

IN SUPPORT OF THE EQUAL RIGHTS AMENDMENT

*by Thomas I. Emerson**

The basic premise of the Equal Rights Amendment is that sex should not be a factor in determining the legal rights of women, or of men. Most of us, I think, agree with this fundamental proposition. For example, virtually everybody would consider it unjust and irrational to provide by law that a person could not go to law school or be admitted to the practice of law because of his or her sex. The reason is that admission to the bar ought to depend upon legal training, competence in the law, moral character, and similar factors. Some women meet these qualifications and some do not; some men meet these qualifications and some do not. But the issue should be decided on an individual, not a group, basis. The fact of maleness or femaleness should be irrelevant. This remains true whether or not there are more men than women who qualify. It likewise remains true even if there be no women who presently qualify, because women potentially qualify and might do so under different conditions of education and upbringing. The law, in short, owes an obligation to treat females as persons, not statistical abstracts.

What is true of admission to the bar is true of all legal rights. If we examine the various areas of the law one by one we will, I believe, reach the same conclusion in every case. Sex is an impermissible category by which to determine the right to a minimum wage, the custody of children, the obligation to refrain from taking the life of another, and so on. The law should be concerned with the right to a living wage for all, the welfare of the particular child, the protection of citizens from murder—that is, with the real issues—not with stereotypes about one or the other half of the human race.

The fundamental principle underlying the Equal Rights Amendment, then, is that the law must deal with the individual attributes of the particular person, rather than make broad classifications based upon the irrelevant factor of sex. The aim of the Equal Rights Amendment is simply to establish these philosophic truths as principles of law.

It should be noted at this point that there is one type of situation where the law may properly focus on a sexual characteristic. When the legal system deals directly with a physical characteristic that is unique to one sex, in a certain sense, the individual obtains a benefit or is subject to

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a restriction because he or she belongs to one or the other sex. Thus a law providing for payment of the medical costs of child-bearing would cover only women, and a law relating to sperm banks would apply only to men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality.

Instances of this kind, involving legislation directly concerned with physical differences found either in all women or in all men, are relatively rare. They may be distinguished from cases where the physical characteristic is not unique to one sex, and from cases of real or assumed psychological or social differences. A legislative distinction between sexes based on some physical characteristic not unique to one seems clearly inappropriate. Consider a determination that only men may be licensed to drive commercial vehicles because they are presumed to be stronger. Insofar as superior strength is not a characteristic of all men, such a determination unreasonably and thus unjustifiably discriminates against large numbers of women. Psychological and social differences between the sexes are similarly unjustifiable bases for discrimination since there is no clear evidence that such traits are unique to one sex or the other. Unless the difference is one that is characteristic of *all* women and *no* men, or *all* men and *no* women, it is not the sex factor but the individual factor which should be determinative.

The theoretical basis for prohibiting differential treatment in the law based upon sex is thus quite clear. The practical reasons for doing so are equally compelling. History and experience have taught us that a legal system which undertakes to confer benefits or impose obligations on the basis of sex inevitably is repressive. It is perhaps too much to expect that the sex which wields the greater influence in formulating the law will not use its power to entrench its position at the expense of the other. At least this has been the outcome of sex differentiation in the American legal system.

The facts are rather well-known by now, and it suffices here simply to make brief reference to conditions in two areas: jury service and employment. At present only twenty-two states and the District of Columbia permit women to claim exemptions not available to men. Of these, eleven states permit a women to be excused solely on the basis of her sex. Rhode Island further provides that women shall be included in jury service only when courthouse facilities permit.¹ Louisiana still requires that women come forward specially and register their desire to be called for jury duty before they may be considered.² A similar statute was upheld by the United States Supreme Court in 1961.³

¹R.I. Gen. Laws Ann. § 9-9-11 (1969).

²La. Rev. Stat. Ann. § 13:3055 (1968).

³Hoyt v. Florida, 368 U.S. 57 (1961).

Women have always been discriminated against in employment, not only in terms of remuneration, but also in outright exclusion from certain occupations. Statutes which have been upheld range from denial of the right to practice law,⁴ to an Oregon statute prohibiting women from participating in wrestling competitions,⁵ which was upheld against fourteenth amendment challenge in 1956.⁶ Twenty-six states have laws or regulations that prohibit the employment of adult women in specified occupations or industries. Ohio, for example, prohibits the employment of women as crossing watchmen, section hands, express drivers, metal molders, bellhops, gas-or electric-meter readers; in shoeshining parlors, bowling alleys as pinsetters, poolrooms; in delivery service on motor propelled vehicles of over one ton capacity; in operating certain freight or baggage elevators; in baggage and freight handling, by means of handtrucks, trucking and handling heavy materials of any kind; and in blast furnaces, smelters and quarries, except in offices thereof.⁷ Nine states prohibit women from mixing, selling or dispensing alcoholic beverages for on-premises consumption. In *Goesaert v. Cleary*⁸ the United States Supreme Court upheld one such law in a far-reaching opinion, proclaiming that "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic."⁹ The statute in question did not exclude all women, but only those who were not wives or daughters of male owners of bars.¹⁰

Similarly, businesswomen labor under significant restrictions derived from common law provisions under which married women were virtually legal nonentities. In four states court sanction and, in some cases, the husband's consent is required for a wife's legal venture into an independent business. In addition, Massachusetts requires a married women or her husband to file a certificate with the city or town clerk's office to safeguard her business property from being liable for her husband's debts.¹¹

It is unnecessary to press these matters further. That our present legal system grossly discriminates against women cannot seriously be

⁴Bradwell v. State, 83 U.S. (16 Wall) 130 (1872); *In re Lockwood*, 154 U.S. 116 (1894).

⁵Ore. Rev. Stat. § 463.130 (1969).

⁶State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956).

⁷Ohio Rev. Code Ann. § 4107.43 (Page 1965).

⁸335 U.S. 464 (1948).

⁹*Id.*, at 466.

¹⁰No. 133, § 19a, [1945] Pub. Acts. of Mich. 146-47, *repealed by*, No. 206, § 1, [1955] Pub. Acts of Mich. 308.

¹¹Mass Gen. Laws Ann. ch. 262, § 34(46) (1959).

questioned. The major portion of that indictment is indeed admitted by most observers, and the critical need for substantial and immediate revisions in our legal structure is likewise conceded. The only remaining issue concerns the method which should be utilized to achieve reform.

There appear to be three basic methods by which discrimination against women can be eliminated from our legal system. The first, the legislative approach, must begin with the repeal or revision of each separate piece of existing legislation through action by the federal, state and local legislatures having jurisdiction, and change of each separate administrative rule or practice through similar action by every federal, state and local executive agency concerned with administration. It goes without saying that such a procedure would involve interminable delay. It is unlikely that proponents of women's rights will be able to eliminate all discriminatory statutes and practices when forced to fight over every separate issue on innumerable fronts. Even if such an effort were successful, it would have no prospective effect, and there would be no protection against future discriminatory legislation and practices. The legislative approach then lacks any guarantee of ultimate success. The struggle would be justified only if no other course of action were possible.

A second method is through court action under the equal protection clause of the fourteenth amendment and the comparable provision of the fifth. This procedure has the advantage of affording a more broad-scale attack upon the problem, with a single agency of government, the United States Supreme Court, playing the primary role. Moreover, some progress has already been made. It is of course recognized that women are "persons"¹² within the embrace of the fourteenth and fifth amendments, and are entitled to "equal protection of the laws" under those provisions.¹³ Some state and lower federal courts have rendered important decisions upholding equality of rights for women under the existing constitutional provisions.¹⁴ I feel reasonably confident that in the long run the United States Supreme Court would reach a position very close to or identical with that of the proponents of the Equal Rights Amendment. Nevertheless, there are serious drawbacks to this approach.

In the first place there are some Supreme Court decisions and some lower court cases which move in the wrong direction.¹⁵ The task of

¹² *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

¹³ *Goesaert v. Cleary*, 335 U.S. 464 (1948).

¹⁴ *Kirstein v. Rector and Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970); *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968).

¹⁵ *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968);

overcoming or distinguishing these decisions could be a long and arduous one. There is, in short, a certain amount of legal deadwood which would have to be cleared away before the courts could make clear-cut and rapid progress. In the second place the Supreme Court has been subjected over a period of time to powerful attack for moving too fast and too far in frontier areas of the law. The Court may consequently be somewhat reluctant to take the lead in bringing about another major social reform, regardless of how constitutionally justified that reform may appear to be. Hence it would be important for the courts, in performing such a task, to have the moral support of the other institutions of government and the people as a whole.

Thirdly, and most important, the problems involved in building a legislative framework assuring equality of rights to women are somewhat different from those which the courts have faced in other areas of equal protection law. In ordinary cases, when a claim is made that equal protection of the laws has been denied, the Supreme Court will apply the rule that differential treatment is valid providing there is a reasonable basis for the classification; and the Court will accept the legislative judgment that the classification is reasonable unless that judgment is beyond the pale of rationality. Yet such a legal doctrine is not appropriate where the differential treatment is based on sex. For reasons stated above, classification by sex, except where the law pertains to a unique physical characteristic of one sex, ought *always* to be regarded as unreasonable. It would be inappropriate, time consuming, and ultimately futile for the courts to investigate in each case whether a legislature was justified in deciding that a particular piece of legislation or administrative practice favored women, disfavored women, benefited society as a whole, and so on. That decision—namely, that all discrimination is outlawed—must be fundamental and not subject to relitigation.

In cases where differential treatment is based upon race, the courts have developed a special rule under the equal protection clause.¹⁶ In racial cases the constitutional doctrine is that classification by race is a “suspect” classification, and the legislature has the burden of showing that it is not an “invidious” or harmful classification or that it is justified by the most compelling reasons. Yet, taken as a whole, the problems of race discrimination are somewhat different from those of sex discrimination. For example, questions of benevolent quotas, compensatory treatment,

United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967).

¹⁶Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

culture bias in psychological testing, separatism, and other issues may need differing treatment. The increasingly complex doctrines being developed in the field of race discrimination are therefore not necessarily applicable to the field of sex discrimination.

The same can be said of other areas of equal protection law. Discriminatory treatment on account of poverty or illegitimacy, classifications in economic regulatory legislation, denial of the right of franchise through malapportionment of legislative districts,—all these present issues peculiar to their own spheres. In short, the establishment of equal rights for women poses questions that are in important ways *sui generis*. An effective solution demands a separate constitutional doctrine that will be geared to the special character of the problem. Furthermore, as stated before, unless Congress and the states, through adoption of a constitutional amendment, express the firm conviction that this reform must be promptly and vigorously undertaken, progress is bound to be slow and faltering.

We come then to the conclusion that the third method—a constitutional amendment—is by far the most appropriate form of legal remedy. The final question is whether the Equal Rights Amendment now before us furnishes a satisfactory constitutional framework upon which to achieve the goal of equal rights for women. I believe that it does.

The proposed amendment states clearly and simply the fundamental objective: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."¹⁷ In this respect it follows the tradition of the great provisions of the Constitution guaranteeing freedom of religion, freedom of speech, due process of law, protection against cruel and inhuman punishment, and other rights.

The word "rights," it seems clear, includes not only rights in the narrow sense of the term, but all forms of rights, privileges, immunities, duties and responsibilities. Thus service on juries, whether it be looked upon as a "right" or a "duty," plainly falls within the scope of the amendment.

The term "equality," interpreted in light of the basic philosophy of the amendment, means that women must be treated by the law in the same way as other persons: their rights must be determined on the basis of the same factors that apply to men.¹⁸ The factor of femaleness or maleness is

¹⁷Section 1 of the amendment provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation." H.R.J. Res. 264, 91st. Cong., 1st Sess. (1969).

¹⁸I do not here deal with the questions that would arise in the interpretation of pre-existing discriminatory statutes after the passage of the Equal Rights Amendment. Such questions can be resolved by courts on the basis of the usual rules applicable in such situations. See p. 232 *infra*.

irrelevant. This principle is subject to the proposition, already noted, that laws may deal with physical characteristics that exclusively pertain to one sex or the other without infringing upon equality of rights. As previously stated, such instances would only rarely occur.

The phrase "shall not be denied or abridged" constitutes an unqualified prohibition. It means that differentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be "reasonable," to be beneficial rather than "invidious," or to be justified by "compelling reasons." Furthermore, for much the same reasons as in the racial area, the clause would not sanction "separate but equal" treatment.¹⁹ Power to deny equality of rights on account of sex is wholly foreclosed.

The Equal Rights Amendment applies only to governmental conduct, federal or state. It does not affect conduct in the private, nongovernmental sector of society. The problems of "state action" raised here are similar to those the courts have dealt with under the fourteenth and fifteenth amendments. The basic legal doctrines that govern are the same, though they may have somewhat different application in the area of sex discrimination.

Finally, it should be noted that the Equal Rights Amendment fits into the total framework of the Constitution and should be construed to mesh with the remainder of the constitutional structure. One particular aspect of this is worth brief attention. It concerns the constitutional right to privacy.

In *Griswold v. Connecticut*²⁰ the Supreme Court recognized an independent constitutional right of privacy, derived from a combination of various more specific constitutional guarantees. The scope and implications of the right to privacy have not yet been fully developed by the courts. But I think it correct to say that the central idea behind the concept is the existence of an inner core of personal life which is protected against invasion by the laws and rules of the society, no matter how valid such laws and rules may be outside the protected sphere. If this is true, the constitutional right of privacy would prevail over other portions of the Constitution embodying the laws of society in its collective capacity. This principle would have an important impact, at some points, in the operation of the Equal Rights Amendment. Thus I think the constitutional right of privacy would justify police practices by which a search of a woman could be performed only by another woman and search of a man, by another man. Similarly the right of privacy would permit, perhaps

¹⁹For a number of reasons, separate treatment of two groups, one of which has previously been treated at law as inferior, can never amount to equal treatment. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954).

²⁰381 U.S. 479 (1965).

require, the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and a certain segregation of living conditions in the armed forces.²¹ The concern over these issues expressed by opponents of the Equal Rights Amendment seems to me to have been magnified beyond all proportion, and to have failed to take into account the young, but fully recognized, constitutional right of privacy.

I will not undertake to consider in detail how the Equal Rights Amendment would affect various existing laws, regulations and practices. It seems useful, however, to state without elaboration what the three essential points at issue seem to be:

First, the courts are entirely capable of laying down the rules for a transitional period in a manner which will not create excessive uncertainty or undue disruption. The courts face similar problems every time they hold that part of a statute is unconstitutional, and they have developed detailed rules for handling these issues under the concept of "separability" (or "severability"). The essential question is whether the legislature would have intended the statute to stand in its modified form. In making this decision the courts have the aid of legislative history where available. There is no reason to suppose, therefore, that formulation of a coherent legal theory applicable to the Equal Rights Amendment is too complex or too difficult for the legal system to cope with.

Second, there has been a great deal of speculation that passage of the Equal Rights Amendment would cause vast changes in many features of our national life. I am inclined to feel that the alarms and warnings are, as usual, overplayed. Such great changes will occur, however, only if they are necessary. Opponents of the measure who stress this aspect of the amendment are acknowledging that widespread discrimination against women persists throughout our society.

Third, it has been argued that adoption of a constitutional amendment will bring about drastic alterations in important institutions of society almost inadvertently, before there has been time to work out the major policy changes required by the new provision. The example most frequently given is the Selective Service System. But one need not conclude that, in those few areas where major new policy must be formulated, there is not adequate time in which to do it. If Congress adopts the Equal Rights Amendment it will surely have full opportunity during the period of ratification by the states to take up amendments to the Selective Service Act. Other areas of our law, such as the marriage and divorce laws, may need similar attention from state legislatures. It is not a

²¹ Under current social mores, the concept of privacy would extend to situations where persons of one sex would be required to disrobe in the presence of persons of the other sex.

weakness but a strength of the amendment that it will force prompt consideration of some changes that are long overdue.

My conclusion from this survey of the legal problems raised by the Equal Rights Amendment is that the method chosen is the proper one and the instrument proposed is constitutionally and legally sound.