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Ruth Bader Ginsburg

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SEXUAL EQUALITY UNDER THE FOURTEENTH AND EQUAL RIGHTS AMENDMENTS*

RUTH BADER GINSBURG**

I. INTRODUCTION

The equal status and dignity of men and women under the law is the animating purpose of the proposed Equal Rights Amendment (ERA).¹ By contrast, the framers of the fourteenth amendment² did not contemplate sex equality. Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities. This article discusses the two rubrics under which gender-based classifications in the law might be tested: first, the equal protection principle explicit in the fourteenth amendment and implicit in the fifth amendment;³ and second, the sex equality principle presented in the proposed Equal Rights Amendment. Central to the

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** Professor of Law, Columbia University. B.A., 1954, Cornell University; LL.B., 1959, Columbia University.

1. The proposed Equal Rights Amendment to the United States Constitution reads:

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.

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

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

S.J. Res. 8, 92d Cong., 1st Sess., 117 CONG. REC. 271 (1971); S.J. Res. 9, 92d Cong., 1st Sess., 117 CONG. REC. 272 (1971); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 526 (1971). Time for ratification has been extended from March 22, 1979, the limitation period prescribed in the proposing clause preceding the text of the ERA, to June 30, 1982. H.J. Res. 638, 95th Cong., 2d Sess., 124 CONG. REC. H7685 (1978), enacted 124 CONG. REC. S17318 (Oct. 6, 1978).

2. U.S. CONST. amend. XIV; see Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 725 (1935) ("If in the law and public opinion of 1865-73 race discrimination stood at the head of all discriminations as needing attention, it is certain that sex discrimination was at the end of the line.").

3. U.S. CONST. amend. V. The Supreme Court has interpreted the fifth amendment due process clause to include an equal protection component generally approached in "precisely the same" way as the fourteenth amendment's express equal protection clause. *Weinberger v. Wier*

discussion is the question: Is the ERA needed, given the generality and development potential of the equal protection guarantee?

The fifth and fourteenth amendments instruct that neither the United States nor any State shall "deny to any person within its jurisdiction the equal protection of the laws." The ERA's substantive section reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁴ Both the equal protection and the equal rights formulations are directed to laws and the actions of officialdom; private action unaccompanied by official participation or stimulation remains outside the purview of both provisions.⁵

II. EQUAL PROTECTION

A. *The Original Understanding*

The equal protection guarantee, phrased with majestic sweep, applies to all persons, and the Supreme Court has acknowledged from the start that women are "persons."⁶ But the legislative history of the fourteenth amendment clarified that government was free to rank "persons" on a number of bases without affront to the equal protection clause; the prime examples, age, economic or social condition, and sex.⁷ Consistent with the framers' perspective, the Supreme Court explained that although women and children are indeed "persons" and may be "citizens" within the meaning of the fourteenth amendment, both are appropriately placed in compartments separate from men.⁸

When the post-Civil War amendments were added to the Constitution, women were not accorded the vote, the right now regarded by the Supreme Court as most basic to adult citizenship. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings.⁹ The fourteenth amendment

senfeld, 420 U.S. 636, 638 n.2 (1975). See Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

4. Two other sections complete the ERA. See note 1 *supra*.

5. On the "state action" concept as it bears on constitutional gender discrimination claims, see Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUMAN RIGHTS 2, 6-14 (1977).

6. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 168 (1874).

7. See CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (Statement of Rep. John A. Bingham).

8. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174-76 (1874); cf. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (commenting in casual dictum that although race was an impermissible criterion for jury service, no doubt a state "may confine [jury] selection to males").

9. See generally Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law* http://openscholarship.wustl.edu/law_lawreview/vol1979/iss2/19

left all that untouched. To the nineteenth century jurist, change in women's status, alteration of laws restricting a woman's options, was state business, not fit subject matter for federal statutory or constitutional resolution.

In part reflective of the original understanding, women litigated few sex equality claims in the eight decades following ratification of the fourteenth amendment. The brave handful who did were unsuccessful: Myra Bradwell, in 1873, was told she had no federal constitutional right to practice law;¹⁰ Virginia Minor, less than two years later, was told participation in the processes of democratic government through the franchise was properly reserved to men;¹¹ bar owner Goesaert and her bartending daughter, in 1948, were required to close up shop because Michigan law, the High Court ruled, legitimately required that husband or father own the establishment;¹² Ms. Hoyt, whose baseball bat struck a death blow to a husband alleged to have wounded, insulted, and humiliated her to the breaking point, was told, in 1961, that the Constitution guaranteed her no right to a fair chance for female peers on the jury roll.¹³

Opinions generally rationalized sex classifications not as stigmatizing "back of the bus" regulation, but as favoring or protecting the fairer or weaker sex, as operating benignly to place and keep women on a pedestal.¹⁴ The original understanding underpinning High Court precedent from 1873 to 1961, however, was sometimes described without a rose-colored lens. Thus, in 1947, Justice Jackson cogently summarized the state of sex equality constitutional doctrine up to the current decade. That year, the Court rejected a challenge to New York's automatic exemption of women from jury service.¹⁵ Justice Jackson's opinion for

School Curriculum, and Developments Toward Equality, 47 N.Y.U.L. REV. 1033, 1057-70, 1082-83 (1972).

10. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873).

11. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177-78 (1874).

12. *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948).

13. *Hoyt v. Florida*, 368 U.S. 57, 64-65 (1961).

14. See Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U. L. REV. 281 (1971). The protective rationale was used regularly in the first decades of this century to justify restrictive labor legislation for women. See Comment, *Regulation of Conditions of Employment of Women: A Critique of Muller v. Oregon*, 13 B.U.L. REV. 276 (1933). The current approach, required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970), is, in most situations, across-the-board wage, hours, health, and safety regulation, protective of male as well as female workers.

15. *Fay v. New York*, 332 U.S. 261 (1947). Missouri and Tennessee retained similar exemptions until 1979. See *Duren v. Missouri*, 99 S. Ct. 664 (1979) (declaring unconstitutional Missouri's exemption for any woman).

the Court explains:

The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the nineteenth amendment.¹⁶

The Constitution, in other words, gave women the vote, but only that. In other respects, our fundamental instrument of government was thought an empty cupboard for sex equality claims.

B. *Doctrinal Development in the 1970's*

The Supreme Court, through the 1960's, purported to adhere to a two-tier model for equal protection review.¹⁷ Most legislation was ranked at the lower tier and survived judicial inspection if *rationally related* to a *legitimate* governmental objective.¹⁸ On the other hand, rights denominated *fundamental* (voting, for example),¹⁹ or classifications labeled *suspect* (race is the prime example)²⁰ were ranged on the upper tier and subjected to rigorous review. To survive inspection, the legislative objective had to be *compelling*, and the classification *necessary* to its accomplishment.²¹

Equal protection adjudication in fact is not so mechanical, clear, and certain, as commentators,²² lower courts,²³ and some of the Justices²⁴ observed, particularly in the early 1970's. Sex-based classification, most notably, appeared to be inching up to a place somewhere in between the two tiers.²⁵

16. 332 U.S. at 290.

17. See generally Gunther, *The Supreme Court, 1972 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

18. See, e.g., *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

19. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

20. *Loving v. Virginia*, 388 U.S. 1 (1967).

21. See generally *Developments in the Law*, *supra* note 17.

22. See Gunther, *supra* note 17.

23. E.g., *Eslinger v. Thomas*, 476 F.2d 225, 229 (4th Cir. 1973).

24. E.g., *Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

25. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1060-77 (1978); Karst, *supra* note 17, at 53-59; *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 177 (1977).

A start was made in 1971, in *Reed v. Reed*,²⁶ when a unanimous Court held inconsistent with equal protection an Idaho statute giving men a preference over women for appointment as estate administrators. The terse *Reed* opinion acknowledged no break with empty-cup-board precedent, but Court-watchers recognized something new was in the wind.

Two years later, in *Frontiero v. Richardson*,²⁷ the Court held married women in the uniformed services entitled to the same fringe benefits as married men. Four of the Justices, in a plurality opinion, ranked sex a "suspect" criterion, warranting the close review the Court gives above all to race discrimination, but also to discrimination based on national origin and religion. Four, however, is one vote short of a Supreme Court majority. No fifth vote has emerged to range sex among the "suspect" categories.

Justice Powell, concurring in *Frontiero*,²⁸ identified a prime source of the reticence exhibited by the Court's majority. The unalterable historic fact is that our eighteenth- and nineteenth-century Constitution-makers evidenced no concern at all about the equality of men and women before the law. The Court must tread lightly, Justice Powell cautioned, when it enters the sticky marshland between constitutional interpretation, a proper judicial task, and constitutional amendment, a job for federal and state legislators.

Backsliding or at least line-holding occurred in the High Court's next two confrontations: in *Kahn v. Shevin* (1974)²⁹ and *Schlesinger v. Bal-lard* (1975),³⁰ the historic "benign" classification explanation for sex discrimination recaptured the Court.

Kahn upheld exclusion of widowers from Florida's real-property tax exemption (worth fifteen dollars annually) accorded widows along with the blind and the totally disabled. To widower Kahn, the classification in question, dating from 1885, was an historical hangover reflecting the lawmakers' view of a wife more as her husband's ward than as his peer. But the Court's majority accepted Florida's argument that the dispensation fairly compensated lone women for the disadvantages they bear in economic endeavor.

Permissible compensation was the theme again in *Schlesinger v. Bal-*

26. 404 U.S. 71 (1971).

27. 411 U.S. 677 (1973).

28. *Id.* at 691 (Powell, J., concurring).

29. 416 U.S. 351 (1974).

30. 419 U.S. 498 (1975).

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lard, in which the Court held it was not a denial of equal protection to hold a male naval officer to a strict "up or out" system (out when twice passed over for promotion), while guaranteeing a female officer thirteen years before mandatory discharge for lack of promotion. Neither contender in *Ballard* challenged the discrimination responsible for promotion of men more rapidly than women—the drastically curtailed job training and assignments available to Navy women.³¹

Later 1975 decisions returned to the *Reed-Frontiero* track. *Taylor v. Louisiana*³² overturned a 1961 precedent, *Hoyt v. Florida*,³³ and held that women could not be exempted from jury duty on the assumption they were occupied day-round tending to hearth, husband, and children. *Stanton v. Stanton*³⁴ declared incompatible with equal protection a Utah law that required parents to support a son until twenty-one, a daughter only until eighteen. *Weinberger v. Wiesenfeld*³⁵ held a widowed father, who wished to care for his infant personally, entitled to the same child-in-care social security benefits a widowed mother receives.

The 1971 to 1975 challengers, in *Reed*, *Frontiero*, *Kahn*, *Taylor*, *Wiesenfeld* and *Stanton*, contended against legislative line-drawing based on gross ranking of females as persons concerned with "the home and the rearing of the family," males, with "the marketplace and the world of ideas."³⁶ Their arguments were circumspect. They did not assert that these propositions were inaccurate as generalizations. Rather, they questioned the law's treatment of women and men who did not fit the stereotype as if they did, and the fairness of gender pigeon-holing in lieu of neutral, functional description. The Court held back doctrinal development, but its opinions evidenced dawning awareness that the traditional legislative slotting had the earmarks of self-fulfilling prophecy. Thus, in *Stanton*, the Court said as to the age-of-majority differential:

31. Significant change has occurred since *Ballard*. Congress has authorized admission of women to the military academies. Department of Defense Appropriation Authorization Act, 10 U.S.C. § 4342 (1976). 10 U.S.C. § 6015 (1976), which excludes women from Navy vessels other than transports and hospital ships, has been declared unconstitutional. *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978). On women's restricted avenues in the armed forces and proposals for widening opportunities, see M. BINKIN & S. BACH, *WOMEN AND THE MILITARY* (Brookings Institution 1977); Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533 (1973).

32. 419 U.S. 522 (1975), followed in *Duren v. Missouri*, 99 S. Ct. 664 (1979).

33. 368 U.S. 57 (1961).

34. 421 U.S. 7 (1975).

35. 420 U.S. 636 (1975).

36. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

To distinguish between [boy and girl] on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.³⁷

The Court's movement away from the empty-cupboard interpretation of equal protection in relation to sex equality claims reflects society's transition to a new period in the history of humankind. An early indicator of it attracted scant attention. In the years 1947 to 1961, before the civil rights movement captured headlines, before Betty Friedan wrote *The Feminine Mystique*,³⁸ there was unprecedented growth in employment outside the home of women ages forty-five to sixty-four.³⁹ A steep increase for younger women followed later, coinciding with, and shored up by, a revived feminist movement—a burgeoning movement caused by, and in turn spotlighting, dramatic alterations in women's lives. Among the salient factors, a sharp decline in necessary home-centered activity. Few goods we consume at home must be made there nowadays. Coupled with that, expansion of the economy's service sector opened places for women in traditional as well as new occupations. A further key item, curtailed population goals and more effective means of controlling reproduction. Added to the picture, vastly extended life spans, meaning that for most of our adult years, small children requiring close care are not part of the household. Inflation, too, has boosted the attraction of gainful employment for wife as well as husband. These conditions account in significant measure for the prevalence of the two-earner family, a pattern becoming more common than the family in which husband is sole breadwinner.⁴⁰ Within a dozen years, the Bureau of Labor Statistics projects, two-thirds of all women ages twenty-five to fifty-four will be gainfully

37. *Id.* at 15.

38. B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

39. Labor force participation rates for women ages 45 to 54 were 24.5% in 1940, 49.5% in 1960, 54.9% in 1974; for women ages 55 to 64, participation rates were 18% in 1940, 37.4% in 1960, 41.7% in 1974. "By 1960, the rate for women 45 to 54 . . . had risen to such an extent that it was noticeably higher than the proportion for 20- to 24-year-old women . . ." WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, *HANDBOOK ON WOMEN WORKERS* 12 (1975).

40. In 1976, in 55% (23,581,000) of families in which husband was gainfully employed (42,624,000), wife was also gainfully employed. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *U.S. WORKING WOMEN: A DATABOOK* 37 (1977).

employed.⁴¹

My Columbia colleague, economist Eli Ginzberg, appraised the sum of these changes as "the single most outstanding phenomenon of our century."⁴² Automobiles, planes, nuclear power plants, all brought about by technology, he called "infrastructural changes." "Important as they are, they do not go [as directly and deeply] to the guts of a society, . . . how it works and how it plays, how people relate to each other, whether they have children and how they bring them up."

With the change Eli Ginzberg called millennial as the backdrop, the Supreme Court, in the 1976 Term, openly acknowledged that gender-based classification attracted an elevated equal protection review standard, a standard more exacting than lower tier "rational basis," albeit less rigorous than upper tier "strict scrutiny." This middle- or perhaps upper-middle-level review standard was articulated initially in 1976 in *Craig v. Boren*:⁴³ "To withstand constitutional challenge . . . classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives."⁴⁴ *Craig* held unconstitutional an Oklahoma "boy-protective" law, a provision allowing girls to purchase 3.2 beer at age eighteen, but requiring boys to wait until age twenty-one. In a less gossamer case argued in tandem with *Craig*, *Califano v. Goldfarb*,⁴⁵ heightened review figured again. The Court held impermissible the social security scheme qualifying a wage earner's widow for survivor's benefits automatically, a wage earner's widower only upon proof that his wife supplied three-fourths of the couple's support. But the bench was sharply divided in the more weighty case. In *Craig*, the Court stood seven-to-two; *Goldfarb* was a five-to-four cliffhanger.⁴⁶

Rulings in the social security cases, *Wiesenfeld*⁴⁷ and *Goldfarb*,⁴⁸ are

41. Fullerton & Flaim, *New Labor Force Predictions in 1990*, in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW 3, 5.

42. Quoted in Briggs, *How You Going to Get 'Em Back in the Kitchen? (You Aren't.)*, FORBES, Nov. 15, 1977, at 177-78.

43. 429 U.S. 190 (1976).

44. *Id.* at 197. See *The Supreme Court, 1976 Term*, *supra* note 25, at 177.

45. 430 U.S. 199 (1977).

46. Seven opinions were written in *Craig*. The *Goldfarb* division was four-one-four; the plurality focused on discrimination against the female as wage earner. Justice Stevens described discrimination against the widower as "the accidental byproduct of a traditional way of thinking about females." 430 U.S. at 223 (Stevens, J., concurring).

47. 420 U.S. 636 (1975).

48. 430 U.S. 199 (1977).

not easily reconciled with the Court's approach in *Kahn v. Shevin*⁴⁹ and *Schlesinger v. Ballard*,⁵⁰ in which sex classifications were upheld as "benign." In *Califano v. Webster*,⁵¹ the Court essayed a synthesis, the five Justices responsible for the *Goldfarb* judgment subscribed to a per curiam opinion in *Webster* distinguishing from knee-jerk categorization by sex a law in fact designed to ameliorate disadvantages women experience.

Webster upheld a classification, effective from 1956 to 1972, establishing a more favorable social security benefit calculation formula for retired female workers than for retired male workers.⁵² But the legislative history indicated that this scheme, unlike the one in *Goldfarb*, had been conceived, at least in significant part, as a response to discrimination commonly encountered by gainfully employed women; specifically, depressed wages for "women's work," and early retirement employers routinely forced on women but not on men.⁵³

Congress phased out the differential in 1972.⁵⁴ By then, the Equal Pay Act (1963)⁵⁵ and Title VII of the Civil Rights Act of 1964⁵⁶ were on the books and had been extended to cover most sectors of the economy, encompassing public as well as private employment. Both acts directly prohibit the discriminatory employer practices that supplied a rationale for the 1956 sex-specific classification. Apparently for that reason, Congress dropped the classification; it did so by equalizing up—extending to men the more favorable calculation once reserved for women.⁵⁷

The *Webster* per curiam, following the *Wiesenfeld-Goldfarb* line, declares post hoc rationalization unacceptable to sustain laws in fact rooted in a "romantically paternalistic"⁵⁸ view of women as men's subordinates. While tilting toward a general rule of equal treatment, the per curiam approves a slim corridor for genuinely compensatory classification—classification (1) in fact adopted for remedial reasons rather

49. 416 U.S. 351 (1974); see text following notes 29-30 *supra*.

50. 419 U.S. 498 (1975); see text accompanying notes 30-31 *supra*.

51. 430 U.S. 313 (1977).

52. 42 U.S.C. § 415(b)(3) (1976) (amended 1976); see 430 U.S. at 313-15.

53. See 430 U.S. at 318.

54. Pub. L. No. 92-603, § 104(b), 86 Stat. 1340 (amending 42 U.S.C. § 417(b)(3) (1976)).

55. 29 U.S.C. § 206(d) (1976) (amended 1972).

56. 42 U.S.C. § 2000e-2 (1976) (amended 1972).

57. Pub. L. No. 92-603, § 104(b), 86 Stat. 1340 (amending 42 U.S.C. § 417(b)(3) (1976)).

58. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (characterizing as "romantic paternalism" some laws purporting to protect or favor women, but in practical effect discriminating against them by confining their activity and opportunity).

than out of prejudice about "the way women are," and (2) trimly tailored in scope and time to match the remedial end.

In *Regents of the University of California v. Bakke*,⁵⁹ Justice Brennan, dissenting in part, cited *Webster* as a pathmarker.⁶⁰ In contrast, Justice Powell, author of the prevailing opinion in *Bakke*, wrote that "the Court has never viewed gender-based classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis."⁶¹ The comment is reminiscent of Justice Powell's cautious concurring opinion in *Frontiero*,⁶² but its implications are less than crystal clear. Did Justice Powell mean law-sanctioned preferential treatment for women should be less vulnerable to challenge in court than preferential treatment for racial and ethnic groups saddled with "a lengthy and tragic history"⁶³ of adverse discrimination? That seems an anomalous position. Did he mean as well that courts should have a higher tolerance for official discrimination against women than for such discrimination against racial and ethnic minorities?⁶⁴

Along with the muddled *Bakke* return, *Vorchheimer v. School Dis-*

59. 438 U.S. 265 (1978).

60. *Id.* at 358-59 (Brennan, J., concurring in the judgment in part and dissenting in part).

61. 438 U.S. at 303.

62. 411 U.S. at 691. See text accompanying note 28 *supra*.

63. 438 U.S. at 303. Earlier, in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), Justice Powell, writing for the Court's majority, commented that "the traditional indicia of suspectness" exist when a class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

64. This meaning might be inferred from Justice Powell's statement in *Bakke* that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share." 438 U.S. at 303. Earlier, however, the Court had distinguished classifications based on illegitimacy from race and sex classifications by commenting that "illegitimacy does not carry an obvious badge, as race or sex do," and that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Mathews v. Lucas*, 427 U.S. 495, 506 (1975).

On the oversight involved in lumping together women and ghettoized minorities for all purposes, the different generators of race and sex discrimination, the areas where similar remedies are appropriate, and the areas where distinct approaches are required, see Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 28-40 (1975) (most nonminority females do not encounter a formidable risk of "death at an early age," the product of generations of segregation in education, housing, community life; for females, customary responsibility for household management and care of young children create stubborn psychological and logistical barriers to achieving equal opportunity). See also Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977).

*trict of Philadelphia*⁶⁵ indicates the unstable state of current equal protection-sex discrimination development. *Vorchheimer* was the final joust in the Supreme Court's 1976 term encounter with official line-drawing by gender; it yielded a nondecision. Presented with the question whether Philadelphia could maintain sex-segregated secondary schools for academically gifted boys and girls, the Court was disarmed. Split four-to-four, the Justices could reach no determination and the judgment below, two-to-one for the school district, remains the last word in the controversy.⁶⁶ The district judge in *Vorchheimer*, who had ruled against the school district, thus establishing a tie vote among all the federal judges who considered the case, commented: "A lower court faced with [the Supreme Court's post-1970's] line of gender discrimination cases has an uncomfortable feeling, somewhat similar to a [player at] a shell game who is not absolutely sure there is a pea."⁶⁷

In sum, the Supreme Court in the 1970's has been tugged in a new direction by arguments urging accommodation of constitutional doctrine to a changed social climate. But the development to date has been uneven, insecure, and marked by sharply divided opinions.⁶⁸ In large measure, the original understanding serves as a counterweight to more

65. 430 U.S. 703 (1977), *aff'd by an equally divided court* 532 F.2d 880 (3d Cir. 1976).

66. The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1228, 1608, 1701-10, 1712-18, 1720, 1721, 1751-58 (1976), as interpreted by the Fifth Circuit, however, provides a solution for most cases involving sex-separated public schools—the Act outlaws student assignments solely on the basis of race, color, sex or national origin. *See United States v. Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977) (sex-separated public high school system violates EEOA).

67. 400 F. Supp. 326, 340-41 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

68. The Court's path has meandered most when childbearing women complained of disadvantageous treatment. To date, the Court's majority does not recognize discrimination on the basis of pregnancy as discrimination on account of sex. *See General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). The Title VII determination in *General Electric* was overturned by Congress. Pub. L. No. 95-555, Oct. 31, 1978 (amending 42 U.S.C. § 2000e to proscribe, expressly, discrimination on the basis of pregnancy).

Using due process rather than equal protection as the handle, the Court held, in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), that school teachers may not be dismissed or placed on involuntary leave arbitrarily at a fixed stage of pregnancy well in advance of the expected delivery date. *Accord*, *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (pregnant women ready, willing, and able to work may not be denied unemployment compensation when jobs are closed to them). But no equal protection shoal is encountered, the Court ruled, when a state-operated comprehensive disability insurance plan excludes normal pregnancy. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

Confronting another facet of women's reproductive capacity, the Court held in 1973, in *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179, that due process prohibits a state from interfering arbitrarily with the decision of a woman and her doctor to terminate a pregnancy by abortion. Some four years later, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court ruled states may

secure doctrinal development. It is one thing to find dynamism supporting *Brown v. Board of Education*,⁶⁹ the landmark 1954 school desegregation decision, in an amendment centrally addressed in the framers' minds to race discrimination.⁷⁰ It is more difficult to elaborate bold doctrine regarding sex discrimination when even a starting point is impossible to anchor to the constitutional fathers' design.⁷¹

III. THE EQUAL RIGHTS AMENDMENT

Originated by the National Woman's Party in 1923,⁷² the ERA was designed to complement the nineteenth amendment. Proponents explained when the measure was first introduced in Congress:

[A]s we were working for the national suffrage amendment . . . it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step . . . toward gaining this equality.⁷³

The idea was to correct or perfect Mr. Jefferson's text. Women were not included in his formulation: "All men are created equal."⁷⁴ As to females, Thomas Jefferson said: "Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."⁷⁵

encourage childbirth over abortion by denying Medicaid reimbursement for nontherapeutic abortion.

In contrast to the Court's separate cubbyholing of these issues, Professor Karst has emphasized their interrelationship. Not only the challenges to explicit male-female legal lines, but the reproductive choice and illegitimacy cases as well, Karst explains, present various faces of a single issue—the roles women are to play in society, their opportunity to participate in full partnership with men in the nation's social, political, and economic life. Karst, Book Review, 89 HARV. L. REV. 1028, 1036 (1976); Karst, *supra* note 17, at 57-58 & n.320.

69. 347 U.S. 483 (1954).

70. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

71. See L. HAND, *THE SPIRIT OF LIBERTY* 160 (I. Dilliard ed. 1952).

72. S.J. Res. 21, 68th Cong., 1st Sess., 65 CONG. REC. 150 (1923). The text of the proposed amendment reads: 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.

73. *Hearings on H.R.J. Res. 75 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 2 (1925) (statement of Mabel Vernon, Exec. Sec'y, National Woman's Party). Clear statement of the position of early proponents appears in Matthews, *Women Should Have Equal Rights With Men, A Reply*, 12 A.B.A.J. 117 (1926).

74. DECLARATION OF INDEPENDENCE, July 4, 1776.

75. Quoted in M. GRUBERG, *WOMEN IN AMERICAN POLITICS* 4 (1968).

Framed as a basic human rights norm, the ERA has two offices.⁷⁶ First, it directs federal and state legislatures to undertake conforming legislative revision. The Amendment stipulates a two-year period for this mop, broom, and paint operation.⁷⁷ Second, it directs the judiciary to a clear source for the constitutional principle, men and women are equal before the law.

Gender-based classifications still clutter the lawbooks of nation and state. At the federal level alone, the Department of Justice⁷⁸ and the Commission on Civil Rights⁷⁹ have identified several hundred statutes with sex-based references. Some examples: The Aid to Families with Dependent Children program provides support for the two-parent family with an unemployed father, but not for the family with an unemployed mother.⁸⁰ Men have priority over women in job training and placement under the work incentive program.⁸¹ Comprehensive Social Security Act changes to accord women more equitable treatment await congressional attention.⁸²

Even new legislation reflects traditional notions about woman's place. The Public Accommodations Title (II) of the Civil Rights Act of 1964⁸³ covers race, religion, and national origin, but not sex. A Congress ready to close the "White Cafe" was not prepared to end the "Men's Grill." In the Black Lung Benefits Act of 1972,⁸⁴ Congress repeated the formula built into the Social Security Act in 1939. Benefits were provided for a miner's wife or widow, but not for a miner's hus-

76. S. REP. NO. 689, 92d Cong., 2d Sess. (1972), is the most concise congressional document explaining the design and expected application of the ERA. Leading commentary is Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

77. Section 3 of the ERA reads: "The amendment shall take effect two years after the date of ratification."

78. See Task Force on Sex Discrimination, Civil Rights Division, U.S. Dept. of Justice, Interim Report to the President (Oct. 3, 1978); Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at 37-38, app. E, *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972) (Solicitor General's listing of "provisions of the United States Code containing differentiations based upon sex-related criteria"), *cert. denied*, 412 U.S. 906 (1973).

79. See U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE (1977).

80. 42 U.S.C. § 607 (1976); S. REP. NO. 744, 90th Cong., 1st Sess. 160 (1967). The consistency of this classification with the equal protection principle will be considered by the Supreme Court in *Califano v. Westcott*, 460 F. Supp. 737 (D. Mass.) (holding such classification unconstitutional), *prob. juris. noted*, 99 S. Ct. 718 (1978).

81. 42 U.S.C. § 633 (1976).

82. See DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE HEW TASK FORCE ON THE TREATMENT OF WOMEN UNDER SOCIAL SECURITY (1978).

83. 42 U.S.C. § 2000a (1976).

84. 30 U.S.C. § 901 (1976) (amended 1978).

band or widower.⁸⁵ An alert senator spotted the omission, but rather than tamper with the statutory text, he relegated his discovery to a comment in the Senate report accompanying the bill.⁸⁶

Thousands of state laws, most of them historical hangovers, typecast men and women.⁸⁷ Alabama authorizes recovery for the father, but not for the mother, on the wrongful death or injury of a child.⁸⁸ Missouri and Tennessee persisted into 1979 in exempting "any woman" from jury service.⁸⁹ Oklahoma provides a custody preference for mother when the child is of tender years, for father when the child is of an age to require education and preparation for labor or business.⁹⁰

Yes, the job of revising outmoded sex-based laws could be done without an ERA. But history strongly suggests the task will remain on a legislative backburner absent the stimulus explicit constitutional commitment would supply.⁹¹ As stated by the American Branch of the International Law Association (Human Rights Committee) in a 1976 report: Authoritative formulation of the basic norm is an "indispensable step toward defense and fulfillment of [a] human right."⁹² Only upon official commitment to the norm can we proceed securely to "measures of implementation," arrangements designed to promote effective application of the norm.

Women and men with consciousness and expectations raised have enlisted the courts in the cleanup operation. Given the legislative foot-dragging, that means a parade of challengers attacking a host of obso-

85. 30 U.S.C. § 902(a)(2)(e) (1976).

86. S. REP. NO. 743, 92d Cong., 2d Sess. 8 (1972) (in view of possibility that a miner may be a female, the terms "wife" and "widow" should be construed to include "husband" and "widower").

87. For comprehensive treatment, see B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *WOMEN'S RIGHTS AND THE LAW—THE IMPACT OF THE ERA ON STATE LAWS* (1977). See also Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086 (1977).

88. See *Thorne v. Odom*, 349 So. 2d 1126 (Ala. 1977). Alabama is also among a dwindling minority of states with legislation authorizing post-divorce maintenance (alimony) for women only. *Orr v. Orr*, 351 So. 2d 904 (Ala. App.), cert. quashed, 351 So. 2d 906 (Ala. 1977) (per curiam). On March 5, 1979, the Supreme Court reversed the Alabama judgment and held the gender criterion unconstitutional. 99 S. Ct. 1102 (1979).

89. This practice was held unconstitutional in *Duren v. Missouri*, 99 S. Ct. 664 (1979). See generally Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975).

90. See *Gordon v. Gordon*, 557 P.2d 1271 (Okla.), cert. denied, 99 S. Ct. 185 (1978).

91. The long campaign to secure the vote for women is instructive. Effort to achieve change state by state was debilitating and ultimately unsuccessful. See E. FLEXNER, *CENTURY OF STRUGGLE* 228 (rev. ed. 1975).

92. AMERICAN BRANCH OF INTERNATIONAL LAW ASSOCIATION, *PROCEEDINGS AND COMMITTEE REPORTS* 81 (1975-76).
http://open.library.utoronto.ca/law_review/vol1979/iss1/19

lete laws one by one before federal and state judges,⁹³ jurists understandably reluctant to press into heavy service an equal protection provision never intended by its framers to deal with sex discrimination. Just as the ERA should end legislative inertia that keeps outdated laws on the books, so the Amendment should relieve judicial anxiety, the uneasiness judges feel in the gray zone between interpretation and alteration of the Constitution.

The ERA, proponents and legislative history point out, is not a "unisex" amendment. It does not stamp man and woman as one. (The common law did that, and it declared man The One.⁹⁴) The Amendment does not command similarity in result, parity, or proportional representation. It is phrased as a negative check on government, a prohibition against use of gender as a factor in official classification.⁹⁵

Majestic human rights guarantees are seldom absolute and the ERA is no exception. Thus, two qualifications are marked in the legislative history.⁹⁶ The first relates to "the potty problem." The Senate Judiciary Committee's majority report explains the congressional expectation that the ERA would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners. (Perhaps Congress found it hard to conceive of a plaintiff litigating the issue, or of a judge who would find man or woman harmed by that limited separation.) The second exception relates to legislation dealing narrowly and particularly with physical characteristics unique to one sex; the regulation of sperm donations, or the financing of pre- and post-natal maternal health clinics, for example.

Some critics have suggested it would be wiser to include these and perhaps further qualifications in the text of the Amendment.⁹⁷ Other basic human rights guarantees bear on evaluation of the charge that the

93. *E.g.*, *Orr v. Orr*, 351 So. 2d 904 (Ala. App.), *cert. quashed*, 351 So. 2d 906 (Ala. 1977), *rev'd*, 99 S. Ct. 1102 (1979); *Missouri v. Duren*, 556 S.W.2d 11 (Mo. 1977), *rev'd*, 99 S. Ct. 664 (1979).

94. 1 W. BLACKSTONE, COMMENTARIES * 442-45.

95. *See* S. REP. NO. 689, 92d Cong., 2d Sess. 2 (1972).

96. *Id.* at 12.

97. *E.g.*, *Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 112-15 (1977-78) (statement of Erwin N. Griswold, former Solicitor General of the United States); Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971); Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. C.R.-C.L. L. REV. 243 (1971).

ERA is overbroad and should be returned to the drawing board for enumeration of exceptions.

"Congress shall make no law abridging the freedom of speech, or of the press."⁹⁸ Is this first amendment formulation unwise because it does not specify "except for words threatening to precipitate an immediate breach of the peace or generating grave and irreparable danger to national security?" These are exceptions, of course, although they do not appear in the text.⁹⁹

"Congress shall make no law prohibiting the free exercise of religion."¹⁰⁰ Would it improve the text to add expressly, "but the legislature, for secular purposes, may ban polygamy, snake handling, make Sunday but not Friday or Saturday a work-free day?"¹⁰¹

The ERA's generality fits the Constitution's design. Grand, general statement would not do for a tight statute, but it is the style appropriate for a constitution expected to govern for generations. Yes, there will be work left for the judiciary. No one can predict with complete assurance how the Amendment will be interpreted and applied in every instance in which it may be relevant.¹⁰² But this much is beyond debate: judges will find in the ERA's legislative history, particularly the Senate Judiciary Committee's majority report,¹⁰³ considerably more guidance than they now have from the legislative branch in measuring gender discrimination claims against an equal protection standard.

Distortion and confusion have attended the ERA debate. Exorbitant claims have been made on both sides about what the Amendment will and will not do. It is, after all, not a case like the vote for eighteen-year-olds,¹⁰⁴ in which the meaning of the text is free from doubt. Nor is the vulnerability of the ERA surprising in the light of history. "The ERA will wreck the home and family" is perhaps the most publicized

98. U.S. CONST. amend. I.

99. See, e.g., G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW chs. 12, 13 (9th ed. 1975).

100. U.S. CONST. amend. I.

101. See *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (same), *appeal dismissed sub nom. Bunn v. North Carolina*, 336 U.S. 942 (1949); *Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (snake handling); *Hardin v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948) (same).

102. See *Marchioro v. Chaney*, 582 P.2d 487 (Wash. 1978) (en banc court divided on question of compatibility with state ERA of legislation requiring that the two members elected to Democratic Party's state committee by county committees be of opposite sex).

103. See notes 76, 95-96 *supra* and accompanying text.

104. *U.S. CONST. amend. XXI*. <http://www.wustl.edu/lawreview/vol1979/iss1/19>

broadside. Antisuffragists raised the same cry. If women gain the vote, they said, it will change the basis of our government from the family as a unit to the individual. It would lead to disaster, it would prove destructive of the highest interests of the home.¹⁰⁵

Rational ERA opponents would concede, however, that if the ERA is kept out of the Constitution, weak families will not get one whit stronger.¹⁰⁶ But on the loss side, should ERA ratification fail, the risk is real that the trend toward opening opportunities to women will be slowed, if not halted. Actors in the political arena might well take defeat of the ERA as a demonstration that feminists lack clout,¹⁰⁷ so that positions and programs they support¹⁰⁸ can be ignored safely, or at least deferred.

In this respect, the ERA is symbolic. A comment by Justice Rehnquist during a November 1, 1978, Supreme Court oral argument makes the point. A gender-based classification had been challenged, and an attorney for the challenger had just completed her argument when the Justice volunteered: "You won't settle for putting Susan B. Anthony on the new dollar then?"¹⁰⁹

The ERA clarifies that tokens will not suffice. It calls upon Congress and state legislatures to undertake earnestly, systematically, and pervasively, the law revision long overdue. And in the event of legislative default, the Amendment arms the judiciary with an unassailable basis

105. See A. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920*, at 17-18 (1971); cf. 11 REPORTS OF THE NEW YORK CITY BAR ASSOCIATION COMMITTEES CONCERNED WITH FEDERAL LEGISLATION, *The Equal Rights Amendment—As of 1972*, Bull. 2, at 38, 41 (1972) ("Any . . . favorable treatment required by some women because of their . . . family roles could be preserved by statutes which utilize those factors—rather than sex—as the basis for distinction.").

106. Over the past decade, in most states, family law has been revised in the direction of sex neutrality. See 3 FAM. L. REP. 4047, 4051-52 (1977); Freed & Foster, *The Economic Incidents of Divorce*, 7 FAM. L.Q. 275 (1973); Freed & Foster, *Taking Out the Fault but not the Sting*, TRIAL 10 (Apr. 1974). In these states, the ERA will necessitate no basic change in orientation. Moreover, the Supreme Court's decision in *Orr v. Orr*, 99 S. Ct. 110 (1979), signals the current unconstitutionality of gender-based classification in this area.

107. Cf. Forrester, *The Feminists—Why Have They Not Yet Succeeded?*, 61 A.B.A.J. 333 (1975).

108. E.g., quality child-care programs, measures to reduce the incidence of family violence, flexible hours in gainful employment, legislation to ameliorate the disadvantageous economic position of homemakers, improved delivery of health services, extension of all antidiscrimination laws to cover sex, more vigorous enforcement of current antidiscrimination provisions. See NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, *THE SPIRIT OF HOUSTON* (1978).

109. Transcript of Argument at 19, *Duren v. Missouri*, 99 S. Ct. 664 (1979); see Johnston, Jr. & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).

for applying the bedrock principle: All men and all women are guaranteed by the Constitution equal justice under law.