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Senate

EQUAL RIGHTS FOR MEN AND WOMEN

The Senate continued with the consideration of the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Mr. BAYH. Mr. President, I ask unanimous consent that excerpts from the majority report of the Senate Judiciary Committee, explaining in significant detail some of the issues which have been discussed here today be printed in the RECORD, so that the State legislatures of the 50 States may have the benefit of that information.

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

[Excerpts from the majority report of the Committee on the Judiciary on the Equal Rights Amendment—submitted by Mr. BAYH]

STATEMENT

The proposed Equal Rights Amendment reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"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.

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

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

The history of the proposal, the need for an Equal Rights Amendment, and the effect of the Amendment are discussed in detail in later sections of this Report. The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women. The Amendment thus recognizes the fundamental dignity and individuality of each human being. The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected. And the Amendment only requires equal treatment of individuals; it does not require any State or the federal government to establish quotas of men or women in, for example, admission to State supported schools.

Both major political parties have repeatedly supported this proposal in their national party platforms. It has received the endorsement of Presidents Eisenhower, Kennedy, Johnson and Nixon. Both the Citizens' Advisory Council on the Status of Women, created by President Kennedy, and the President's Task Force on Women's Rights and Responsibilities, created by President Nixon, have recommended in strongest terms approval of the Amendment. At least eleven states (California, Connecticut, Delaware, Florida, Louisiana, Maryland, Minnesota, Nebraska, New York, North Dakota, Pennsylvania) have taken official action in support of the Amendment. The House of Representatives on October 12, 1971 approved the Amendment 354 to 23. And S.J. Res. 8, which is identical to H.J. Res. 208, is cosponsored by over half the Senate.

Moreover, an impressive list of organizations have recorded their support of the Equal Rights Amendment. Among them are the following:

American Association of College Deans.
American Association of University Women.
American Association of Women Deans and Counselors.
American Association of Women Ministers.
American Civil Liberties Union.
American Federation of Soroptimist Clubs.
American Home Economics Association.
American Jewish Congress.
American Medical Women's Association.
American Newspaper Guild.
American Nurses Association.
American Society of Microbiology.
American Society of Women Accountants.
American Society of Women Certified Public Accountants.
American Women in Radio and Television.
Association of American Women Dentists.
B'nai B'rith Women.
Church Women United.
Common Cause.
Council for Christian Social Action, United Church of Christ.
Council for Women's Rights.
Ecumenical Task Force on Women and Religion (Catholic Caucus).
Federally Employed Women.
General Federation of Women's Clubs.
Intercollegiate Association of Women Students.
International Association of Human Rights Agencies.
International Brotherhood of Painters and Allied Trades.
International Brotherhood of Teamsters.
International Union of United Automobile, Aerospace & Agricultural Implement Workers UAW.
Interstate Association of Commissions on the Status of Women.
Ladies Auxiliary of Veterans of Foreign Wars.
League of American Working Women.
National Association of Colored Women.
National Association of Negro Business and Professional Women's Clubs.
National Association of Railway Business Women.
National Association of Women Lawyers.
National Coalition of American Nuns.
National Education Association.
National Federation of Business and Professional Women's Clubs.
National Organization for Women.
National Welfare Rights Organization.
National Woman's Party.
National Women's Political Caucus.
Professional Women's Conference.
St. Joan's Alliance of Catholic Women.
Unitarian Universalist Women's Federation.
United Automobile Workers.
United Methodist Church—Women's Division.
Women's Equity Action League.
Women's International League for Peace and Freedom.
Women's Joint Legislative Committee for Equal Rights.
Women United.

Finally, a number of distinguished constitutional scholars have testified in support of the Equal Rights Amendment, including Professor Norman Dorsen of New York University, Professor Thomas I. Emerson, Lines Professor of Law at Yale Law School, and Leo Kanowitz, Professor of Law at the University of New Mexico. Moreover, the Association of the Bar of the City of New York, through its Committee on Civil Rights and Special Committee on Sex and Law has urged "adoption of the [Equal Rights] Amendment as the best means of establishing equality before the law." And the American Bar Association recently adopted a resolution which "supports constitutional equality for women, and urges extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

In sum, the Committee was impressed with the broad base of political, public and scholarly opinion in favor of the Equal Rights Amendment, and recommends that it be approved.

I. LEGISLATIVE HISTORY

Proposed constitutional amendment providing for equal rights for men and women have been introduced in nearly every Congress since 1923, shortly after the ratification of the 19th Amendment extended the right to vote to women. Resolutions were reported favorably by the Subcommittee on Constitutional Amendments in the 88th, 89th and 90th Congresses, as well as a number of earlier Congresses. Resolutions were reported favorably by the Committee on the Judiciary in the 80th, 81st, 82nd, 83rd, 84th, 86th, 87th and 88th Congresses.

In the 81st Congress, and again in the 83rd Congress, resolutions passed the Senate with a floor amendment. This floor amendment provided that the Amendment "shall not be construed to impair any rights, benefits or exemptions now or hereafter conferred by law upon members of the female sex." In both instances, the House of Representatives failed to act. The same floor amendment was added to an equal rights resolution during Senate consideration in the 86th Congress. The proponents of the amendment objected to this addition because it diluted the equality of rights and responsibilities among men and women, which is the Amendment's goal. Accordingly, the resolution's principle sponsors moved to recommit it to the Judiciary Committee, and that motion was passed.

On May 5, 6, and 7, 1970, the Subcommittee on Constitutional Amendments held hearings on the Equal Rights Amendment. It received testimony from 42 witnesses, received 75 additional insertions of material, and compiled a hearing record of almost 800 pages. *The Equal Rights Amendment*, Hearings Before the Senate Subcommittee on Constitutional Amendments, 91st Cong., 2d Sess. (1970). The Subcommittee met and reported the Amendment to the full Committee on August 10, 1970. Soon thereafter the full Committee held a further series of hearings on the Amendment, on September 9, 10, 11, and 15, 1970. It listened to 25 witnesses and compiled a 430 page record of hearings. *Equal Rights 1970*, Hearings Before the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

In the meantime, the House of Representatives voted to discharge its Judiciary Committee from further consideration of the Equal Rights Amendment and, on August 10, 1970, by a vote of 350 to 15, approved the Amendment (H.J. Res. 264).

The House-passed joint resolution was not referred to the Senate Judiciary Committee but was placed directly on the Calendar pursuant to the request of the Senate leadership. H.J. Res. 264 became the pending Senate business on October 6, 1970. After several days of debate, on October 13, 1970, the Senate adopted by a vote of 36 yeas to 33 nays Amendment No. 1049, which added a second sentence to the first section of the joint resolution, as follows: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service." Amendment 1049 also imposed a seven-year time limit on the ratification process and made the joint resolution effective two years—instead of one year—after ratification. Thereafter, the Senate also adopted, 50 yeas to 20 nays, Amendment No. 1048, which added to the pending joint resolution a second section proposing an additional constitutional amendment relating to prayers in public buildings. After further debate the Senate laid aside the joint resolution, as amended, on November 19, 1970, and proceeded to the consideration of other business. No further action was taken in the 91st Congress.

In the 92d Congress, Subcommittee No. 4 of the House Judiciary Committee held hearings on H.J. Res. 208—which is identical to S.J. Res. 8 and 9 in the 92d Congress—on March 24, 25, and 31, and April 1, 2, and 5, 1971, hearing testimony from 35 witnesses. *Equal Rights for Men and Women*, Hearings Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. (1971). On April 29, 1971 the Subcommittee by a voice vote ordered the measure reported to the House Judiciary Committee. The full Committee amended the joint resolution on June 22, 1971 by a vote of 19 to 16 by adding a section which provided that the Amendment would "not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or any State which reasonably promotes the health and safety of the people." It then, by vote of 38 to 2, ordered the joint resolution reported favorably. The Committee Report, H.R. Rep. 92-259, was filed on July 14, 1971. Separate views were filed by 14 Representatives; Minority views were filed by 3.

On October 12, 1971 the House rejected by vote of 104 to 254 the Committee amendment to H. J. Res. 208. After further debate, it approved the resolution in its original form by vote of 354 to 23. (117 Cong. Rec. H. 9392 (Daily ed. Oct. 12, 1971)).

In the Senate, the Subcommittee on Constitutional Amendments met on November 22, 1971, and adopted by vote of 6 to 4 a motion to substitute the following language for sections 1 and 2 of S.J. Res. 8, and S.J. Res. 9, and H.J. Res. 208:

"SECTION 1. Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them.

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

The subcommittee then voted unanimously to report all three joint resolutions, as amended, to the full Judiciary Committee.

By vote of 15 to 1 on February 29, 1972, the Senate Judiciary Committee ordered S.J. Res. 8, S.J. Res. 9 and H.J. Res. 208 reported favorably to the floor unamended. Prior to ordering the Equal Rights Amendment reported favorably and unamended, the Committee took the following actions:

(1) Rejected by roll call vote of 1 to 15 a motion to substitute for sections 1 and 2 of the Equal Rights Amendment the language (printed above) recommended by the Subcommittee on Constitutional Amendments (see Part IV, *infra*);

(2) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes, rape, seduction, or other sexual offenses," (see Part IV, *infra*);

(3) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "Nothing contained in this article shall be construed to deprive the United States and the several States of the legislative power to extend to female persons any right or protection sanctioned by the fifth or fourteenth articles of amendment";

(4) Rejected by roll call vote of 2 to 14 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service or service in combat units of the Armed Forces", (see Part III (B), *infra*);

(5) Rejected by roll call vote of 3 to 13 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service," (see Part III(B), *infra*);

(6) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "No Federal law shall prohibit an institution of higher education from enrolling only male or female students or students of both sexes. If any such institution of higher education enrolls both male and female students, such institution shall not be allowed to accept only a certain percentage of individuals of either sex," (see Part III(E), *infra*).

II. THE NEED FOR THE EQUAL RIGHTS AMENDMENT

A. Discrimination against women

While there has been some progress toward the goal of equal rights and responsibilities for men and women in recent years, there is overwhelming evidence that persistent patterns of sex discrimination permeate our social, cultural and economic life. The magnitude of sex discrimination in the country today can be gauged by the simple and eloquent statement of Congresswoman Shirley Chisholm when she testified before the Subcommittee on Constitutional Amendments in May 1970: "I have been far oftener discriminated against because I am a woman than because I am black."

Some legislative progress has been made toward equal rights, but not enough to wipe out all discrimination against women in State and Federal law. Congress approved Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment unless sex is a "bona fide occupational qualification." And Congress approved the Equal Pay Act which assures that many persons who do equal work receive equal pay regardless of sex. But these laws fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly.

The Supreme Court has been slow to move too: recently, for the first time, it did invalidate a state law which discriminated against women, but it did so in a way which left the burden of proof on each woman plaintiff to show that the law is unreasonable. The Court has consistently refused to apply the Fourteenth Amendment to discrimination based on sex with the same vigor it applies the Amendment to distinctions based on race.

In the States, progress has been mixed. Some States have made diligent efforts to revise outmoded and discriminatory laws, and three States—Illinois, Pennsylvania and Virginia—have recently approved State constitutional provisions banning sex discrimina-

tion. But in other States, there has been no progress at all.

On the whole, sex discrimination is still much more the rule than the exception. Much of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty.

Specific examples of sex discrimination are legion, and have been brought to the attention of Congress many times, through hearings on the Equal Rights Amendment and on other legislation (for example, *Discrimination Against Women*, Hearings Before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)). In assessing the need for the Equal Rights Amendment, it is useful to review a few of the best known and most far reaching cases of invidious sex discrimination.

1. Criminal Liability and Civil Responsibility

Difficult as it is to believe, the record shows that women are sometimes denied even the basic rights and responsibilities of citizenship in the United States today. Until 1966, for example, three States exluded women from juries altogether. And today there is still at least one State which requires women, but not men, to register specially to be eligible to serve on juries.

There is also invidious discrimination against women in the criminal laws of some States. One State has a statute allowing women to be jailed for three years for habitual drunkenness, while a man can receive only 30 days for the same offense. In two States, the defense of "passion killing" is allowed to the wronged husband, but not to the deceived wife. And in another State, female juvenile offenders can be declared "persons in need of supervision" for non-criminal acts until they are 18, while males are covered by the statute only until age 16.

2. Education

Governmental action also contributes significantly to sex discrimination in education. Approximately 75 percent of the college students in the country attend publicly supported institutions. These colleges and universities have a crucial role in determining employment opportunities for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country. As an independent report prepared for the Department of Health, Education and Welfare this year stated: "Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."

Discrimination in admission to college is widespread. In 1968, only 18 per cent of the men entering public four-year colleges had a high school grade average of B+ or better. But 41 per cent of the freshman women had attained such grades. In 1969 one State university published an admissions brochure which stated that "admission of women on the freshman level will be restricted to those who are especially well qualified." Another State university admitted women only for summer school sessions, and never to the regular academic curriculum, unless they are related to employees or students and wish to pursue a course of study otherwise unavailable. In 1970, the percentage of the female population enrolled in college was markedly lower than the percentage of the male population. Over 40 percent of the males between the ages of 18 and 21, and over 20 percent of the males between 23 and 24 were enrolled in college. But the comparable figures for females were 29 percent and 9 percent respectively.

Discrimination in admission to graduate schools is, if anything, even more widespread, despite the fact that women's undergraduate grade point averages are higher than men's. Testimony before the House Special Subcommittee on Education in 1970 revealed, for example, that the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929–30 and 1965–66 (while male applications increased by only 29 percent). The percentage of women applicants who were accepted actually declined during the same period. And while women received 55 percent of the Bachelors degrees awarded in all fields in 1968–69, women received only 37 percent of the Masters degrees, only 13 percent of the Doctorates, and only 4 percent of the professional degrees.

Discrimination against women does not end with admission; it pervades every level of the teaching profession. While 75 percent of the teachers in public elementary and secondary schools are women, only 22 percent of the elementary school principals and only 4 percent of the high school principals are women. At the college level, statistics show that while almost half of the male teachers become full professors only 10 percent of the female teachers are granted that status. And according to a recent survey of 36 prominent law schools, to take a final example, only 2.1 percent of the faculty members are women, and a quarter of those are classified as Librarians.

3. Business and labor

The business and labor laws of some States discriminate invidiously against women. Some States place special restrictions on the right of married women, but not married men, to contract or to establish independent businesses or to become a guarantor or a surety. Perhaps even more astounding, the Committee discovered at the hearings in 1970 that twenty-six States then had laws or regulations which prohibited the employment of adult women in specified occupations or industries which were open to adult men.

Most States have enacted so-called "protective" labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a women can life or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. Speaking of such restrictive laws as a whole, the Equal Employment Opportunities Commission states in its guidelines on sex discrimination:

"The Commission believes that [state laws which restrict or limit the employment or conditions of employment of females] although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to 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, preferences and abilities of individual females and tend to discriminate rather than protect."

Partially because of these laws, and also because of other sorts of sex discrimination, working women are at a great disadvantage in the private sector. The median salary income for women is only 59.5 percent of that earned by men—and in recent years the gap between male and female median incomes has been widening. In 1969, less than 5 percent of all fulltime female workers earned over $10,000 per year, compared with 35 percent of all male workers. At the other end of the scale, 14.4 percent of women, but only 5.7 percent of men, earned less than $3,000. Indeed, sex discrimination is so pervasive that women with four years of college education made only slightly more than men with an eighth grade education. And while women account for more than 40 percent of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs.

Sex discrimination is clearly present even in government employment, which in total accounts for more than 20 percent of the labor force. For example, although women constituted 34 percent of all full-time white collar Federal Civil Service Employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four highest grades. And sex discrimination in government has an effect even greater than the numbers involved, for private employers often look to government as a model for employment practices.

B. Inadequacy of legislative or judicial relief

It is sometimes argued that all of the discriminatory laws and practices which exist could be eliminated without a constitutional amendment. If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding state interest", then part of the reason for the Amendment would disappear. But the Court has persistently refused so to hold. Indeed, the Court has upheld many laws which plainly discriminate against women.

Its first significant case involving sex discrimination was *Bradwell* v. *Illinois*, 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. The Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, to uphold the law. Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in *Minor* v. *Happersett*, 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

Later, the Court began to apply a standard of "reasonableness" to laws which discriminated on the basis of sex. This test was employed to uphold against constitutional attack labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart* v. *Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied.

More recently, in *Hoyt* v. *Florida*, 386 U.S. 57 (1967), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment, since it was reasonable 'for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."

Last year the Supreme Court for the first time struck down a law which discriminated

against women. In *Reed* v. *Reed*, ———— U.S. ————, 40 U.S.L.W. 4013, (1971, the Court invalidated a State law which arbitrarily favored men over women as administrators of estates. But the Court did not overrule such cases as *Goesart* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the Fourteenth Amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable." And that is a difficult burden to carry, indeed. As the Association of the Bar of the City of New York pointed out in its recent report "[t]he 1971 *Reed* case indicated no substantial change in judicial attitude." Passage of the Equal Rights Amendment will make it clear that the burden is *not* on each woman plaintiff to show sex discrimination is "unreasonable"; the Amendment will, instead, assure all men and women the right to be free from discrimination based on sex.

Of course, it would theoretically be possible for Congress and each State to revise their laws and eliminate those which discriminate against women. But without the impetus of the Equal Rights Amendment, that process would be far too haphazard and much too slow to be acceptable. We cannot afford to wait any longer for Congress and each of the 50 State legislatures to find the time to debate and revise their laws. As in other areas where the Constitution has been amended, there is an imperative for immediate action. The Nation has waited too long already—it has been 49 years since the Equal Rights Amendment was first introduced. Only a constitutional amendment can provide the legal and practical basis for the necessary changes.

Finally, we cannot overlook the immense symbolic importance of the Equal Rights Amendment. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land.

The Committee concludes that because of the pervasive legal sex discrimination which now exists, and because of the inedaquacy of legislative and judicial remedies, there is a clear and undeniable need for the Equal Rights Amendment.

III. THE EFFECT OF THE EQUAL RIGHTS AMENDMENT

A. General principles

The general principles on which the Equal Rights Amendment rests are simple and well-understood. Essentially, the Amendment requires that the federal government and all state and local governments treat each person, male and female, as an individual.

It does not require that any level of government establish quotas for men or for women in any of its activities; rather, it simply prohibits discrimination on the basis of a person's sex. The Amendment applies only to governmental action; it does not affect private action or the purely social relationships between men and women.

The Separate Views of Congressman Edwards and 13 other members of the House Judiciary Committee in the House Report on the equal rights amendment, H.R. Rep. 92-359, state concisely and accurately the understanding of the proponents of the Amendment:

"The basic premise of House Joint Resolution 208 in its original form is a simple one. As stated by Professor Thomas Emerson of Yale University, one of the Nation's foremost authorities on constitutional law, the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.

"The existence of a characteristic found more often in one sex than the other does not justify legal treatment of all members of that sex different from all members of the other sex. The same is true of the functions performed by individuals. The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex.

"The main reason underlying the basic concept of the original text derives from both theoretical and practical considerations. The equal rights amendment (H.J. Res. 208) embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society with the individual, and with the right of each individual to develop his own potentiality.

"The legal principle underlying the equal rights amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

"Just as the principle of equality does not mean that the sexes must be regarded as identical, so too it does not prohibit the States from requiring a reasonable separation of persons of different sexes under some circumstances. In this regard, two collateral legal principles are especially significant. One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.

"Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

"With respect to other constitutional considerations, it should be noted that (H.J. Res. 208) would apply only to governmental action, and not to private or individual action. In this regard, as well as in some of its other features, (H.J. Res. 208) is similar to those provisions of the 14th Amendment which are directed against racial, ethnic, and religious discrimination. Thus, in interpreting (H.J. Res. 208) the courts would have available a substantial body of case law which could be used as a guide when relevant. At the same time much as the struggle of women for equality is comparable to that of racial, ethnic, and religious minorities, there are some differences which the courts could also take into account in appropriate cases."

Because substantial controversy has arisen over the impact of the Equal Rights Amendment in a few specific areas, it is appropriate to suggest the likely application of these general principles in such areas.

B. Military service

It seems clear that the Equal Rights Amendment will require that women be allowed to volunteer for military service on the same basis as men; that is, women who are physically and otherwise qualified under neutral standards could not be prohibited from joining the service solely on the basis of their sex. This result is highly desirable for today women are often arbitrarily barred from military service and from the benefits which flow from it: for example, educational benefits of the G.I. bill; medical care in the service and through Veterans Hospitals; job preferences in government and out; and the training, maturity and leadership provided by service in the military itself.

It seems likely as well that the ERA will require Congress to treat men and women equally with respect to the draft. This means that, if there is a draft at all, both men and women who meet the physical and other requirements, and who are not exempt or deferred by law, will be subject to conscription. Once in the service, women, like men, would be assigned to various duties by their commanders, depending on their qualifications and the service's needs.

Of course, the ERA will not require that all women serve in the military any more than all men are now required to serve. Those women who are physically or mentally unqualified, or who are conscientious objectors, or who are exempt because of their responsibilities (e.g., certain public officials; or those with dependents) will not have to serve, just as men who are unqualified or exempt do not serve today. Thus the fear that mothers will be conscripted from their children into military service if the Equal Rights Amendment is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service. For example, Congress might well decide to exempt all parents of children under 18 from the draft.

Our understanding of the effect of the Equal Rights Amendment comports with that of the House. The members of the House Judiciary Committee, quoting from the Report of the Senate Judiciary Committee on the Equal Rights Amendment in 1964, said:

"It could be expected that women will be equally subject to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the government would not require that women serve where they are not fitted just as men [are not required to serve where not fitted]."

Or, as Congresswoman Martha Griffiths, the primary sponsor of H.J. Res. 208, said on the floor:

"The draft is equal. That is the thing that is equal. But once you are in the Army you are put where the Army tells you where you are going to go."

Congressman Edwards, who had chaired the House Subcommittee Hearings on the Equal Rights Amendment, put it this way:

"Women in the military could be assigned to serve wherever their skills or talents were applicable and needed, in the discretion of the command, as men are at present."

Furthermore, our understanding comports with that of the witnesses at the hearings and other interested parties. See, for example, the testimony of Professor Norman Dorsen of New York University Law School in *Equal Rights for Men and Women 1971*, Hearing Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. 162-164 (1971); Report of the President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (April, 1970) (the Equal Rights Amendment "would impose on women an obligation for military service"); National Association of Women Lawyers, Letter to Hon. Emanuel Celler (April 27, 1971) (females "would be . . . subject to the draft on the same basis as young men"

and "women in the military would receive the same benefits and veterans' preferences, employment, education skills learned in the service").

One question often raised is whether men and women can serve together efficiently in the Armed Services. Perhaps the best answer is that they are doing so now without apparent difficulty. The experience of other countries supports this conclusion. In Israel, women are required to serve in the Defense Forces just as men. They are not, however, assigned to combat posts, nor are they required to engage in physical combat. Rather, they perform critical noncombatant tasks in the clerical, communication, electronics and nursing fields. Separate and independent facilities are maintained for women soldiers. Under these circumstances, no significant difficulties have arisen from having men and women serve together.

C. Labor legislation

A number of States have laws which restrict or limit the occupations or conditions of employment of females, but not of males. These laws are often called "protective", but in practice many of them discriminate against women by making it difficult and sometimes impossible for a fully qualified woman to obtain certain jobs, often highly desirable ones. Because of Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment in certain instances where sex is not a "bona fide occupational qualification", these laws are not nearly as great a barrier to fair employment for women as they once were. Nevertheless, some States retain their laws.

Most of the so-called "protective" laws were passed to protect women from exploitation in another era, and they represented hard won progress. But today, some are merely restrictive, and because they apply only to women confer no real benefit. For example, some States have laws which absolutely prohibit women, whether qualified or not, from certain jobs—jobs which are open to men. Other States have weight lifting laws applicable only to women which effectively deny fully qualified women certain jobs. Still others have laws limiting the hours women may work—and these sometimes prevent women from gaining promotions to supervisory positions. As the Equal Employment Opportunity Commission has found, such laws "do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect."

Ratification of the Equal Rights Amendment will result in equal treatment for men and women with respect to the labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit, which offer real protection, will, it is expected, be extended to protect both men and women. Examples of laws which may be expanded include laws providing for rest periods or minimum wage benefits or health and safety protections. Men are now sometimes denied the very real benefits these laws offer. As Professor Leo Kanowitz pointed out to your Committee at its Hearings in September 1970: "The fears of some opponents of the [Equal Rights] Amendment that its adoption would nullify laws that presently protect women only are thus unfounded—since the equality of treatment required by the [A]mendment can be achieved by extending the benefits of those laws to men rather than by removing them for women." The Association of the Bar of the City of New York pointed out in discussing laws requiring rest periods for women only, that they "may be extended to both sexes without burden or disruption."

D. Expansion versus nullification of unconstitutional statutes

The question of whether laws found unconstitutional under the Equal Rights Amendment will be struck down or extended to cover both men and women, is a question which extends beyond the area of labor legislation. Of course, the legislatures of the several States will have the primary responsibility for revising those laws which conflict with the Equal Rights Amendment. Indeed, the purpose of delaying the effective date of the Equal Rights Amendment for two years after ratification is to allow legislatures—particularly those which meet only in alternate years—and agencies an opportunity to review and revise their laws and regulations. As stated above, the Committee expects that any labor law, or other legislation, which is truly protective will be extended to include both sexes, while laws which are restrictive will become null and void.

In those situations where a court finds a State or federal law in conflict with the Equal Rights Amendment, the legal infirmity will be cured either by expanding the law to include both sexes or nullifying it entirely. As discussed above, it is expected that those laws which are discriminatory and restrictive will be stricken entirely as the court did in *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D. Ill. March 31, 1970) which involved a law banning women from a certain occupation. On the other hand, it is expected that those laws which provide a meaningful protection would be expanded to include both men and women, as for example minimum wage laws, see *Potlatch Forests, Inc.* v. *Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), or laws requiring rest periods, *cf.* Equal Employment Opportunities Commission Case No. 6-8-6654 (June 23, 1969), 1 CCH Employ. Prac. Guide 6021.

There can be no question that the courts, upon holding a statute unconstitutional, can expand the scope of the statute if necessary to cure its legal infirmity. As Mr. Justice Harlan said, concurring in *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (footnote omitted):

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *See Skinner* v. *Oklahoma ex rel. Williams*, 316 U.S. 535, 543 (1942); *Iowa Des-Moines Nat'l. Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Developments In the Law-Equal Protection* 82 Harv. L. Rev. 1065, 1136-37 (1969).

The Supreme Court has applied this principle in many cases. In 1880, for example, the Court extended a State statute limiting jury service to "electors" to include blacks enfranchised by the 14th and 15th Amendments rather than striking the law down. *Neal* v. *Delaware*, 103 U.S. 370 (1880). In *Sweat* v. *Painter*, 339 U.S. 637 (1950), and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) the Court held that State laws restricting access to State institutions of higher education on the basis of race were unconstitutional; it expanded the laws so that black students had equal access. And in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), the Court extended to illegitimate children the right, restricted by a State statute to legitimate children, to recover wrongful death benefits. See generally Dorsen, *The Necessity of a Constitutional Amendment* in Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rts.—Civ. Lib. L. Rev. 216 (1971).

As previously stated, courts have had a great deal of experience in dealing with laws which discriminate on the basis of sex, for Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex unless sex is a "bona fide occupational qualification". Under that Federal statute a State overtime wage law was extended to include men, *Potlatch Forests, Inc.* v. *Hays*, 318 Supp. 1368 (E.D. Ark. 1970) as were weightlifting limitations, *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). On the other hand, State laws banning women from an occupation have been struck down, *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D., Ill. March 31, 1970), *on remand from* 418 F. 2nd 366 (7th Cir. 1969). See generally *Developments In the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1188-1190, 1194-1195 (1971).

E. Criminal law, education and family law

The general principles discussed above will govern the application of the Equal Rights Amendment to all fields of law. With respect to criminal law, for example, the Amendment will prohibit a State from providing for different punishments for men and women who commit the same crime, *cf. Commonwealth* v. *Daniel*, 430 Pa. 642, 243, 243A. 2d 400(1968). But the Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men.

With respect to education, the Equal Rights Amendment will require that State supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The Amendment would not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population; rather admission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. A similar result may be expected with respect to the distribution of scholarship funds. State schools and colleges currently limited to one sex would have to allow both sexes to attend. Employment and promotion in public schools would, as in the case of other governmental action, have to be free from sex discrimination.

It should also be noted with respect to education that the Amendment would not require that dormitories or bathrooms be shared by men and women. As explained above, the Amendment does not prohibit the separation of the sexes where the right of privacy is involved. As the Association of the Bar of the City of New York pointed out in its report, "[t]he constitutional right of privacy could be used to sanction separate male and female facilities for activities which involve disrobing, sleeping and personal bodily functions."

The Equal Rights Amendment may also have an effect on those State laws affecting domestic relations. In this area, as elsewhere, the Amendment will prohibit discrimination based on sex. This will mean that State domestic relations laws will have to be based on individual circumstances and needs, and not on sexual stereotypes. The report of the Association of the Bar of the City of New York accurately describes the Amendment's effect in this area:

"The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. The support obligation of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare.

"Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays

at home in compensation for the performance of her or his duties.

"Although courts still probably would be reluctant to interfere in the allocation of support between husband and wife in an ongoing marriage, upon the dissolution of marriage, both husbands and wives would be entitled to fairer treatment on the basis of individual circumstances rather than sex. Thus alimony laws could be drafted to take into consideration the spouse who had been out of the labor market for a period of years in order to make a non-compensated contribution to the family in the form of domestic tasks and/or child care."

As Professor Norman Dorsen pointed out to the Committee:

"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. The action by the Commissioners, a respected and prudent body, deserves special consideration."

In sum, there is no reason to fear that the Equal Rights Amendment will have undesirable effects on the rights of men and women under State domestic relations laws.

* * * * *

V. SECTIONAL ANALYSIS

Resolution: This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people. It has been included in every amendment added to the Constitution in the last 50 years. It is interesting to note that the longest period of time ever taken to ratify a proposed amendment was less than 4 years. The power and responsibility of Congress to impose a reasonable time limit for ratification of constitutional amendments was made clear in both *Dillon v. Gloss* 256, U.S. 368 (1921), and *Coleman v. Miller*, 307 U.S. 433 (1939).

Section 1: This is the operative portion of the Amendment, described in detail above.

Section 2: This section grants Congress the power to implement the provisions of the Amendment by legislation. The wording is taken from Section 5 of the 14th Amendment, and almost identical language is found in the 13th, 15th, 19th, 23d, 24th, and 26th Amendments.

Section 3: This section delays the effective date of the Amendment for two years after ratification. The purpose of this section is to give the States and the federal government an opportunity to review and revise their laws, regulations and practices so as to bring them into compliance with the Amendment. Those State legislatures which meet only in alternate years, of course, will need this length of time to have an adequate opportunity to review their laws.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. I yield back the remainder of my time.

Mr. ERVIN. I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the joint resolution. The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. EASTLAND. Mr. President, on this joint resolution, I have a pair with the Senator from Arkansas (Mr. McCLELLAN) and the Senator from Florida (Mr. CHILES). If they were present and voting, they would vote "yea." If I were permitted to vote, I would vote "nay." I therefore withhold my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. McCLELLAN), the Senator from South Dakota (Mr. McGOVERN), and the Senator from New Hampshire (Mr. McINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. McINTYRE), the Senator from South Dakota (Mr. McGOVERN), and the Senator from Washington (Mr. JACKSON) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "yea."

The yeas and nays resulted—yeas 84, nays 8, as follows:

[No. 122 Leg.]

YEAS—84

Aiken	Fulbright	Muskie
Allen	Gambrell	Nelson
Allott	Gravel	Pastore
Anderson	Griffin	Pearson
Baker	Gurney	Pell
Bayh	Harris	Percy
Beall	Hart	Proxmire
Bellmon	Hartke	Randolph
Bentsen	Hatfield	Ribicoff
Bible	Hollings	Roth
Boggs	Hruska	Saxbe
Brock	Hughes	Schweiker
Brooke	Humphrey	Scott
Burdick	Inouye	Smith
Byrd, Va.	Javits	Sparkman
Byrd, W. Va.	Jordan, N.C.	Spong
Cannon	Jordan, Idaho	Stafford
Case	Kennedy	Stevens
Church	Long	Stevenson
Cook	Magnuson	Symington
Cooper	Mansfield	Taft
Cranston	Mathias	Talmadge
Curtis	McGee	Thurmond
Dole	Metcalf	Tower
Dominick	Miller	Tunney
Eagleton	Mondale	Weicker
Ellender	Montoya	Williams
Fong	Moss	Young

NAYS—8

Bennett	Ervin	Hansen
Buckley	Fannin	Stennis
Cotton	Goldwater	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Eastland, against.

NOT VOTING—7

Chiles	McGovern	Packwood
Jackson	McIntyre	
McClellan	Mundt	

The PRESIDING OFFICER (Mr. ROTH). Before announcing the result, the Chair would like to remind the occupants of the galleries that no demonstrations are permitted under the rules of the Senate. The Chair respectfully requests that the galleries comply with that request.

On this vote the yeas are 84, the nays are 8. Two-thirds of the Senators present having voted in the affirmative, the joint resolution is passed.

[Demonstrations in the galleries.]

Mr. BAYH. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. PASTORE, Mr. COOK, and other Senators moved to lay the motion on the table.

The PRESIDING OFFICER. The question is on the motion to lay on the table.

The motion to lay on the table was agreed to.