THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON FEDERAL LEGISLATION

Report on

H. J. Res. 2 (76th Cong.) Introduced by Mr. Ludlow
H. J. Res. 25 (76th Cong.) Introduced by Mr. Kennedy
H. J. Res. 27 (76th Cong.) Introduced by Mr. Guyer
S. J. Res. 7 (76th Cong.) Introduced by Senators Townsend, Burke and Gibson

Each Entitled

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

These resolutions all propose in identical terms an equal-rights-for women amendment, reading:

"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.

"Congress shall have power to enforce this article by appropriate legislation."

These resolutions have the vigorous support of the National Woman's Party. The League of Women Voters is just as violently opposed to them.

This difference in viewpoint reflects a broad cleavage of policy between substantial groups of women. In this report it is not necessary to take sides concerning the wisdom of removing distinctions which some women wish to preserve, but merely to point out that the subject is one appropriate for action in the various states, rather than for the federal constitution.

The most important difference between the two groups is in their attitude toward industrial legislation for the protection of women. The one group feels that laws establishing maximum hours of work for women, forbidding their employment in certain types of work, and prescribing working conditions, etc., represent an advance which should not be lost. The other group believes that such legislation, instead of being a protection of women, is a restriction on women, which closes doors of opportunity and forces them to compete with each other in more poorly paid work.

No sound reason appears for requiring uniformity in state legislation on such subjects. There is no question of competition between states with low standards and states with high standards, which is the justification urged for a Federal Child Labor Amendment, and consequently, no reason for imposing on one state where the women voters may feel that protective legislation is to their advantage, the views of women in the other states. It would seem unfortunate to forbid any legislature under any circumstances from taking account of organic differences which exist between men and women. The late Mr. Justice Holmes, in a case involving minimum wages for women (Adkins v. Children's Hospital, 261 N. S. 525, at 569-70) dissenting, stated:

> "It will take more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."

Mr. Justice Frankfurter, while a professor at Harvard Law School, said:

> "Only those who are ignorant of the nature of law, and of its enforcement, or indifferent to the exacting aspects of woman's life, can have the naivete, or the recklessness, to sum up woman's whole legal position in a meaningless and mischievous phrase about 'equal rights.' Nature made man and woman different; the law must accommodate itself to the immutable differences of Nature." (Quoted in Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, February 8, 1938, p. 69.)

Moreover, the proposed amendment would affect the fields of marital relations and property rights, both of which have always been recognized as exclusive matters of state concern. In fact, it would have such a widespread effect that it might bring about many unwanted results, such as followed the Cable Act in 1922, which gave women the same citizenship rights upon marriage as men, but resulted in creating stateless women, or cases of dual nationalities, one only slightly less annoying than the other.

While there are still states where the wife's earnings belong to the husband, where a married woman cannot make a contract without her husband's consent, and where the women have not the right to serve on juries, great progress has unquestionably been made in giving recognition to the rights of women. Trying to correct the matter by constitutional amendment would create uncertainty as to whether specific statutes making distinctions between men and women were to be altered so as to put men on the standard of women or women on the

standard of men. For example, the Labor Law of the State of New York limits the hours of work of women employed in factories, prohibits night work in certain occupations, and requires the furnishing of special facilities for women. Moreover, a husband is chargeable with the support of his wife and children, a duty which is enforceable both civilly and by criminal penalties. The question would arise under the proposed amendment as to whether the wife should be deprived of the right of support or whether the husband should be given the right to be supported by his wife, and if the latter, as to how reciprocal duties of support could be reconciled on a basis of equality.

The law of New York provides that the state militia is to be composed only of male citizens and the federal law provides that recruits enlisted in the army must be effective and able embodied men. Presumably the courts would not apply even a constitutional provision as broadly phrased as the proposed equal rights amendment to require the enlistment of women in the armed forces, but it should be pointed out that the proposed amendment makes no exception in its terms to prevent the raising of even this question.

If the proposed equal rights amendment were adopted, the interpretation of state laws in the light of the equal rights amendment would immediately become a federal question cognizable in the federal courts. From the point of view of

the administration of those courts, it is not desirable to add to their burden the vast field of inquiry which this amendment would open up, including the common law as well as the statutory law of all of the states.

Moreover, the power of Congress to legislate on the subject of equal rights grants indeterminate powers to inject federal legislation into a state's own law on any subject in which the rights of men and women are involved - a very broad field.

The prudent course would seem to be to continue attacking specific objectionable statutes, rather than resort to a blanket amendment which would intrude the federal constitution into matters which are properly of state concern.

The proposed amendment is disapproved.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION
of
THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK

March 25, 1939.