the request of the President's Commission on the Status of Women and its Committee on Civil and Political Rights of which I was a member, I prepared an exhaustive memorandum entitled " A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se." My study advanced the thesis that the principle of equal rights as declared in the text of the proposed Equal Rights Amendment could be established through proper judicial interpretation of the Fourteenth Amendment, provided that there was a reexamination of the doctrine of "sex as a valid basis for legislative classification" and a shift of emphasis from distinctions based upon sex per se to a functional analysis. The Commission adopted this approach in its Final Report in October 1963 and called for early judicial clarification of the constitutional status of women by the Supreme Court so that the principle of equality without regard to sex might be firmly established in our fundamental law. I annex hereto and incorporate as part of this statement the Memorandum.

Advocates of the Equal Rights Amendment who served on the Commission were persuaded to accept this view as a possible route to equal rights, and subsequently those of us who had advocated a reexamination of the Fourteenth Amendment as an alternative labored long and hard to vindicate the Commission's position.

The sad fact is that we have failed. In the seven intervening years, attempts to raise the issue of equality for women before the Supreme Court have been frustrated either through procedural roadblocks or because victories won in the lower courts were not appealed by the States' Attorneys General. Federal judges resorted to judicial abstention through reluctance to review the Muller precedent of 1908 which has not yet been reexamined and overruled by the Supreme Court. In the absence of a clarifying decision by that Court, the constitutional position of women remains ambiguous and it is entirely understandable and justifiable that women and their attorneys, frustrated by continued judicial delays, now seek an unequivocal constitutional declaration of equality.

It should be significant to this Committee that constitutional attorneys who have wrestled with litigation involving attempts to use the Fourteenth Amendment to eliminate sex-based discrimination have gradually come to recognize the necessity of a new Constitutional declaration. Professor Paul Freund, although a recognized constitutional authority, has given no evidence through his published writings of detailed study of this aspect of civil rights. On the other hand, Professor Thomas I. Emerson of Yale University is the leading authority on Civil and Political Rights in the United States, 7/ and out of the wealth of his research and experience in the courts has advanced a conceptual framework for objective consideration of the meaning of equal rights as a constitutional principle.

Quite apart from the legal implications discussed in the various statements by attorneys, there are strong policy considerations which impel support of the Equal Rights Amendment in 1970. Congress is a political body which must be responsive to rapid social change. Elsewhere I have pointed out that we are in the cauldron of a worldwide revolution in human rights which I conceive to be indivisible. Traditionally alienated groups who have not shared power in the basic decisions which affect their lives---Negroes, women, youth, various ethnic and social minorities, the poor, the aged and the handicapped---are now demanding with various degrees of intensity the right to be accepted as persons, to express their individuality, and to share fully in making the decisions which shape their destinies.

In responding politically to groups which have demonstrated their power to disrupt if not to decide, Congress has finally passed legislation to implement constitutional amendments which were adopted a century ago---namely, the Fourteenth and Fifteenth Amendments-- and which were, until recent decades, considered primarily for the protection of the freed Negroes. This historical development has had certain unfortunate, and perhaps unanticipated consequences. One is that administrators of anti-discrimination laws, under the pressure of the Black Revolt, have often tended to meet the claims of Negroes at the expense of women whose claims are equally legitimate. In practical terms, this has often meant giving Negro males preferences over White females. Given the tendency of entrenched privileged groups to retain their power and advantage and to play off one disadvantaged group against another, and given the accelerating movement for Women's Rights/Women's Liberation, there exists the danger of a collision course between the aroused Black Militants and the Militant Feminists. The terrifying consequences of this potential conflict can be avoided by a statesmanship which recognizes the indivisibility of human rights and clearly guarantees the rights of all.

Professor Freund's thesis that Congress already has the power to implement equal rights for women without a new Constitutional amendment fails to take into account certain lessons of history. Negroes and women are the two major groups in the country which have been subjected to a prolonged history of legal proscriptions and disabilities based upon biological characteristics which were permanent and easily identifiable. The characteristics of religious minorities have been private and less visible; the characteristics of race and sex are public and permanent and discrimination based on these factors is therefore much more difficult to dislodge.

The process of eliminating racial and sex-based discrimination has always been a subject of intense controversy because of the large numbers of people involved and the resistance to change of attitudes constantly stimulated by the presence of observable group physical characteristics. The human mind finds it necessary to classify and label large groups of things, objects or persons in order to encompass the myriad stimuli of experience taken in through the senses. In so doing human beings resort to stereotypes in which the characteristics observed in personal contact with a few individuals are assigned to all the individuals who can be indentified as belonging to an ascribed class.

A classic example has been the attempt to find a stable terminology to classify a group of people whose physical characteristics vary from African to European prototypes and who in fact defy classification. The instability of such terminology is demonstrated by fact that in a lifetime of less than six decades I have been subjected to the following indentifications: "Colored," "negro", (sic), "Negro, "Black." The mass media have aided and abetted a vociferous minority in describing all persons of color as "Black", although there is no evidence that the majority of persons heretofore indentified as "Negroes" are dissatisfied with the term and wish to use another term of self-definition.

Similarly, in the case of women the fundamental fallacy in our laws and customs has been to treat all women as a single class without regard to the fact that they vary as individuals in their body structure, strength, musculature, physical and emotional capacities, aspirations and expectations, just as men do. Thus laws, which make distinctions on the basis of sex lock all individuals identified as belonging to one of the two sexes into a stereotype which restricts the individuality and makes for explosive frustrations---whether the individual is male or female.

These observations are supported by the trend of anthropological, sociological and psychological data and lead to the conclusion that the data upon which Muller v. Oregon 8/ was decided in 1908 is not only outmoded but now supports a pernicious doctrine in our constitutional law. Other attorneys have stated admirably the compelling reasons why the Fourteenth Amendment is no longer adequate to guarantee equal rights without regard to sex. I wish merely to add that given the history of women's prolonged subordinate position in our society, as a Nation we now face a crisis somewhat analogous to the constitutional crisis which produced the Civil War Amendments. There were those members of Congress who were convinced that the Thirteenth Amendment adequately supported the full claims of the freed Negroes to citizenship and equal rights, and the Civil Rights Act of 1866 was passed on this assumption. The uncertainty of Congressional authority under the Thirteenth Amendment, however, led to the adoption of the first section of the Fourteenth Amendment and the introduction into the fundamental law of the United States of the concept of Equal Protection of the Law.

The judicial history of these amendments, however, as instruments for guaranteeing the rights of persons who seek protection against discrimination based upon factors other than race amply demonstrates in the case of sex-based discrimination that the restriction upon constitutional development and the uncertainty that has been engendered must be removed. Women can no longer be satisfied with a mere Congressional declaration but are insisting upon having the promise of equality raised to a clear Constitutional standard beyond the power of transitory political bodies to dilute or diminish. Moreover, the proposed Equal Rights Amendment goes further than the Due Process Clause of the Fifth Amendment applicable to the Federal Government, in that it explicity prohibits the United States from denying or abridging equal rights on account of sex.

Professor Freund also expressed concern that the enforcement clause which gives legislative authority to Congress and the States "within their respective jurisdictions" to implement the Equal Rights Amendment is a restriction upon Congressional power. I respectfully submit that this view is a narrow and static interpretation of Constitutional theory. Judicial opinions abound with the principle that the Constitution is interpreted as a whole and the legislative history of the Equal Rights Amendment can make it clear that it reinforces other amendments to the Federal Constitution dealing with individual rights. I further submit that the plain intent of the Equal Rights Amendment is to overrule the judicial precedent that sex is a valid basis for legislative or judicial distinctions under the Fourteenth Amendment. The Supreme Court has already overruled all precedents which support racial distinctions in the law. Since legal distinctions based upon race and upon sex have many common origins and parallel developments and have been the focal points of comparable social conflict, both should be buried in the debris of past historical errors.

Furthermore, the plain language of the amendment "within their respective jurisdictions" appears to mean no more than it says: that States are not foreclosed from passing anti-discrimination measures intended to eliminate sex-based discrimination just as now they are not foreclosed from enacting civil rights legislation even though parallel legislation by Congress may exist. There is abundant experience in our history of federal and state legislation directed toward a common purpose: the Federal Equal Pay Act existing along side of numerous State Equal Pay Acts; Title VII of the Civil Rights Act of 1964 and the fair employment practice legislation of nearly four-fifths of the States; Title II of the same act operating along with the public accommodations sections of numerous state civil rights acts. The language under discussion merely makes clear that the several States will have both the power and the obligation to act simultaneously with the Federal Government to eliminate sex-based discrimination within their respective jurisdictions. In the case of an irreconcilable conflict between State and Federal legislation on the same subject-matter, however, the Supremacy Clause of the Federal Constitution requires that the Federal legislation shall take precedence over the State law. In view of these well-established constitutional principles, Professor Freund's apprehensions seem to be ill-founded.

Finally, I appeal to this Committee and to the United States Senate to use the uniquely human gift of vision and imagination in a creative approach to the Equal Rights Amendment. Much of the testimony already presented has either emphasized the possible dire consequences or the grievances which have led to the urgent demand for the adoption of the Amendment. I suggest that what the opponents of the Amendment most fear is not equal rights but equal power and responsibility. I further suggest that underlying the issue of equal rights for women is the more fundamental issue of equal power for women. No group in power has surrendered its power without a struggle. Many male opponents of equal rights for women recognize the more fundamentally revolutionary nature of the changes which a genuine implementation of such an amendment would bring about. A society in which more than half of the population is absent from the formal authority and decision-making processes is a society in dangerous imbalance. Those who argue

in support of the idea of fundamental differences between men and women only reinforce the compelling reasons why women should have access to equal power through the implementation of equal constitutional rights. In a jury exclusion case based upon sex in 1946, Mr. Justice Douglas speaking for the Supreme Court made an observation which I respectfully urge upon the members of this Committee:

> ...The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among th imponderables.
>
> To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded. 9/

The acceptance of the concept of equal power for women which is implicit in the concept of equal rights would mean a fundamental transformation of our society in ways which we cannot now clearly conceive. Since no woman is a mother in the home for more than a segment of her life and since statistically women live longer than men at the present time, the large number of women who will be free from childbearing under the most traditional conceptions of such functions will constitute a formidable minority seeking entrance to their rightful share of decision-making in public affairs. Men of inferior performance will necessarily have to yield their positions of power and privilege to women of superior performance. This fact alone, I submit, is at the very core of much male opposition to the adoption of this Amendment. Those males of superior ability, dedication and performance will be relatively unaffected or, more likely, will be enhanced by the changes.

A Congress of the United States in which one-third or more are women (if one uses the formula of the percentage of the labor force who are women) and the unique experiences of this untapped resource are likely to accelerate our progress toward the solution of such massive problems as pollution, poverty, racism and war. Similarly, in all of the other public and private institutions of the United States, the introduction of women in greater proportion to their representation in the total population than presently exists would necessarily transform these institutions into more humane and inclusive instruments of human activity. The presence of women would also accelerate the presence of other groups in our heterogeneous population and bring into play a variety of human experiences and wisdom which would enrich the entire process. Women may well hold the key to the reconciliation of the races, the generations and the social and economic classes. The adoption of the Equal Rights Amendment and its ratification by the several States could well usher in an unprecedented Golden Age of human relations in our national life and help our country to become an example of the practical ideal that the sole purpose of governments is to create the conditions under which the uniqueness of each individual is cherished and is is encouraged to fulfill his or her highest

creative potential. The first step toward this goal of equality of right can be taken if the members of the United States Senate can make the great leap of faith and adopt the Equal Rights Amendment by the necessary two -thirds majority. It is the challenge and the opportunity of this Century, and your place in history may well be determined by the decision you make upon the other half of the population.

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Footnote References

1/ See e.g. The Right to Equal Opportunity in Employment, 33 CALIF. L. REV. 388-437 (Oct. 1945); The Historical Development of Racial Legislation in the United States, XXII JOURNAL OF NEGRO EDUCATION, 4-15 (1953); Protest Against the Legal Status of the Negro, THE ANNALS, 357: 55-64 (Jan. 1965); States' Laws on Race and Color, comp. and ed., Woman's Division of Christian Service, The Methodist Church (1951) 746 pp.; 1955 Supplement; The Law As It Affects Desegregation, RADCLIFFE QUARTERLY, Aug. 1963; Jane Crow and the Law, 34 GEO. WASHINGTON L. REV. 232-256 (Dec. 1965) (co-author with Mary O. Eastwood); "The Rights of Women," in Norman Dorsen, ed., Americans' Rights: What They Are; What They Should Be, to be published by Pantheon Books in 1971; "The Liberation of Black Women," in Voices of the New Feminism, ed. by Mary Lou Thompson, Beacon Press, Oct. 1970; "The Law of Sex-Based Discrimination in Employment," Proceedings of American Bar National Institute, Equal Employment Opportunity: Its Involvements, Its Enigmas, Its Orthodoxy, March 29, 1969, Washington, D.C. Human Rights, U.S.A.: 1948-1966, Service Center, Board of Missions, The Methodist Church, 1967. See also unpublished works: "Roots of the Racial Crisis: Prologue to Policy," 1965 (Yale University Library: Doctoral (J.S.D.) thesis); "The Case for Sex Equality in Jury Service," March 1966, ACLU (co-author with Dorothy Kenyon).

2/ See e.g. Kanowitz, Women and the Law (1969), pp. 154 ff; Mead and Kaplan, eds., American Women (1965), pp. 147-151. See also White v. Crook, 251 F. Supp. 401 (N.D. Ala. 1966); Motion for Leave to File Brief Amicus Curiae and Brief of the American Civil Liberties Union, Amicus Curiae in Phillips v. Martin Marietta Corp., U.S. Supreme Court, October Term, 1969, No. 1058.

3/ Cobb, An inquiry into the Law of Negro Slavery (1858), pp. 86-89.

4/ See e.g., Alabama Code (1852), Sec. 3307; North Carolina Code (1855), Ch. 107, Sec. 44, p. 573; Kansas Territory Statutes (1855), Ch. 48, Sec. 26, 31, pp. 241-242.

5/ Kansas Territory Statutes (1855), Ch. 48, Secs. 26-32, pp. 241-242.

6/ Pressman, "Job Discrimination And The Black Woman," The Crisis, p. 103 (March, 1970).

7/ See e.g. Emerson, Haber and Dorsen, Political and Civil Rights in the United States, 3rd Ed., Little, Brown & Co., 1967 (2 vols.) pp. 227; Emerson, The System of Freedom of Expression, Random House, 1970, 754 pp. Note also that Professor Emerson was the successful counsel who prepared the brief and argued the precedent-making case before the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the important issue of the right to privacy was raised and was canvassed by the justices' opinions.

8/ 208 U.S. 412 (1908). See Appendix II, "Note on Muller v. Oregon and the 'Oregon Brief' Popularly known as the 'Brandeis Brief' annexed to 'A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se," attached to this statement.

9/ Ballard v. U.S. 320 U.S. 187, 193 (1946), citing and quoting from Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).