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SEXUAL EQUALITY, THE ERA AND THE COURT—A TALE OF TWO FAILURES

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INTRODUCTION

> When Samuel Johnson was asked, "Which is more intelligent, man or woman?," he replied, "Which man and which woman?"[1]

Women's search for equality in the law has been a long and arduous one. Its success has depended upon the ever-changing tide of public opinion, but society has made steady advances. Challenges in both the legislative and judicial spheres have effected some reform—it can indeed be said that women have "come a long way" from the time when one author observed "[a] woman can never be outlawed, for a woman is never in law."[2] The Equal Rights Amendment, sent by Congress[3] to the states for ratification in 1972,[4] represents the culmination of these efforts into a single statement of equality of the sexes. Once bright, hopes for ratification of this amendment have now been extinguished.[5] This, in conjunction with the recent trend against recognition of complete sexual equality in decisions announced by the Supreme Court,[6] renders women's prospects for constitutional protection uncertain. On a larger scale, such setbacks to the struggle constitute a loss to society as a whole; equality for women is essential to equality for men as well. Men, too, are victims of a social system which attempts to categorize and stereotype on the basis of sex. The achievement of equal rights would assure that "*nobody* [w]ould be forced into a predetermined role on account of sex, but each person [w]ould be given better possibilities to develop his or her personal

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1. M. Newcomer, A Century of Higher Education for American Women 27 (1959) (quoting G. Stoddard, On the Education of Women 94–95 (1950)).

2. 1 F. Pollock & F. Maitland, The History of English Law 482 (2d ed. 1968). Pollock and Maitland stated this was an "ancient rule" and that "private law with few exceptions puts women on a par with men; public law gives a woman no rights and exacts from her no duties, save that of paying taxes and performing such services as can be performed by deputy." *Id.*

3. *See* H.R.J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. 35815 (1971); S.J. Res. 8, 92d Cong., 2d Sess., 86 Stat. 1523, 118 Cong. Rec. 9598 (1972) [hereinafter ERA]. The text of the ERA is contained in 86 Stat. 1523.

4. *Id. See also infra* text accompanying notes 14–17.

5. *See infra* text accompanying notes 65–69.

6. *See infra* text accompanying notes 167–219.

talents."[7] It is doubtful that this objective can be attained at the present time in light of the defeat of the ERA and recent Supreme Court decisions.

The development of the ERA, from its inception to its ultimate demise, in many ways parallels the simultaneous evolution of the rulings of the Supreme Court on sex discrimination. The fate of the ERA and the trend of judicial decisions reflect the attempts of Congress, the Supreme Court, and the nation as a whole to grapple with the same problems and concerns created by the emerging acceptance of women as equals. While the paths of the legislature and the judiciary diverge slightly, it is interesting to note the many similarities in the degree to which equality has been accomplished in each sphere. The purpose of this article is to examine these concurrent movements, legislative and judicial, and their import for the struggle towards sexual equality.

I. THE EQUAL RIGHTS AMENDMENT: A PERCEIVED NEED

The first proposal of an equal rights amendment may have been made by the women at the Seneca Falls Convention in 1848 when they stated: "We hold these truths to be self-evident: that all men and women are created equal . . . ."[8] This early movement for a national statement of

7. Address by Olof Palme, Women's National Democratic Club, Washington, D.C., June 8, 1970, in Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 1 (1975) (emphasis added) [hereinafter cited as Ginsburg, *Gender*].

8. 1 E. Stanton, S. Anthony & M. Gage, The History of Woman Suffrage 70 (1881), *reprinted in* E. Flexner, Century of Struggle 75 (1975) [hereinafter cited as Flexner]. *See also* S. Hufstedler, Women and the Law, in Equal Justice Under Law 63, 65 (Bicentennial Lecture Series 1977) [hereinafter cited as Hufstedler]. Other selections from the women's Declaration of Sentiments from Seneca Falls vividly portray their feelings:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.
>
> He has never permitted her to exercise her inalienable right to the elective franchise.
>
> He has compelled her to submit to laws, in the formation of which she had no voice.
>
> . . .
>
> He has made her, if married, in the eye of the law, civilly dead.
>
> He has taken from her all right in property, even to the wages she earns.
>
> . . . In the convenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.
>
> . . .
>
> After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.
>
> He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she received but a scanty remuneration. He closed against her all the avenues to wealth and distinction which he considers most honorable to himself.
>
> . . .

sexual equality failed to develop, overshadowed by the more immediate concerns of abolition and suffrage.[9] After the Civil War, Susan Anthony, an important force in the early women's movements, and others strived in vain to include women expressly in the fourteenth and fifteenth amendments.[10] Disappointed in that endeavor, the women redoubled their efforts to gain the vote, and in 1920, the nineteenth amendment became a reality.[11]

In 1923, the first version of the equal rights amendment was submitted to Congress.[12] Thereafter, resolutions proposing equal rights amendments

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> He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.
>
> He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

1 E. Stanton, S. Anthony and M. Gage, *supra* note 8, at 70–71, *reprinted in* B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law 1–2 (1975) [hereinafter cited as Babcock and Freedman].

9. Babcock and Freedman, *supra* note 8, at 3–4; Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 Calif. L. Rev. 1086, 1086 (1977).

10. Flexner, *supra* note 8, at 145–49. *See also* Babcock and Freedman, *supra* note 8, at 4; Hufstedler, *supra* note 8, at 69–70. In fact, Susan Anthony and Elizabeth Stanton would rather have seen the fourteenth amendment defeated than have it include the word "male" in the Constitution for the first time. Flexner, *supra* note 8, at 145–52. Another interesting sidelight to the history of this era was the arrest and conviction of Susan Anthony for voting without the lawful right to vote. Her defense was based upon her interpretation of the privileges and immunities clause of the fourteenth amendment as having given all citizens, including women, the right to vote regardless of state law. The court refused to accept her argument, directed a verdict against her, and fined her $100, which she never paid. Babcock and Freedman, *supra* note 8, at 9–10; Flexner, *supra* note 8, at 167–71; Hufstedler, *supra* note 8, at 70.

11. U.S. Const. amend. XIX. There are several works, too numerous to cite, detailing the history of the suffrage movement. *See, e.g.*, C. Catt & N. Shuler, Woman Suffrage and Politics (1970); W. Chafe, The American Woman: Her Changing Social, Economic, and Political Roles, 1920–1970 (1972) [hereinafter cited as Chafe]; Flexner, *supra* note 8; A. Kraditor, The Ideas of the Woman Suffrage Movement, 1890–1920 (1965); W. O'Neill, Everyone Was Brave (1969) [hereinafter cited as O'Neill]. Perhaps the following provides an inkling of the immense effort expended in gaining passage of the nineteenth amendment:

> To get the word male in effect out of the constitution cost the women of the country fifty-two years of pauseless campaign thereafter. During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to urge Legislatures to submit suffrage amendments to voters; 47 campaigns to induce State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to persuade State party conventions to include woman suffrage planks; 30 campaigns to urge presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses. Millions of dollars were raised, mainly in small sums, and expended with economic care. Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest and such aid as they could. It was a continuous, seemingly endless, chain of activity.

Catt and Shuler, *supra*, at 107–08.

12. This amendment read: "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." *See* S.J. Res. 21, 68th Cong., 1st Sess., 65 Cong. Rec. 150 (1923). The

were introduced in every succeeding Congress, but they seldom commanded much attention.[13] Finally, however, the House of Representatives adopted the Equal Rights Amendment[14] on October 12, 1971.[15] The Senate adopted the ERA on March 22, 1972.[16] Congress then submitted the amendment to the states for ratification. The text of Proposed Amendment XXVII read very simply:

> 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.[17]

Congress did not accomplish adoption of the ERA without opposition. Some critics suggested the goals of the ERA could be attained through

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language was amended to the current version in 1943, purportedly to "avoid the possibility that it might be interpreted to require uniformity in laws among the states." Babcock and Freedman, *supra* note 8, at 129 n.1. *See also* J. Boles, The Politics of the Equal Rights Amendment 58 n. 24 (1979) [hereinafter cited as Boles].

13. Babcock and Freedman, *supra* note 8, at 129; I. Murphy, Public Policy on the Status of Women 17 (1973); O'Neill, *supra* note 11, at 275–94; Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 886–88 (1971) [hereinafter cited as Brown and Emerson]. The reasons suggested for the almost complete disregard of these earlier resolutions are myriad. Indeed, there was a profound disagreement among women in the 1920's and 1930's as to whether an equal rights amendment was desirable or even advisable. W. Chafe, *supra* note 11, at 112–32; O'Neill, *supra* note 11, at 278–85.

One must consider the historical setting of the intervening decades. The 1930's saw the Great Depression during which working women were urged to return home to permit men to occupy the few available jobs. Babcock and Freedman, *supra* note 8, at 57; Chafe, *supra* note 11, at 58–59, 107–08. Next came a World War which demanded the attention of the entire nation and during which women stepped into the work force in large numbers to take the places of men in the armed forces. Chafe, *supra* note 11, at 135–50. These events made equal rights for women seem a secondary goal. Hufstedler, *supra* note 8, at 75–78. The war was followed by a period in which women again returned home to domesticity. Chafe, *supra* note 11, at 217–25. This period was the primary target of Betty Friedan's The Feminine Mystique (1963).

14. *See supra* note 3. Two works served as the impetus of the women's movement of the 1960's. That movement, in turn, figured importantly in the drive to have the ERA adopted. These are Simon de Beauvoir's The Second Sex published in 1949, which first appeared in the United States in 1953, and Betty Friedan's The Feminine Mystique, *supra* note 13. A neat capsulization of the latter and its effects were made by Shirley Hufstedler:

> Meanwhile, middle-aged women who had followed the Fifties' dream into suburbia received a shock of recognition. Betty Friedan's book, *The Feminine Mystique*, told them that their unhappiness with their lot was not caused by character disorders. They had good causes of action for breach of the personal fulfillment warranty that was tucked into their 1950's marriage packets. Unfortunately, specific performance was not available, and the statute of limitations had run on the damage actions, but nothing prevented their being vocal about their grievances.

Hufstedler, *supra* note 8, at 78.

15. *See supra* note 3.

16. *Id.*

17. *Id.*

means short of constitutional amendment. The alternative put forth most often was that sex discrimination be corrected through lesser pieces of legislation.[18] Proponents of the ERA argued forcefully against the efficacy of such a process:

> [S]uch suggestions unrealistically assume a delicacy and precision in the legislative process which has no relationship to actual legislative capability. More importantly, the process is unlikely to be completed within the lifetime of any woman now alive. Such a method requires multiple actions by fifty state legislatures and the federal congress . . . . To be comprehensive such efforts would require a tremendously expensive, sophisticated, and sustained political organization, both nationally and within every state and locality. Campaigns to change the laws one by one could drag on for many years, and perhaps in some areas never be finished.[19]

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18. *See, e.g.*, Freund, *The Equal Rights Amendment Is Not the Way*, 6 Harv. C.R.-C.L. L. Rev. 234 (1971) [hereinafter cited as Freund]. This article is cited as being "the best known and most scholarly analysis preferring legislative to constitutional change." Babcock and Freedman, *supra* note 8, at 138. In reading the article, however, one is struck by the inconsistencies in Freund's argument. He purports to disagree with the proponents of the ERA only as to the choice of means, rather than the ends to be obtained, but he obviously favors certain of those laws which have been deemed beneficial to women, such as exemption from the draft and support laws. As this article discusses, the proponents of the ERA felt that these should be sex-neutral also. Another sub-argument made by Freund and others is that because only state action would have been subject to the prohibition of the ERA, everything the ERA would have affected could have been corrected by legislation. This, however, is simply avoiding the issue. Nothing would prevent a legislature, after having eradicated all discriminatory laws today, from passing a statute which discriminated on the basis of sex tomorrow. *See also* Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 Harv. C.R.-C.L. L. Rev. 243 (1971).

The other alternative which the opponents of the ERA discussed most frequently in the literature was the possibility that the fifth and fourteenth amendments of the United States Constitution could be construed by the Supreme Court to establish equality of the sexes. *See, e.g.*, Brown and Emerson, *supra* note 13, at 875–82; Dorsen and Ross, *The Necessity of a Constitutional Amendment*, 6 Harv. C.R.-C.L. L. Rev. 216, 218–19 (1971) [hereinafter cited as Dorsen and Ross]; Emerson, *In Support of the Equal Rights Amendment*, 6 Harv. C.R.-C.L. L. Rev. 225, 228–29 (1971) [hereinafter cited as Emerson]; Freund, *supra*, at 235–36, 242; Kurland, *supra*, at 250–51. These articles were written at the very beginning of any Supreme Court movement in that direction and were only predictive. However, as discussed more fully, *see infra* text accompanying notes 92–219, the articles which argued against any such reliance were prophetic. As stated by Dorsen and Ross:

> A Supreme Court apparently retreating from a period of activism and reform is unlikely to add women to the groups entitled to special protection under the fourteenth amendment. Even if the Court were to expand the constitutional rights of women, it is doubtful that its holdings would be sufficiently broad to make an amendment unnecessary.

Dorsen and Ross, *supra*, at 218–19.

19. Brown and Emerson, *supra* note 13, at 883. *See also* Emerson, *supra* note 18, at 228; Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U.L.Q. 161, 173–74 [hereinafter cited as Ginsburg, *Sexual Equality*]. Those who supported the legislative route contended such a step-by-step process would be necessary, even if the ERA were adopted. *See, e.g.*, Freund, *supra* note 18, at 237. This approach ignores the effect the ERA would have had on presumptions of invalidity and the comparative ease with which a charge of sexual discrimination could have been established. Picker, *Law and the Status of Women in the United States*, 8 Colum. Human Rights L. Rev. 311, 313 (1976) [hereinafter cited as Picker]. Also, reading between the

Thus, ERA supporters viewed the legislative route as too lengthy and uncertain. However, whether the legal scholars proposed changes by legislative or constitutional means, almost none seriously disputed the existence of sexual discrimination and the need for some reform.[20]

A. Interpretation of the ERA: Privacy and Sex-Specific Characteristics

Both before and after the ERA was sent to the states for ratification, the debate was heated over how it would be construed by the courts.[21] Whether the ERA would lead to a truly desirable equality, or to absurd results was crucial to the amendment's success and instrumental in its downfall. Based upon the Congressional history, the most widely held viewpoint was that the ERA would render gender a prohibited classification with two exceptions, one relating to personal privacy matters, and the other relating to physical characteristics unique to one sex.[22]

The proponents of the ERA argued the constitutional right to privacy, first recognized by the Supreme Court in *Griswold v. Connecticut*,[23] would permit the continued separation of the sexes in such areas as public rest

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lines, one feels very strongly that the authors were, in essence, tacitly acknowledging their feelings that discrimination on the basis of sex could be justified in more areas than those affected by the right of privacy and sex-specific characteristics.

20. The books and articles chronicling the history of discrimination against women in the legal context are legion. *See, e.g.*, Flexner, *supra* note 8; L. Kanowitz, Women and the Law (1969); Up From the Pedestal (A.Kraditor ed. 1968); Cavanagh, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 Harv. C.R.–C.L. L. Rev. 260 (1971); Ganucheau, *Why I Support the ERA*, 4 S.U.L. Rev. 16 (1977) [hereinafter cited as Ganucheau]; Ginsburg, *Sexual Equality, supra* note 19; Johnston and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971); *Reverse Discrimination Under Alabama's Law of Decedents' Estates*, 32 Ala. L. Rev. 135 (1980). *But see* Pascal, *Why I Oppose the ERA*, 4 S.U.L. Rev. 11 (1977).

21. The Supreme Court, itself, acknowledged the gravity of this issue. In Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring), Justice Powell, joined by Chief Justice Burger and Justice Blackmun, provided some guidance in this matter by stating in his concurring opinion that ratification of the ERA would "resolve the substance of this precise question," *i.e.*, whether sex should be identified as a suspect classification.

22. U.S. Commission on Civil Rights, Statement on the Equal Rights Amendment 21–22 (Clearinghouse Pub. 56, 1978) [hereinafter cited as Statement on the Equal Rights Amendment]; Emerson, *supra* note 18, at 231; Ginsburg, *Gender, supra* note 7, at 23; Comment, *Congressional Intent and the ERA: A Proposed New Analysis*, 40 Ohio St. L.J. 637 (1979). *See also* Brown and Emerson, *supra* note 13, at 889–902, which adopted an almost identical interpretation before many of the Congressional debates and was an influential factor therein. Babcock and Freedman, *supra* note 8, at 144. For some of the congressional hearings, *see, e.g., Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *House Hearings*]; *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Senate Hearings I*]; *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Senate Hearings II*]. Debate referring to these exceptions can also be found. *See, e.g.*, 118 Cong. Rec. 8902, 8904 (1972) (remarks of Sen. Bayh).

23. 381 U.S. 479 (1965). In fact, *Griswold* was read into the record during Senate debates by Senator Bayh. 118 Cong. Rec. 9321–31 (1972).

rooms, sleeping quarters of prisons or other similar public institutions and living quarters in the armed forces.[24] Critics questioned whether extant case law warranted such a broad interpretation.[25] Nonetheless, the ERA's opponents employed the now famous, or infamous, "potty excuse"[26] as a smoke screen to cloud the real issues. That excuse was "magnified beyond all proportion."[27]

Commentators construed the other exception, relating to physical characteristics unique to one sex, to be very narrow in concept and application:

> Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. . . . So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore the individual characteristics found in both sexes in favor of an average based on one sex.[28]

Other suggestions for what would be considered gender-specific laws included those establishing medical leave for childbearing and those punishing forcible rape.[29] Any extension of this exception into the realm of characteristics found generally or primarily, but not exclusively, in one sex or the other was never intended.[30] One real danger inherent in the exception relating to sex-specific characteristics was the possibility that it could be used to justify laws which in effect discriminated seriously against one sex. For example, laws concerning pregnancy as it relates to the ability to work could have been allowed under this exception.[31] Brown and Emerson recognized this difficulty and suggested six factors which

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24. Brown and Emerson, *supra* note 13, at 900–902; Emerson, *supra* note 18, at 231–32; Ginsburg, *Gender, supra* note 7, at 25. *See also House Hearings, supra* note 22, at 150–52 (testimony of Lucille H. Shriver and Bill Scott); *Senate Hearings I, supra* note 22, at 303–304 (statement of Thomas I. Emerson).

25. *See, e.g.*, Freund, *supra* note 18, at 240–41; Comment, *Congressional Intent and the ERA: A Proposed New Analysis, supra* note 22, at 651–53.

26. They argued men and women would have to share restroom facilities. Statement on the Equal Rights Amendment, *supra* note 22, at 2; Ginsburg, *Gender, supra* note 7, at 25. *See also* Ganucheau, *supra* note 20, at 31–32.

27. Emerson, *supra* note 18, at 232. *See also* Ganucheau, *supra* note 20, at 31–32; Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 938 (1979) [hereinafter cited as Ginsburg, *Ratification*].

28. Brown and Emerson, *supra* note 13, at 893. *See also House Hearings, supra* note 22, at 402 (statement of Thomas I. Emerson).

29. Brown and Emerson, *supra* note 13, at 894; Ginsburg, *Gender, supra* note 7, at 37.

30. Brown and Emerson, *supra* note 13, at 893–94; Emerson, *supra* note 18, at 226. *See also* Harzenski and Weckesser, *The Case for Strictly Scrutinizing Gender-Based Separate But Equal Classification Schemes*, 52 Temp. L.Q. 439, 472–478 (1979).

31. The Supreme Court has struggled with the problem of sex-specific characteristics primarily in regard to pregnancy. It is not the purpose of this article to discuss that line of cases beginning with Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) and Geduldig v. Aiello, 417 U.S. 484 (1974). *See, e.g.*, Ginsburg, *Gender, supra* note 7, at 34–40; Kirp and Robyn, *Pregnancy, Justice and the Justices*, 57 Tex. L. Rev. 947 (1979); Note, *General Electric Company v. Gilbert:*

a court should consider in determining "whether the necessary close, direct, and narrow relationship existed between the unique physical characteristic and the provision in question."[32] The factors were: (1) the proportion of the sex which actually has the characteristic in question, (2) the relationship between the characteristic and the problem, (3) the proportion of the problem attributable to the unique physical characteristic of the sex, (4) the proportion of the problem eliminated by the solution, (5) the availability of less drastic alternatives and (6) the importance of the problem ostensibly being solved.[33] Whether this test or a similar one were to be propounded, some such safeguard would have been necessary under the ERA to prevent a gender-specific trait like pregnancy from being used to discriminate against one sex.

Some authorities suggested at least one other interpretation of the ERA: that it would render sex a suspect classification akin to those subject to the strict scrutiny analysis under the fourteenth amendment.[34] Whatever viewpoint they advocated, almost all commentators concurred on the proposition that there were no *absolute* guarantees on how the Supreme Court would construe the ERA.[35] To the question of whether this uncertainty on the exact reading of the ERA should serve as the downfall of a long-awaited and much needed statement of equality between the sexes, proponents answered with an emphatic and resounding "No":

> "Congress shall make no law abridging the freedom of speech, or of the press." 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.
>
> "Congress shall make no law prohibiting the free exercise of religion." Would it improve the text to add expressly, "but the leg-

The Plight of the Working Woman, 11 J. Mar. J. Prac. & Proc. 215 (1977); Comment, *Pregnancy Disability Benefits and Title VII: Pregnancy Does Not Involve Sex?*, 29 Baylor L. Rev. 257 (1977); *Sex Discrimination—Court Narrows Gilbert—Some Pregnancy Discrimination Is Sex Related*, 27 Buffalo L. Rev. 295 (1978); *The Demise of the Discriminatory Effect Analysis—Nashville Gas Co. v. Satty*, 27 De Paul L. Rev. 1301 (1978); *Eberts v. Westinghouse Electric Corp.: Gender-Based Discrimination* After *Gilbert and Satty*, 12 J. Mar. J. Prac. & Proc. 459 (1979); *Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women Under General Electric Co. v. Gilbert*, 22 St. Louis U.L. J. 101 (1978).

32. Brown and Emerson, *supra* note 13, at 894. *See also* Ginsburg, *Gender*, *supra* note 7, at 26, 38.

33. Brown and Emerson, *supra* note 13, at 895–96.

34. *See, e.g.*, Picker, *supra* note 19, at 313; Comment, *Congressional Intent and the ERA: A Proposed New Analysis*, *supra* note 22, at 643.

35. Brown and Emerson, *supra* note 13, at 888; Dorsen and Ross, *supra* note 18, at 223; Freund, *supra* note 18, at 237; Ginsburg, *Sexual Equality*, *supra* note 19, at 176; Kurland, *supra* note 18, at 245–48.

> islature, for secular purposes, may ban polygamy, snake handling, make Sunday but not Friday or Saturday a work-free day?"
>
> 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.[36]

Thus, the courts' interpretation of the ERA represented an area of controversy which both Congress and supporters of the ERA tried to resolve somewhat by suggesting their own constructions of the amendment. It was recognized, however, that no final answer would be forthcoming until the ERA could be tested in the courts.

Events since 1972 partially mooted at least some of the issues that surrounded the ERA as to its interpretation and effect. The rumblings of a minor revolution in family law was beginning to occur when the Supreme Court decided *Orr v. Orr*.[37] At that time, a few states had already enacted the Uniform Marriage and Divorce Act[38] requiring that the right to support be determined on a sex-neutral basis. *Orr* invalidated on equal protection grounds a state law permitting alimony awards to wives, but not to husbands.[39] This trend towards sex-neutral provisions in marriage and divorce laws has continued up to the present time.[40]

Movement has also taken place in the employment sphere. Title VII[41] and state analogues have largely negated any impact the ERA might have

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36. Ginsburg, *Sexual Equality*, *supra* note 19, at 176 (footnotes omitted). *See also* Dorsen and Ross, *supra* note 18, at 223–24; Ganucheau, *supra* note 20, at 34.

37. 440 U.S. 268 (1979).

38. Uniform Marriage and Divorce Act § 308 (1971). *See* Kanowitz, *The ERA: The Task Ahead*, 6 Hastings Const. L.Q. 637, 648 (1979) [hereinafter cited as Kanowitz, *The ERA*].

39. One author rather humorously described the support question as follows:

> Next there is the related argument that upon passage of the Equal Rights Amendment, husbands will cease to support their wives and will force them to obtain employment outside the home, whether or not they choose to do so. (Such melodrama! One visualizes former housewives standing in the snow on Christmas Eve selling their children pursuant to orders of their husbands.)

Ganucheau, *supra* note 20, at 32. *See also infra* text accompanying notes 140–145.

40. *See, e.g.*, Uniform Marriage and Divorce Act (1971). *See also* Brown and Emerson, *supra* note 13, at 936–54; Ginsburg, *Ratification*, *supra* note 27, at 938.

A related issue to the support question was the concern that the enforcement provision of the ERA would have permitted the federal government to interfere with state control of areas such as family law which were historically considered to be exclusively of state concern. Commentators viewed this as spurious, however, because of the "already enormous power of the national Congress to legislate in almost unlimited fashion in almost unlimited areas, as a result of the Supreme Court's expansive interpretations of the commerce clause." Kanowitz, *The ERA*, *supra* note 38, at 651. Thus, commentators argued, Congress probably already possessed the power to legislate in these areas, and there is no reason to suppose it would have done so after ratification of the ERA. *Id.* at 650–51. *See also* Ganuchea, *supra* note 20, at 30.

41. 42 U.S.C. §§ 2000e–2000e-17 (1976).

had on protective labor laws such as weight-lifting restrictions, maximum hours and job prohibitions.[42]

It is submitted that these changes in both family and labor law reflected a growing awareness and acceptance of the concept of sexual equality. Given this, it is incomprehensible to many how what seemed to be a very simple and lucid statement of equality became enmeshed and embroiled in the controversies which surrounded the ERA. Doubtless, historical hindsight will provide us with a better perspective of what happened. Present perceptions suggest that the change required in social norms was simply too great. The chronicle of the ERA endeavor over the past ten years indicates a society willing to accept alterations in its social structure, but only to a certain extent. Further, political mood has drifted toward conservatism. An administration which has favored legislative change in lieu of an amendment must have had a dampening effect upon an already

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42. *See, e.g.*, Brown and Emerson *supra* note 13, at 922; Ginsburg, *Gender*, *supra* note 7, at 23–24. For a discussion of the effect of Title VII on these types of statutes, see Babcock and Freedman, *supra* note 8, at 268–82.

Interestingly,

> Title VII was not drafted with gender-based discrimination in mind. As presented to the House of Representatives, the bill prohibited discrimination based on race, religion and national origin. The category "sex" was added by floor amendment, not by a proponent of the measure, but by a congressman who sought thereby to defeat the entire bill. His tactic backfired.

Ginsburg, *Gender*, *supra* note 7, at 9–10 (footnote omitted).

Initially, women actually lobbied to have laws enacted concerning weight-lifting restrictions, maximum hours and minimum wage. Brown and Emerson, *supra* note 13, at 922; Ginsburg, *Gender*, *supra* note 7, at 5; Kanowitz, *The ERA*, *supra* note 38, at 649–50. They later realized such provisions could be used effectively against them:

> The uneven coverage, wide variation among states, proliferation of exceptions for jobs for which coverage seems most appropriate, and outright exclusion of women from many lucrative occupations demonstrate a lack of protective function. The conclusion that the laws serve primarily as an excuse for employers and unions to keep women in lower-paying jobs, or out of the labor force altogether, is supported by the increasing number of women's lawsuits challenging these restrictions. Moreover, any sex-based law has an inevitably discriminatory impact, because a large number of women do not fit the female stereotypes on which the laws are predicated. These women are unfairly denied the higher wages and other benefits of traditionally "male" jobs. To the limited extent that the laws do provide bona fide protection, men are discriminatorily denied benefits.

Brown and Emerson, *supra* note 13, at 923 (footnote omitted). *See also* Ganucheau, *supra* note 20, at 23–24. As to those laws which were beneficial, such as minimum wage and overtime pay provisions, proponents of the ERA recognized that it was preferable to extend their coverage to men as well rather than to eliminate them entirely. The fear that the ERA would have done away with these laws led to some of the early opposition against it. *See, e.g.*, *Senate Hearings I*, *supra* note 22, at 103–107 (statement of Margaret F. Ackroyd), 229–33 (statement of Ruth Miller); *Senate Hearings II*, *supra* note 22, at 321–24 (testimony of Myra K. Wolfgang), 354–58 (statement of Eloise M. Basto). *See also* Babcock and Freedman, *supra* note 8, at 282–87; Brown and Emerson, *supra* note 13, at 927–28; Dorsen and Ross, *supra* note 18, at 220–21. For a listing of some of these protective laws, *see* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 Syracuse L. Rev. 639, 646–50 (1979).

ailing ratification endeavor. Unquestionably, many other factors contributed to the ERA's defeat.[43] Perhaps the most crucial of these, however, was the question of compulsory military service.

B. The Draft: The Final Stumbling Block on the Road to Equality

Although privacy matters and sex-specific characteristics presented interpretational difficulties, they did not appear to pose insurmountable problems in the ratification endeavor. What did, however, was the "draft" issue. Whether women would be subject to compulsory military service as a result of the ERA was, perhaps, the most divisive and volatile question

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43. In a very candid article written in 1979, Leo Kanowitz discussed several of the more emotional allegations surrounding the ERA and their impact upon the failure to achieve ratification within the original seven-year period. His observations are still valid and noteworthy. In his initial assessment, he criticized the apparent attitude of the women's rights movement toward housewives "as being somehow less worthy human beings than those who do hold . . . jobs." Kanowitz, *The ERA*, *supra* note 38, at 653. Others, in an attempt to assuage the fears of those concerned about the effect of the ERA on their chosen roles as wives and mothers, insisted passage would "give an added dignity to those roles, as it will become apparent that a woman who is a wife and mother has chosen those roles freely." Ganucheau, *supra* note 20, at 33. Nevertheless, this perceived negative sentiment of the movement must have alienated many who would have otherwise supported the ERA.

Another highly volatile issue was whether the ERA would have legitimized homosexual relationships. Many argued Congress did not intend such a result, nor would it have been the practical effect of the ERA. *See e.g.*, 118 Cong. Rec. 9331 (1972) (remarks of Sen. Bayh). *See also* Babcock and Freedman, *supra* note 8, at 179–80; Ganucheau, *supra* note 20, at 30; Ginsburg, *Ratification*, *supra* note 27, at 937. Despite one's personal feelings on the question of how our laws should treat homosexuals, it is indisputable that "gay liberation" as a concept is much further from being generally accepted by society than equality for women. The failure, and refusal by some, to separate the two "has inevitably hardened the opposition of those who [were] already inclined to oppose the ERA, and has turned many a potential supporter of the Amendment into an opponent." Kanowitz, *The ERA*, *supra* note 38, at 654.

Confusion, though unjustified, of the abortion question with the ERA was also a factor in the latter's demise. The two are not really related because Roe v. Wade, 410 U.S. 113 (1973), was not decided on the basis of the Equal Protection Clause. Ganucheau, *supra* note 20, at 29–30. Again, one must consider the current conservative atmosphere of the nation in which an amendment to the United States Constitution prohibiting abortion is being seriously contemplated. The anti-abortion stand of many is based upon sincerely held religious and moral convictions, and, thus, "their ability to judge the ERA on its merits has been greatly impaired." Kanowitz, *The ERA*, *supra* note 38, at 654.

Finally, some proponents conveyed the impression that the struggle for ratification was a fundamental contest between male and female. Nothing could have been further from the truth because men, as well as women, are victims of sexual stereotyping. Misconception of the effects of the ERA vis-a-vis men may well have discouraged many men from supporting the amendment. *Id. See also* Boles, *supra* note 12.

In a recent poll of regular and student members of the American Bar Association, 76% agreed with the statement that "[m]ost people believe there's no need for E.R.A. because what it seeks to accomplish is being attained by legislation"; and, 80% agreed with the statement that "[m]ost people don't want to see women subject to the military draft." However, only 34% agreed with the statement that "[m]ost people feel that E.R.A. would disrupt and tend to destroy our family structure." *E.R.A., Handgun Control, and the Death Penalty*, 68 A.B.A.J. 266 (1982). Thus, the draft was seen as a divisive issue by this group, as well.

of the entire period.[44] Unsuccessful attempts were made during the Congressional debates to exempt this area from the coverage of the ERA.[45] The general consensus was that without such a provision, women would be included in any registraton or draft.[46] Many proponents of the amendment favored this result.[47] The rationale behind the second view was sound: if women are to be accorded the benefits of society, they must also share the burdens. One commentator graphically explained:

> Opposition to the potential draftability of women undoubtedly reflects a concern that it could lead to the sending of women to foreign battlefields where they would face all the horrors of combat. My response to this—the only one that, in my opinion, makes sense in the context of the ERA debate—is that having our youth torn apart by enemy shrapnel is equally horrendous whether the victims are male or female; that our relative equanimity in the face of this prospect periodically faced by the young male members of our society, and our consternation at the thought of this happening to female members of our society, is unfair, irrational, and reveals the fundamental sexist bias of the society at large in the basic realm of a life and death issue. Whether we should ever have a draft at all, I suggested, is an entirely distinct question from whether, if we do have a draft, women and men may be treated unequally.[48]

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44. *See, e.g.*, Brown and Emerson, *supra* note 13, at 967–79; Dorsen and Ross, *supra* note 18, at 222; Freund, *supra* note 18, at 238; Ginsburg, *Gender*, *supra* note 7, at 24–25; Hale and Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 Hastings L.J. 199 (1971); Kanowitz, *The ERA*, *supra* note 38, at 646–47; Note, *The Equal Rights Amendment and the Military*, 82 Yale L.J. 1533 (1973).

45. Senator Sam Ervin proposed this amendment. *See, e.g.*, 116 Cong. Rec. 30610 (1970) (remarks of Sen. Ervin); 116 Cong. Rec. 29668-71 (1970) (remarks of Sen. Ervin). Senator Stennis also supported this amendment. 118 Cong. Rec. 9317-18 (1972) (remarks by Sen. Stennis). Actually, it effectively blocked passage of the ERA in the Senate during the 91st Congress. Brown and Emerson, *supra* note 13, at 887–88. *See also* Hale and Kanowitz, *supra* note 44, at 199–200.

46. *See supra* note 44. *See also* 118 Cong. Rec. 8907 (1972) (remarks of Sen. Cook); 118 Cong. Rec. 8903 (1972) (remarks of Sen. Bayh); *Senate Hearings I*, *supra* note 22, at 75–78 (statement of Paul A. Freund). A significant benefit that would accompany being subject to compulsory military service would be the concomitant easing of restrictions upon the role of women in the military. The primary one has been, and still is, the prohibition against combat duty. *See infra* note 197. In fact, the Pentagon has repeatedly asked Congress to rescind the exclusion and has narrowed the definition of combat in order to assign women to as many jobs as possible. *Women in the Armed Forces*, 95 Newsweek, Feb. 18, 1980, at 34–35. *See also Presidential Recommendations for Selective Service Reform: A Report to Congress, House Comm. on Armed Services*, 96th Cong., 2d Sess. 20 (1980) [hereinafter cited as *Presidential Recommendations*]. These restrictions and prohibitions have prevented women from competing on an equal basis in all areas for career purposes. Ginsburg, *Gender*, *supra* note 7, at 24–25.

47. *See, e.g.*, *Senate Hearings II*, *supra* note 22, at 74–75 (testimony of Jean Witter), at 337–43 (statement of Caroline Bird). *See also* Dorsen and Ross, *supra* note 18, at 222; Ganucheau, *supra* note 20, at 30–31; Ginsburg, *Gender*, *supra* note 7, at 24.

48. Kanowitz, *The ERA*, *supra* note 38, at 647 *See also* Brown and Emerson, *supra* note 13, at 976–77.

The reinstatement of registration in the summer of 1980 and, with it, the possibility of another draft, may have fueled anti-ERA sentiments.[49] Many proponents of the amendment had feared such a result.[50] The return to prominence of an issue which divided women who otherwise supported the ERA[51] may have had a negative impact. Beyond registration lurked the specter of placing women in combat situations; the general public did not seem prepared to accept such a development:

> If registration is approved and women are ultimately drafted, they will fill more non-combat roles, freeing men to fight in case of war. But the nation should be under no delusions that this is an egalitarian system. It would be made so only if women take part in combat. The country could choose to move in that direction, but that would mean overcoming centuries of cultural tradition and accepting the very real physical limitations of women. For the time being at least, most Americans seem unwilling to take that ultimate step.[52]

Thus, the pattern emerges. After a long legal existence as chattel, owned either by their fathers or husbands, women have finally achieved a state of semi-equality. The concept of equality of the sexes has been endorsed by many and introduced successfully in some areas. Nonetheless, the reality of its proposed practical application in the military context has constituted a hurdle over which society has declined to step. As the second portion of this article discusses, the Supreme Court has reflected this sporadic development in its opinions. There, too, the denial of complete equality has resulted at least in part from the Court's reflection of the nation's inability to accept women as equals in the military.[53]

C. An Unsuccessful Attempt: Was It Worth It?

Despite all the doubts, uncertainties and opposition, the ratification process of the ERA started quickly and positively. Twenty-two states

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49. On July 2, 1980, President Carter signed a proclamation reinstating draft registration of 19- and 20-year old men. Presidential Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). President Carter had originally requested that women also be included. *Presidential Recommendations, supra* note 46, at 20–23. For a brief summary of the historical events surrounding the reinstatement of registration, *see* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 Wayne L. Rev. 35, 36–38 (1980) [hereinafter cited as Roberts].

50. *See Women in the Armed Forces, supra* note 46, at 35.

51. *See Draft Women? The Arguments For and Against*, 90 U.S. News and World Rep., April 6, 1981, at 31.

52. *Women in the Armed Forces, supra* note 46, at 42.

53. *See infra* text accompanying notes 190–219.

voted for the amendment in 1972,[54] and an additional eight joined in 1973.[55] In all, thirty-five of the necessary thirty-eight states ratified the ERA, with Indiana being the last on January 24, 1977.[56] But the tide ebbed, then halted. It became evident that ratification would not occur within the original seven-year time limit set by Congress.[57] At least five states attempted to rescind their ratification.[58] Supporters concluded that "[a]cceptance of a broad human rights norm that breaks with tradition takes time to achieve."[59] More time was required, evidently, than everyone thought, except for those few who had been labelled "nervous" in 1970 because they felt seven years to be too short.[60]

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54. The first state to ratify the ERA was Hawaii on March 22, 1972, the same day the Senate completed the Congressional adoption of the ERA. *See supra* text accompanying note 16. The other states were: Delaware (March 23), New Hampshire (March 23), Idaho (March 24), Kansas (March 28), Nebraska (March 29), Tennessee (April 4), Alaska (April 5), Rhode Island (April 14), New Jersey (April 17), Texas (April 19), Colorado (April 21), Iowa (April 21), West Virginia (April 22), Wisconsin (April 26), New York (May 3), Michigan (May 23), Maryland (May 26), Massachusetts (June 21), Kentucky (June 26), Pennsylvania (September 26) and California (November 13). U.S.C.A., Const. amend. 14 to end 344 (West Cum. Supp. 1978, Supp. 1981).

55. These states were: Wyoming (January 16), South Dakota (February 5), Oregon (February 8), Minnesota (February 12), New Mexico (February 28), Vermont (March 1), Connecticut (March 15) and Washington (March 27). *Id.*

56. In addition to Indiana, the other states included: Maine (January 18, 1974), Montana (January 25, 1974), Ohio (February 7, 1974) and North Dakota (February 3, 1975). *Id.* It is interesting to note that many of the states which did not ratify the ERA are those which were in the old Confederacy. Many of these states also failed to ratify the nineteenth amendment. U.S. Commission on Civil Rights, The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution 2 n. 15 (Clearinghouse Pub. 68, 1981) [hereinafter cited as *The Equal Rights Amendment*]. *See also* 124 Cong. Rec. 26210 (1978) (remarks of Rep. Meyner).

57. *See supra* note 3. Ruth Bader Ginsburg made some interesting observations concerning time limitations of proposed constitutional amendments. Only the most recent ones, since the eighteenth, have had accompanying limitation periods. The nineteenth had none, and:

> Suffragists still with us in 1970 argued against a time limit for the ERA. They wanted to keep the pattern consistent with the nineteenth amendment. But principal congressional proponents of the ERA accepted addition of a seven year specification to the proposing clause that preceded the text of the amendment. They thought the stipulation innocuous, a "customary" statute of limitations, not a matter of substance worth opposing. The nineteenth amendment, after all, was proposed in 1919 and ratified in 1920. No amendment now part of the Constitution had taken even four years to be ratified.

Ginsburg, *Ratification, supra* note at 27 (footnotes omitted). *See also House Hearings, supra* note 22, at 247 (statement by Margery C. Leonard).

58. Idaho, Indiana, Nebraska, Tennessee and Kentucky "rescinded" their ratification. Kentucky's acting governor vetoed that state's rescission. Boles, *supra* note 12, at 2–3; The Equal Rights Amendment, *supra* note 56, at 2 n.13; Kanowitz, *The ERA, supra* note 38, at 638 n.3. South Dakota has also attempted rescission. *Last Hurrah for the ERA?*, 98 Newsweek, July 13, 1981, at 24. *What Killed Equal Rights?* 120 Time, July 12, 1982, at 32. *See also infra* text accompanying note 68.

59. Ginsburg, *Ratification, supra* note 27, at 922.

60. *Id.*

In 1978, Congress was persuaded to grant a grace period of an additional three years and three months.[61] Senator Baker claimed this extension to be a first in constitutional history.[62] A new round of articles had appeared which stressed the continuing perceived need for a constitutional amendment and which called for renewed attempts at ratification.[63] ERA advocates were confident a rational viewpoint would prevail over the scare tactics used by the opposition:

> Extension of time for ratification fo the ERA permits responsible members of the community to speak out more volubly than they have up to now, to counter irrational assertions that have mired the ERA debate, to insist on rational discourse. If that is done, no state legislator could so readily resort to fears of unisex potties, widows stripped of social security benefits, women forced to work outside the home, mothers compelled to surrender their children to government caretakers and the like to confound the issue.[64]

These hopes proved to be ill-founded. Proponents failed to detect or appreciate the effective organization of the opposition which succeeded in preventing ratification. No state ratified the ERA after Indiana in early 1977.[65] As the new deadline was fast approaching in the summer of 1982,

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61. H.R.J. Res. 638, (95th Cong., 1st Sess.) (1978), approved by the House of Rep. Aug. 15, 1978, 124 Cong. Rec. 26265 (1978) and by the Senate Oct. 6, 1978, 124 Cong. Rec. 34315 (1978). For hearings on the extension, *see Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Senate Hearings on Extension*], and *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 95th Cong., 1st and 2d Sess. (1977–78) [hereinafter cited as *House Hearings on Extension*].

62. 124 Cong. Rec. 33187-88 (1978) (remarks of Sen. Baker). *See also supra* note 57.

Because of the uniqueness of the extension, there was doubt as to whether Congress possessed the power to grant it. Both the hearings and debates reflected this doubt. *See, e.g.*, 124 Cong. Rec. 34279-314 (1978) (Senate debate); 124 Cong. Rec. 26206-64 (1978) (House debate); *Senate Hearings on Extension, supra* note 61; *House Hearings on extension, supra* note 61. Ruth Bader Ginsburg argued that Congress could do so. Ginsburg, *Ratification, supra* note 27, at 922–23. The United States District Court for the District of Idaho, however, recently ruled the extension invalid. The Supreme Court tabled the issue pending passage of the deadline. N.O.W. v. Idaho, ___ U.S. ___, 102 S. Ct. 1273 (1982).

63. *See, e.g.*, Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetration of Traditional Myths*, 43 Alb. L. Rev. 73 (1978); Erickson, *Equality Between the Sexes in the 1980's*, 28 Clev. St. L. Rev. 591, 595 n.20 (1979); Ganucheau, *supra* note 20; Ginsburg, *Ratification, supra* note 27; Ginsburg, *Sexual Equality, supra* note 19; Kanowitz, *The ERA, supra* note 38; Picker, *supra* note 19; Comment, *Congressional Intent and the ERA: A Proposed New Analysis, supra* note 22. *But see* Mendelson, *ERA, the Supreme Court, and Allegations of Gender Bias*, 44 Mo. L. Rev. 1 (1979) [hereinafter cited as Mendelson].

64. Ginsburg, *Ratification, supra* note 27, at 938 (footnotes omitted).

65. *See supra* note 56 and accompanying text.

even the amendment's most ardent supporters began to acknowledge defeat, despite their renewed campaigns to obtain passage.[66] If the ERA had gained the recognition of an additional three states, it would still have had to survive at least two challenges to its validity. The first was the issue of the constitutionality of the extension.[67] The second challenge involved questions concerning the legality of the attempted rescissions.[68] A final decision on these issues is unnecessary as the opposition groups have effectively sounded the death knell of the ERA despite continuing popular support in its favor.[69]

When midnight passed on June 30, 1982, and the ERA was not ratified, the dilemma which remained was whether all the energy expended in

66. *Another Dark Day for the Feminist Cause*, 91 U.S. News and World Rep., July 6, 1981, at 53; *Battle of the Sexes: Men Fight Back*, 89 U.S. News and World Rep., Dec. 8, 1980, at 50, 51; *ERA Marches On To Another Loss*, 115 Time, May 26, 1980, at 23; *Last Hurrah for the ERA?*, *supra* note 58, at 24, 25. Proponents primarily emphasized Florida, Illinois, Missouri, Oklahoma, North Carolina, Virginia and Georgia as targets for the final effort toward ratification. *Another Dark Day for the Feminist Cause*, *supra*; *Last Hurrah for the ERA?*, *supra* note 58, at 24; *What Killed Equal Rights?*, *supra* note 58, at 32–33. Even with strong campaigns, however, the ERA recently failed to gain passage in Oklahoma and Georgia. *The ERA Loses Two More Rounds*, 119 Time, Feb. 1, 1982, at 18. A rather ironic discovery was made in Oklahoma during the last effort:

> A major task was simply familiarizing the public with the amendment itself. The *Daily Oklahoman* released the results of a poll showing that Oklahomans favored the ERA by a slim margin. In the same poll, residents were asked their opinion of this unidentified passage: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Eighty percent approved, many not knowing that they were endorsing the wording of the ERA.

Id. The United States Commission on Civil Rights noted a similar finding in Utah in its June, 1981, publication. The Equal Rights Amendment, *supra* note 56, at 1, and stressed continued need for ratification:

> Although State, local, and Federal government may act without the ERA to promote equal rights, the reality is that without the amendment, governments at all these levels have not taken—and most likely will not take—the steps necessary to rid their laws, policies, and practices of the sex bias that continues to intrude upon the lives of women and men in this country.

Id. at 2.

67. *See supra* note 62.

68. See *supra* note 58 and accompanying text. The efficacy of rescission has been a turbulent issue, evoking numerous discussions. *See, e.g.*, Burke, *Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U. West L.A. L. Rev. 1 (1976); Heckman, *Ratification of a Constitutional Amendment: Can a State Change Its Mind?*, 6 Conn. L. Rev. 28 (1973); Kanowitz and Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 Hastings L.J. 979 (1977); Rhodes and Mabile, *Ratification of Proposed Federal Constitutional Amendments—The States May Rescind*, 45 Tenn. L. Rev. 703 (1978); Note, *The Equal Rights Amendment: Will States Be Allowed to Change Their Minds?*, 49 Notre Dame Law. 657 (1974); Comment, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 Tenn. L. Rev. 93 (1973). *See also Senate Hearings on Extension*, *supra* note 61; *House Hearings on Extension*, *supra* note 61.

69. The Gallup Poll: Public Opinion 1972–1977, 447, 684 (1978); The ERA Loses Two More Rounds, *supra* note 66, at 18. The failures in Oklahoma and Georgia made the ERA's defeat a virtual certainty. *See supra* note 66.

trying to gain ratification was wasted in a futile gesture or whether it was worthwhile. Surely it cannot be be termed wasted in one regard. Seventeen states now have equal rights provisions in their constitutions, due in large measure to the efforts expended on the ERA.[70] Construction of these state "ERA's" runs the gamut from requiring a rational basis for the state law under attack,[71] to a compelling state interest,[72] and to an even more stringent test.[73] This varied treatment sometimes renders them ineffectual in eradicating discrimination on the basis of sex. Nevertheless, the overall result is a positive one for at least two reasons. First, the effective use of these statutes to invalidate such discrimination, even on a limited basis, is an improvement over past conditions. Second, in the process of ratifying the ERA and providing a state counterpart, state legislatures have become more sensitive to the problem in relation to their own statutes.[74]

Another beneficial aspect of the women's rights movement in general, and of the campaign for ratification in particular, reveals itself in the heightened awareness of the federal court system in the area of discrimination on the basis of sex. As will be discussed more fully,[75] the progress

70. These states are: Alaska (Alaska Const. art I, § 3); Colorado (Colo. Const. art II, § 29); Connecticut (Conn. Const. art. I, § 20); Hawaii (Hawaii Const. art. I, § 21); Illinois (Ill. Const. art. I, § 18); Louisiana (La. Const. art. I, § 3); Maryland (Md. Const. Declaration of Rights art. 46); Massachusetts (Mass. Const. pt. 1, art. I); Montana (Mont. Const. art. II, § 4); New Hampshire (N.H. Const. pt. 1st, art. 2d (1981)); New Mexico (N.M. Const. art. II, § 18); Pennsylvania (Pa. Const. art. I, § 28); Texas (Tex. Const. art. I, § 3a); Utah (Utah Const. art. IV, § 1); Virginia (Va. Const. art. I, § 11); Washington (Wash. Const. art XXXI, § 1); and Wyoming (Wyo. Const. art. I, § 3, art. V, § 1). Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, *supra* note 9, at 1111–12.

Two of these states, Utah and Wyoming, included the provisions in their original constitutions. *Id.* at 1087 n.9, 1090, 1092. Thus, they were not products of the ERA effort.

71. In fact, the "arbitrary, capricious or unreasonable" standard is written into the Louisiana Constitution. La. Const. art. I. § 3. This result was reached in Virginia despite the language of the provision which states sex should be free from "any governmental discrimination." Va. Const. art. I, § 11. *See, e.g.*, Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973).

It is also interesting to note that Utah, after using a rational basis test and being reversed in Stanton v. Stanton, 421 U.S. 7 (1975), *see infra* text accompanying notes 105–106, still asserted that "[t]o judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life." Stanton v. Stanton, 552 P.2d 112, 114 (Utah 1976). The Supreme Court again reversed. Stanton v. Stanton, 429 U.S. 501 (1977). *See also* Annot., 90 A.L.R.3d 158, 176 (1979); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, *supra* note 9, at 1092–95.

72. *See, e.g.*, People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974). *See also* Annot., 90 A.L.R.3d 158, 174–76 (1979); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, *supra* note 9, at 1095–98.

73. *See, e.g.*, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977), *aff'd after remand*, 40 Md. App. 550, 392 A.2d 1149 (1978). *See also* Annot., 90 A.L.R.3d 158, 172–74 (1979); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, *supra* note 9, at 1098–1102.

74. An outgrowth of the latter is evidenced by the recent changes in family law. *See supra* text accompanying notes 37–40.

75. *See infra* text accompanying notes 92–219.

which has been made is not as extensive as some would wish. Still, some advancement is preferable to none.[76]

Undoubtedly, negative implications exist in the failure of the ERA. There may be a long delay before Congress will be amenable to sending another ERA to the states for ratification.[77] Current events and opinions seems to indicate that no such effort will occur in the near future.

The death of the ERA presents a more immediate and, perhaps, more serious concern. This is the question of whether the courts and the legislatures will consider this to be a statement of public opinion and act accordingly. Viewed in this perspective, the decision of the Supreme Court to "wait and see" before declaring sex to be a suspect classificaton looms more large.[78] The Court, already reluctant to effectuate a revolution in constitutional law, may be even less inclined to do so now. A similar reaction might be expected from the legislatures:

> [S]hould 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, so that positions and programs they support can be ignored safely, or at least deferred.[79]

Should the courts and legislatures take such a stance, however, they would be committing a grave error. The ERA commanded continuing popular support,[80] and this should not be ignored. A retreat from the recognition of equality of the sexes would be in disregard of the large numbers who support equal rights, but who have been lulled into believing that the courts and legislatures would rectify discrimination on the basis of gender.[81]

Despite the drawbacks, the positive aspects of the ERA effort outweigh the negative. A new set of values concerning women and men and their relative roles in society has gained a foothold. Unfriendly courts and

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76. As noted by Leo Kanowitz in discussing the Supreme Court's decisions:

> While this burden of justification [i.e., substantial relationship test] is not as great as I and other equal-rights advocates would like, being less onerous than the one applied in race discrimination cases and much less than would be required by the ERA, it nevertheless represents a significant step forward from the "any-rational-basis" test that had prevailed at the beginning of the ratification campaign.

Kanowitz, *The ERA*, *supra* note 38, at 658–59.

77. Some ERA proponents fought extension of the time period for this reason. Ginsburg, *Ratification*, *supra* note 27, at 938 n.119.

78. *See supra* note 21. As one author expressed it:

> Although deference to the legislative process is laudable, there exists a danger in this "wait and see" approach. If the Equal Rights Amendment fails to pass—and sex thereby is not elevated to third tier status—the Court then will have the sole discretion to block strict scrutiny.

Emden, *supra* note 63, at 75.

79. Ginsburg, *Sexual Equality*, *supra* note 19, at 177 (footnotes omitted).

80. *See supra* note 69. *See also The Equal Rights Amendment*, *supra* note 56, at 1–2.

81. Kanowitz, *The ERA*, *supra* note 38, at 661.

legislatures can chill the atmosphere and impede the progress, but surely only temporarily:

> [P]ersonal and social dilemmas will not evaporate upon the incantation of pieties from the past . . . . Nor can the fact that women are not inferior to men be obliterated by reciting traditional mythology. Together and unequal is no more defensible than separate but equal.[82]

II. THE SUPREME COURT'S RESPONSE TO THE PERCEIVED NEED

Without the ERA, the opinions of the Supreme Court in the field of sex discrimination increase in gravity and importance. The enactments of Congress and the fifty state legislatures may figure prominently in the overall design, but the Supreme Court is the final arbiter in our general constitutional scheme. Only the Supreme Court possesses ultimate power over the issue now that the ERA has become a moot question. As one Justice recently stated:

> [T]he Constitution is the supreme law of the land and *all* legislation must conform to the principles it lays down. . . .
>
> Furthermore, "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provisio[n], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less."[83]

Thus, the decisions of the Supreme Court affect the futures of both men and women. The discussion now turns from the chronicle of the ERA to the parallel development of sex discrimination law in the courts.

Early judicial history reveals the same failures in the judicial forum as in the legislative. At the same time women were making abortive attempts to have an equal rights amendment added to the Constitution,[84] they were pursuing their quest for equality through the court system. Their efforts in this regard met with little or no success. Classification on the basis of sex did not trouble the Supreme Court. Cases representative of this earlier attitude include *Bradwell v. Illinois*,[85] *Minor v. Happersett*,[86] *Muller v.*

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82. Hufstedler, *supra* note 8, at 86.

83. Rostker v. Goldberg, 453 U.S. 57, 112–13 (1981) (Marshall, J., dissenting) (citation omitted).

84. *See supra* notes 8–17 and accompanying text.

85. 83 U.S. (16 Wall.) 130 (1872). In this case, the Supreme Court affirmed a decision of the Illinois Supreme Court which denied a woman the right to practice law on account of her sex. The Court found this not to be a privilege or immunity of citizenship within the meaning of the privileges and immunities clause of the fourteenth amendment.

86. 88 U.S. (21 Wall.) 162 (1874). This ruling saw another unsuccessful attempt to utilize the privileges and immunities clause of the fourteenth amendment. The Court ruled the right to vote not to be among those protections and, hence, upheld the power of Missouri to deny women the

Oregon,[87] *Goesaert v. Cleary*,[88] and *Hoyt v. Florida*.[89] Although now viewed as outdated, these rulings presented very clearly the Court's feelings on men's and women's roles in society:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.
>
> . . .
>
> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[90]

The first sign of an alteration in the Court's assessment of the issue came only a few months before Congress sent the ERA to the states for ratification.[91] In *Reed v. Reed*,[92] the Supreme Court breathed the first life

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vote. One at least has to acknowledge the Court's recognition of women as "persons" who could also be "citizens" within the meaning of the fourteenth amendment. *Id.* at 165.

Ginsburg considers both this case and Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), *see supra* note 85, to be products of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), in which "the Court virtually ruled out any independent range of application for the [privileges and immunities] clause." Ginsburg, *Gender*, *supra* note 7, at 5. *See also* Ginsburg, *Sex Equality and the Constitution*, 52 Tul. L. Rev. 451, 453–54 (1978) [hereinafter cited as *Constitution*].

87. 208 U.S. 412 (1908). In *Muller*, the Court held an Oregon statute constitutional which limited the hours of employment of women. The Court found justification for its decision in woman's weaker physical nature and her need to be protected "from the greed as well as the passion of man." *Id.* at 422. Although this type of legislation was once sought after by women, it has since been viewed as a hindrance to equality in employment. *See* Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 Hastings L.J. 1379, 1405 (1980) [hereinafter cited as *"Benign" Sex Discrimination*]. *See also* text accompanying notes 41–42. *Muller* is renowned for the initiation of the "Brandeis brief."

88. 335 U.S. 464 (1948). In *Goesaert*, the Court gave short shrift to a challenge of a Michigan statute prohibiting a woman from being a licensed bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. In a three-page opinion, the Court stated that to ask the question of whether Michigan could enact this statute was "one of those rare instances where to state the question is in effect to answer it." Further, "Michigan could, beyond question, forbid all women from working behind a bar." *Id.* at 465.

89. 368 U.S. 57 (1961). The Court in *Hoyt* upheld a Florida statute limiting jury service by women to those who registered with the court. Appellant, a woman, had been convicted by an all-male jury of killing her husband by assaulting him with a baseball bat. She felt "women jurors would have been more understanding or compassionate than men." *Id.* at 59. *Hoyt* was later overruled, in effect, in Taylor v. Louisiana, 419 U.S. 522 (1975) which held that it violated a defendant's sixth amendment right to a jury trial to exempt women solely on the basis of their sex.

90. Bradwell v. Illinois, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). Commentators on these early cases include: Brown and Emerson, *supra* note 13, at 875–79; Ginsburg, *Gender*, *supra* note 7, at 4–8; Hull, *supra* note 42, at 645–51; Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 Duke L.J. 163, 166–70. In Senate hearings on the ERA, Rep. Martha Griffiths argued the ERA "would be like a beacon light which should awaken those nine sleeping Rip Van Winkles to the fact that the 20th century is pressing into history. It is a different world and they should speak for justice, not prejudice." *Senate Hearings II*, *supra* note 22, at 24 (Statement of Rep. Martha W. Griffiths).

At least one author has argued very forcefully that these decisions "do not even remotely support the charge of 'sexism' in the work of the high court." Mendelson, *supra* note 63, at 2. If these are not representative of the Court's attitude, however, Mr. Mendelson fails to state what is.

91. *See supra* text accompanying notes 15–17.

92. 404 U.S. 71 (1971).

into the Equal Protection Clause insofar as it related to discrimination on the basis of sex. While commentators debated the advisability of adopting the ERA and its possible interpretations by the courts,[93] the Supreme Court grappled with the problem of sex discrimination in its own fashion, which was to determine what equal protection test would be most appropriate. *Reed* concerned an Idaho statute which granted a preference for male over female executors in the same entitlement class in the administration of estates.[94] The Court found the mandatory preference arbitrary and invalid.[95] It apparently used a rational basis test, instead of the strict scrutiny test which was developed by the Warren Court to attack suspect classifications such as race.[96] Because the statute failed to survive the Court's examination despite the rational basis language, some suggested that a new era in gender-based discrimination had arrived.[97] The pertinent language in *Reed* which purportedly sustained this claim came from a 1920 opinion which stated legislative classifications must bear a "fair and substantial relation" to the end sought.[98]

The first concrete attempt to develop a higher test which could garner the support of a majority came in the next sex discrimination case addressed by the court, *Frontiero v. Richardson*.[99] In that opinion, a plurality consisting of Justices Brennan, Douglas, White and Marshall voted to elevate sex to a suspect classification because they considered "sex like race and national origin, [to be] an immutable characteristic determined

93. *See supra* notes 18–43 and accompanying text.

94. 404 U.S. at 72–73.

95. *Id.* at 76. The state's justification of administrative convenience was that it would lighten the load of the probate courts by eliminating a class of controversy. Although "not without some legitimacy," this justification was insufficient to preserve the statute. *Id.* The decision in *Reed* was unamimous. *Id.* at 71.

96. The two-tier analysis of legislation being challenged on the ground of equal protection is so firmly established that it need not be discussed at length. The traditional test was highly deferential and required only some rational connection between the classification employed and the ends sought to be achieved. *See* Williamson v. Lee Optical, 348 U.S. 483 (1955). Indeed, at least one commentator labelled the traditional test "toothless." Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18–19 (1972). Later the Warren Court modified this test by developing a second, higher standard of review—the "strict scrutiny" test for those cases concerning fundamental rights such as voting and those involving suspect classifications such as race. *See* Loving v. Virginia, 388 U.S. 1 (1967). This test could be satisfied only by demonstrating a compelling governmental interest for the classification. Because so few statutes met this heavy burden, the test was characterized as " 'strict' in theory and fatal in fact." Gunther, *supra*, at 8.

97. *See, e.g.*, Emden, *supra* note 63, at 78–80; Ginsburg, *Constitution, supra* note 86, at 458–59; Gunther, *supra* note 96, at 32–37; Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1381–82; *Reverse Sex Discrimination Under Alabama's Law of Decedents' Estates, supra* note 20, at 140–41. In fact, the Supreme Court itself would later cite *Reed* in support of the middle-tier analysis. *See* Craig v. Boren, 429 U.S. 190, 197–99 (1976). However, at least one author felt *Reed* leaves one somewhat puzzled at its reputation as the intellectual progenitor of the modern gender-based equal protection doctrine." Roberts, *supra* note 99, at 96.

98. 404 U.S. at 76, (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

99. 411 U.S. 677 (1973).

solely by the accident of birth."[100] *Frontiero* invalidated a provision under which a male member of the military service could claim his wife as a dependent without proof of her dependency, while a female member was required to prove the actual dependency of her husband.[101] The Government could forward no justification for the distinction other than administrative convenience. The Court indicated that " 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[102] In his concurrence, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found sufficient support in *Reed* for their decision and urged that any declaration of sex as a suspect classification would be premature in light of the ratification process of the ERA then occurring.[103]

The Court's next effort to articulate a sex discrimination test did not come about until *Craig v. Boren*.[104] Intervening decisions failed to address the question directly. *Stanton v. Stanton*,[105] in which the Court struck down a Utah statute which established a lower age of majority for females than for males, was representative. The Court was able to avoid stating a test because it considered this distinction invalid "under any test—compelling state interest, or rational basis, or something in between."[106] Further, an examination of the opinions before *Craig* reveals a lack of consistency by the individual justices.[107]

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100. *Id.* at 686. The challenge in *Frontiero* was based upon the due process clause of the fifth amendment. The Court's approach to fifth amendment equal protection claims has been the same as to those under the fourteenth amendment. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974).

101. 411 U.S. at 678–79.

102. *Id.* at 690. The Government argued that wives were more frequently dependent upon their husbands than vice-versa and, thus, a conclusive presumption of wives' dependence would be administratively cheaper and easier. *Id.* at 688–89.

In what was perhaps a preview of Kahn v. Shevin, 416 U.S. 351 (1974), the Court noted the statutory scheme was "not in any sense designed to rectify the effects of past discrimination against women." 411 U.S. at 689 n.22.

103. 411 U.S. at 692 (Powell, J., concurring). Justice Stewart filed a rather cryptic concurrence on the ground the statute worked as invidious discrimination. *Id.* at 691 (Stewart, J., concurring). Justice Rehnquist dissented for the reasons set forth in the district court's opinion on the ground the provision satisfied the rational relationship test. *Id.* (Rehnquist, J., dissenting).

104. 429 U.S. 190 (1976).

105. 421 U.S. 7 (1975).

106. *Id.* at 17. The Utah Supreme Court had upheld the statute essentially on the ground it was more important for males to obtain an education due to their primary responsibility of providing a home. *Id.* at 14.

107. The inconsistency prompted one court to observe: "[a] lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea." Vorchheimer v. School Dist. of Philadelphia, 400 F. Supp. 326, 340–41 (E.D. Pa. 1975), *rev'd on other grounds*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977) (per curiam).

Craig took a stumbling step toward a test to which a majority could initially adhere.[108] At issue was an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen.[109] Justice Brennan wrote the opinion of the Court and, finding support in *Reed,* stated that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[110] Thus, Justice Brennan created a test which required something less than a compelling state interest and something more than a rational basis. Although the Court accepted Oklahoma's asserted purpose of traffic safety, it did not find persuasive the statistical surveys which were submitted. Oklahoma failed to demonstrate a *substantial relationship* between the classification and the goal to be achieved. Hence, the Court considered gender not to be a "legitimate, accurate proxy" for the regulation of drinking and driving and ruled the classification unconstitutional.[111]

Justice Powell, in concurrence, expressed his reservations concerning the "substantial relationship test" but conceded that the Court had subjected gender-based classifications "to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present."[112] Further,

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be

108. Depending upon which law review article one consults, commentators viewed *Craig* as either a plurality or a majority opinion. *Compare* Note, *The Search for a Standard of Review in Sex Discrimination Questions,* 14 Hous. L. Rev. 721 (1977) *with* Ginsburg, *Constitution, supra* note 86, at 468. The vote at issue was Justice Powell's concurrence and whether it demonstrated agreement with the substantial relationship test developed in Justice Brennan's opinion. 429 U.S. at 210–11 (Powell, J., concurring). With four concurrences and two dissents, *Craig* cannot be termed a unified approach to sex discrimination. Justice Stevens concurred, but declined to join the others in establishing a middle-tier standard of review. He even cast aspersions on the two-tier analysis, stating "[t]here is only one Equal Protection Clause." *Id.* at 211 (Stevens, J., concurring). Justice Blackmun concurred in that part of the opinion setting forth the substantial relationship test. *Id.* at 214 (Blackmun, J., concurring). Justice Stewart found the statute totally irrational. *Id.* at 214–15 (Stewart, J., concurring). Chief Justice Burger dissented, stating: "Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the normal . . . protection afforded by the Equal Protection Clause." *Id.* at 215, 217 (Burger, C. J., dissenting) (citation omitted). Justice Rehnquist also dissented because he felt the rational basis test to be the appropriate one and decided that the substantial relationship test came "out of thin air." *Id.* at 217, 220 (Rehnquist, J., dissenting). A clear majority for the substantial relationship test would later emerge. *See, e.g.,* Caban v. Mohammed, 441 U.S. 380 (1979), and *infra* notes 160–66 and accompanying text.

109. 429 U.S. at 191–92.

110. *Id.* at 197.

111. *Id.* at 204.

112. *Id.* at 210 (Powell, J., concurring).

> applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.[113]

Thus, the Court articulated the *Craig* test. Of immense importance, it has governed the Court's rulings on laws discriminating on the basis of sex since its inception. All succeeding pronouncements by the Court have been attempts to further refine the middle-tier analysis set forth in *Craig*.

A. Supreme Court Interpretation of Sexual "Equality": Benign-Discrimination and Substantial Relationship

With thirty states ratifying the ERA in shortly over one year,[114] it appeared the ERA would be an immediate success. Concurrently, the Supreme Court was also engaged in its own rapid evolution: from a bare recognition that sex-based classifications could be invalid in *Reed v. Reed*,[115] to a plurality of four justices finding gender a suspect classification in *Frontiero v. Richardson*.[116] The ERA never garnered the support of the final three states needed for ratification.[117] Similarly, the fifth vote required to elevate sex to a suspect classification has never materialized. Rather, the Court compromised on a middle-tier analysis for gender-based discrimination in *Craig v. Boren*.[118]

This marriage of convenience has not produced entirely consistent results, because the middle-tier analysis has proven difficult to apply. Two central issues before the Court reflected to some degree two difficulties encountered by Congress. First, the Court tried to justify differing treatment of the sexes under the "benign" classificaton concept. At the same time, Congress defended the compatibility of the ERA with certain privacy matters which mandated continued separation of the sexes.[119]

113. *Id.* at 210–11 n.*.
114. *See supra* notes 54–55 and accompanying text.
115. 404 U.S. 71 (1971). *See supra* text accompanying notes 92–98.
116. 411 U.S. 677 (1973). *See supra* text accompanying notes 99–103.
117. *See supra* notes 65–66 and accompanying text.
118. 429 U.S. 190 (1976). *See supra* text accompanying notes 104–13.
119. *See supra* text accompanying notes 23–27.

Second, the Court had problems with sex-specific characteristics vis-a-vis the *Craig* test. Congress was considering arguments that laws concerning sex-specific characteristics should be exempt from the ERA's coverage. It was recognized precautions should be taken to prevent this from being used unfairly against one sex.[120] The Court, in its application of middle-tier analysis, has at times committed this error. It has permitted a sex-specific characteristic to become a false issue in its determination of whether a statute classified on the basis of sex and, then, whether it was "substantially related" to the governmental interest. This article will examine each in detail.

1. Benign Classification: Benefit or Burden

"Benign" classifications as developed by the Court were classifications based on sex which, the Court asserted, could be justified because of their stated purpose to assist in eradicating the vestiges of past discrimination against women. In fact, this rationalization has been raised in support of almost every gender-based statutory scheme addressed by the Court since *Reed v. Reed*.[121] It first appeared in *Kahn v. Shevin*,[122] decided shortly after *Frontiero v. Richardson*.[123] In *Kahn*, the Court upheld a Florida statute granting all widows, but not widowers, an annual $500 property tax exemption. The reasoning seemed to employ a "rational basis" standard.[124] The Court viewed the provision as remedial in character, designed to protect widows facing an inhospitable job market, and, on this basis, distinguished *Reed* and *Frontiero*.[125] Critics attacked *Kahn*, arguing it provided women with the best of two worlds: invalidation of laws perceived as invidiously discriminatory and approval of those supposedly enacted to correct the vestiges of past discrimination.[126] The

120. *See supra* text accompanying notes 28–33.

121. 404 U.S. 71 (1971). Indeed, the State of Mississippi forwarded the "benign" purpose argument in support of its all female professional nursing school in the most recent sex-discrimination case decided by the Court. Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S. Ct.3331, 3339 (1982).

122. 416 U.S. 351 (1974).

123. 411 U.S. 677 (1973).

124. 416 U.S. at 352.

125. *Id.* at 355. It is interesting to note that *Kahn* was authored by Justice Douglas, who had found sex inherently suspect in Frontiero v. Richardson, 411 U.S. 677 (1973). *See* Hull, *supra* note 42, at 658–59. Justices Brennan, Marshall and White dissented and continued their position of sex as suspect. Although they found the statute served a compelling state interest by cushioning the impact of spousal loss upon females who needed it, they argued the result could be achieved by a more narrowly drawn provision. 416 U.S. at 357–60 (Brennan, J., dissenting). Justice White also dissented on the basis of sex as a suspect classification. However, he emphasized the failure of the statute to provide for needy widowers as well. *Id.* at 360–62 (White, J., dissenting).

126. Also of concern to the critics was the apparent return to the rational basis standard for testing "benign" discrimination. *See, e.g.*, Ginsburg, *Constitution, supra* note 86, at 465–66; Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813, 818 (1978) [hereinafter cited as Ginsburg, *Some Thoughts*].

possibility that women would be unfairly benefitted was not the only drawback to this opinion, however. The majority opinion ignored the difficulties experienced with so-called "protective" legislation and its tendency to foster the notion of women as inferior and incapable of caring for themselves.[127]

As in *Frontiero*, military issues were highlighted once more in *Schlesinger v. Ballard*,[128] which concerned the distinction drawn between male and female officers in the promotion system. Women who had failed a second time to be promoted were permitted to remain in the service four years longer than men in the same situation.[129] Because of the combat restriction placed upon women in the armed services and its concomitant effect on the possibility of promotion, the Court perceived a need to allow women an additional opportunity to achieve a higher rank. Thus, the Court found a benign purpose and upheld the statute on that basis, without specifically indicating what standard it was applying.[130] Justice Brennan, joined by Justices Douglas and Marshall in dissent, once again expressed his belief that sex should be classified as suspect and further noted his concern at "the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment [*i.e.*,

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127. 416 U.S. at 357 (Brennan, J., dissenting). Indeed, the classification in *Kahn* "was barely distinguishable from other products of paternalistic legislators who regarded the husband more as his wife's guardian than as her peer." Ginsburg, *Some Thoughts*, *supra* note 126, at 818. *See also* Hull, *supra* note 42, at 641, 660–61. In addition, it is very questionable whether the tax exemption in *Kahn* was enacted to compensate females for past discrimination or whether it was based upon the traditional stereotypes. As Justice Stevens later noted:

> [T]hat case involved a discrimination between surviving spouses which originated in 1885; a discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males. It seems clear, therefore, that the Court upheld the Florida statute on the basis of a hypothetical justification for the discrimination which had nothing to do with the legislature's actual motivation.

Califano v. Goldfarb, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring) (footnote omitted). *See also* Erickson, *supra* note 63, at 599–600; Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 Brooklyn L. Rev. 1 (1975).

On the other hand, two members of the Court suggested only women, but not men, have been the victims of past discrimination. *Kahn*, 416 U.S. at 360 (Brennan, J., dissenting). Such a position, however,

> [F]ails to appreciate that whether one talks of the male's unique obligation of compulsory military service, his primary duty for spousal and child support, or his lack of the same kinds of protective labor legislation that have traditionally been enjoyed by women, he has paid an awesome price for other advantages he has presumably enjoyed over women in our society.

Kanowitz, *The ERA*, *supra* note 38, at 657.

128. 419 U.S. 498 (1975).

129. *Id.* at 500.

130. *See Id.* at 508–10.

the combat restriction] imposed directly and currently by the Navy itself."[131]

Weinberger v. Wiesenfeld[132] addressed a legislative scheme which could also be deemed compensatory for past discrimination. At issue was a social security law which prevented a widower from receiving benefits based on the earnings of his deceased wife, although analogous benefits were available to widows.[133] The Court perceived the law to be discriminatory against female wage earners who had to pay into the system, but whose widowers received no benefits. The Government sought to characterize the act as benign, and thus valid pursuant to the Court's rationale in *Kahn*. The Court declined to be distracted by "the mere recitation of a benign, compensatory purpose [which] is not an automatic shield . . . protect[ing] against any inquiry into the actual purposes underlying a statutory scheme."[134] The opinion proclaimed the law to be "entirely irrational"[135] and therefore unconstitutional.

The rulings of the Court since the "benign purpose" cases decided before *Craig* have reflected a Court retreating from its initial embrace of

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131. *Id.* at 511 n.1 (Brennan, J., dissenting). "The problem in [*Schlesinger*] was not the allegedly preferential treatment, but the absence of equal treatment; not the illusory benefit conferred on female lieutenants, but the entire fabric of a military policy which was permeated with sex differentials and which handicaps the female in every stage of military life, from entrance to promotion to discharge to retirement." Hull, *supra* note 42, at 662. *Schlesinger* has been criticized on the ground there was no real legislative history to support the rationale of compensating for previous discrimination. *See, e.g.*, Erickson, *supra* note 63, at 600. *See also Schlesinger*, 419 U.S. at 511 (Brennan, J., dissenting). Also, some female officers evidently felt the differential worked to their disadvantage:

> The woman officer who wishes to leave short of thirteen years is not entitled to severance pay, and mandatory discharge at the thirteen year mark would not bring her even close to the twenty years' service she would need to qualify for a Navy pension. Under the "up or out" system the male officer, discharged generally after nine years, would get severance pay, and would have the opportunity to start up the ladder in a new career some four years earlier than his female counterpart.

Ginsburg, *Some Thoughts, supra* note 126, at 818. Further, it was suggested this eased the pressure on women's superiors to promote them because they could stay in service longer. Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1406–1407.

132. 420 U.S. 636 (1975).

133. *Id.* at 639–41.

134. *Id.* at 648.

135. *Id.* at 650–51. The Government attempted to justify the provision as one "designed to compensate women . . . for the economic difficulties which still confront women who seek to support themselves and their families." *Id.* at 648. After examining the legislative history of the social security law, the Court rejected the government's contention and found an intention not to protect women, but to provide benefits which would increase parental attention to children who had been deprived of a parent. Based upon this, the Court felt "[t]he classification discriminates among surviving children solely on the basis of the sex of the surviving parent." *Id.* at 651. The Court further observed that it was as important for a child to be cared for by its father as by its mother. *Id.* at 652.

the benign classification concept. *Califano v. Goldfarb*[136] addressed yet another provision which distinguished between widows and widowers in relation to survivors' benefits and which rendered it more difficult for widowers to obtain them. Although the Court had resoundingly invalidated a similar statute in *Wiesenfeld*,[137] it could only muster a 5–4 plurality to the same effect in *Goldfarb*.[138] What confused the *Goldfarb* Court was from what perspective this type of law should be viewed: as discriminatory against female wage earners as in *Wiesenfeld*, or as a preferential treatment of widows as in *Kahn*.[139]

Continued retrenchment was evident in *Orr v. Orr*.[140] At issue was Alabama's alimony statute which required only husbands to pay alimony

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136. 430 U.S. 199 (1977).

137. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), was in essence an 8–0 decision. Justice Douglas took no part in the decision. *Id.* at 653. Justice Rehnquist filed a special concurrence on the ground the statute did not rationally serve "any valid legislative purpose." *Id.* at 655.

138. Justice Brennan, joined by Justices White, Marshall and Powell, authored the opinion. 430 U.S. at 201. Justice Stevens filed a concurrence stating the statute discriminated against the surviving male spouses, not the deceased female wage earners. Justice Stevens did not find either the administrative convenience rationale nor the asserted benign purpose persuasive. *Id.* at 217–24 (Stevens, J., concurring). Justice Rehnquist, joined by Chief Justice Burger, Justices Stewart and Blackmun, dissented on the basis the administrative convenience rationale was due more deference in the field of social insurance legislation and, further, that the statute should be upheld under *Kahn*. *Id.* at 224–42 (Rehnquist, J., dissenting). Because Justice Stevens did not feel the statute discriminated against the deceased female wage earners, the result would have been different had he found either rationale sufficient to uphold the statute.

139. Indeed, Chief Justice Burger noted in his concurrence in Califano v. Webster, 430 U.S. 313, 321 (1977) (Burger, C. J., concurring): "I question whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the 'offensive' provisions struck down in *Weinberger v. Wiesenfeld* . . . and *Frontiero v. Richardson* . . . or more like the 'benign' provisions upheld in *Schlesinger v. Ballard* . . . and *Kahn v. Shevin*. . . ." (citations omitted).

Kanowitz noted the problem the Court had with recognizing that a statute benign to some women could also be harmful to others:

> In seeking to determine whether Congress might have had a benign purpose to benefit needy widows, therefore, the *Wiesenfeld* majority and *Goldfarb* plurality were prepared to permit a large group of women (covered employees) to be deliberately, seriously and discriminatorily injured by the federal government for the sake of assisting another group of women (surviving spouses of covered male employees).

Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1409.

140. 440 U.S. 268 (1979). One case decided after *Goldfarb* and before *Orr* represented a minor aberration in the Court's retrenchment. Califano v. Webster, 430 U.S. 313, 320 (1970), a *per curiam* ruling, upheld a social security enactment which resulted in higher payments for female wage earners upon retirement because it "was not 'the accidental byproduct of a traditional way of thinking about females,' . . . but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." *Id.* at 320 (citation omitted).

One commentator has argued that the actual reason the statute was passed was because "employers were forcing women to retire earlier than men and were also failing to hire older women. . . . At the same time, however, Congress failed to enact legislation forbidding such discrimination by employers, thus treating the symptoms rather than the disease." Erickson, *supra* note 63, at 601. Thus, the effect might well have been the forcing of older women into early retirement when such

upon divorce.[141] The Court accepted, as important governmental objectives, two asserted purposes of the act: "assisting needy spouses" and "compensating women for past discrimination during marriage."[142] Despite this determination, the Court still felt there was no reason to use gender as an indicator of need because hearings were already being held in each case to determine the relative financial circumstances of the parties.[143] Other factors in the ruling demonstrated a more critical analysis of "benign" classifications than previously engaged in by the Court. The opinion not only suggested that a sex-neutral classification could serve the governmental purpose, but it also seemed to limit the inquiry on the issue of past discrimination between the sexes. The Court used language indicating evidence of past discriminaation would only be sought "in the sphere to which the statute applied a sex-based classification."[144] In *Orr*, the realm of review was restricted to marriage. Thus, *Orr* arguably held that a state could not defend discriminatory legislation on the ground that it compensated for general wrongs against women, unless it was designed to correct past discrimination in that particular field.[145]

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was not their desire. *Id. See also* Kanowitz, *"Benign" Sex Disrimination, supra* note 87, at 1406. But see Ginsburg, *Some Thoughts, supra* note 126, at 822–25, wherein *Webster* was viewed as attempting "to preserve and to bolster a general rule of equal treatment while leaving a corridor for genuinely compensatory classification." *Id.* at 823. The retirement ages have now been equalized, as the Court noted in *Webster*. 430 U.S. at 320.

Interestingly, at least one commentator perceived *Webster* as a possible indication of retreat from the *Kahn* doctrine because the substantial relationship test was applied in *Webster*, as opposed to the rational basis test used in *Kahn*. Hull, *supra* note 42, at 663–64. Others feared the use of the substantial relationship test indicated that benign classifications would be upheld regardless of the test used. *Constitutional Law—Equal Protection—Standard of Review Applicable in Sex Discrimination Cases*, 45 Tenn. L. Rev. 514, 526 (1978).

141. 440 U.S. at 270.

142. *Id.* at 280.

143. *Id.* at 281–82.

144. *Id.* at 281. The Court also stated that the hearing could be used to "determine which women were in fact discriminated against *vis-a-vis their husbands.*" *Id.* at 281–82 (emphasis added). One commentator felt this language suggested "a conscious determination on the part of the Court majority to narrow substantially the scope of the benign discrimination doctrine." Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1387.

Other commentators saw a further eroding of the *Kahn* benign discrimination doctrine in *Orr* because Justice Brennan, speaking for the Court, stated that the middle-tier analysis would be applied to classifications which discriminated against men, rather than women. 440 U.S. at 279. *See* Hull, *supra* note 42, at 664–65; Comment, *Wengler v. Druggists Mutual Insurance Co.—However the Discrimination Is Described, If Gender-Based, the Substantial Relationship Test Applies*, 1981 Utah L. Rev. 431, 440. However, Justice Blackmun specifically stated in his concurrence he assumed the Court's decision in *Orr* did not cut "back on the Court's decision in *Kahn v. Shevin.*" 440 U.S. at 284 (Blackmun, J., concurring). Kanowitz termed this as "a valiant, but futile, attempt to deny the obvious." Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1387 n.57.

145. This practice of examining only the specific area at issue for evidence of past discrimination was also used by the Court in its most recent sex discrimination opinion. Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331 (1982), involved the constitutionality of an all-female, state-supported professional nursing school. Justice O'Connor, for the majority, rejected the

The future of "benign" classifications in gender-based discriminations is unclear. There has been an increasing awareness that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[146] Further, the Court has subjected "benign" classifications to a more rigid scrutiny to determine whether they benefit women as a whole or whether they result in discrimination against some women as well. This development seems insufficient. The Court must realize that the concept of "benign" classifications "has no place in the realm of sex discrimination."[147] Every statute which discriminates in favor of women discriminates against men. This effect was evident in the several cases which examined statutes treating widows more favorably than widowers. To justify such a result on the ground it compensates women for past discrimination is to disregard the fact of past discrimination against men. While men may have enjoyed some of the benefits of being considered the stronger sex, they also have had to shoulder the concomitant burdens, such as mandatory military service. The Court has failed to fully appreciate this reality.[148] Once it does, it should re-examine its position and discard the concept of benign classifications as it relates to sex-based discrimination.

2. The Court's Retrenchment: The Substantial Relationship Test

Sex-specific characteristics, such as a woman's ability to bear children, have presented syllogistic difficulties to both the legislatures and the

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state's claimed "benign" purpose and stated: "a state can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage *related to the classification.*" *Id.* at ___, 102 S. Ct. at 3338 (emphasis added). Further, "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing. . . ." *Id.* at ___, 102 S. Ct. at 3339. Thus, the Court limited its examination of past discrimination to the field of nursing.

146. 440 U.S. at 283.

147. Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1380. *But see* Ginsburg, *Gender, supra* note 7, at 28–34.

148. Kanowitz discussed, in a very lengthy article, what he perceived to be the failure of the Court to acknowledge the discrimination against men and the resulting misapplication of the concept of benign discrimination to the sex discrimination realm. Kanowitz, *"Benign" Sex Discrimination, supra* note 87. He also asserted elimination of the benign classification concept in the realm of sex discrimination would be consistent with the intended effect of the ERA. *Id.* at 1380. *See also* Comment, *Congressional Intent and the ERA: A Proposed New Analysis, supra* note 22, at 648–49. Brown and Emerson suggested, however, that there would still be room for "affirmative action" under the ERA. Brown and Emerson, *supra* note 13, at 904–905.

Kanowitz also asserted women would not suffer from the demise of the benign discrimination doctrine because the remedy could "both remove the burdens and preserve the benefits of benignly discriminatory laws." Kanowitz, *"Benign" Sex Discrimination, supra* note 87, at 1412. This would be accomplished by extending the benefits to the excluded class. *Id.* at 1412–29.

Unfortunately, the Court continued to pay lip-service to the benign discrimination doctrine in Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331 (1982). While it is true that the Court followed the limitations on the scope of the doctrine, *see supra* note 145 and accompanying text, this is still insufficient, and the Court should discard the doctrine of benign discrimination.

courts. As discussed, Congress indicated that statutes classifying on the basis of these types of characteristics should be treated as exceptions to the ERA.[149] The Court, however, has failed to apply the substantial relationship test consistently in regard to gender-specific characteristics. Initially, when an enactment dealt with a sex-specific characteristic directly, the Court found there was no classification on the basis of sex.[150] More troublesome, however, has been the willingness of certain members of the Court to permit themselves to be diverted by a sex-specific characteristic in order to reach a finding that men and women were not similarly situated. Then, they assert, the statute can be upheld. For example, in 1979, the Court rendered two decisions which highlighted the importance of both the initial determination of whether a statute in fact classifies on the basis of gender between similarly situated males and females and the substantial relationship test once the court finds gender discrimination.[151] Both *Parham v. Hughes*[152] and *Caban v. Mohammed*[153] examined laws concerning illegitimate children. *Parham* dealt with a Georgia wrongful death statute which precluded a father who had not legitimated a child from suing to recover for that child's wrongful death.[154] *Caban* involved a New York adoption law which required the consent to adoption by the mother, but not the father, of an illegitimate child.[155] In both cases, five of the nine Justices agreed there was a classification based on gender between similarly situated males and females; four felt them to be dissimilarly situated because of the parental role.[156] Justice Powell cast the swing vote in each decision by his application of the middle-tier

149. *See supra* notes 28–33 and accompanying text.

150. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974). *See also supra* note 31.

151. Arguably, a finding that men and women are similarly situated is necessary before application of the substantial relationship test is appropriate. *See infra* note 205 and accompanying text. *See also* Erickson, *supra* note 63, at 596 n.27.

152. 441 U.S. 347 (1979).

153. 441 U.S. 380 (1979).

154. 441 U.S. at 348–49.

155. 441 U.S. at 385.

156. In *Parham*, Justice Stewart, joined by Chief Justice Burger and Justices Rehnquist and Stevens, found the mothers and fathers of illegitimate children not to be similarly situated. They relied primarily on the statute which permitted fathers, but not mothers, to legitimate the child. However, they also looked to the sex-specific characteristic of being a mother/father because "[u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown." 441 U.S. at 355. These Justices made the same basic finding in their dissents in *Caban*, relying upon the differences between fathers and mothers. 441 U.S. at 394–401 (Stewart, J., dissenting) and *Id.* at 407–417 (Stevens, J., dissenting). Likewise, Justices White, Brennan, Marshall and Blackmun felt that both statutes discriminated on the basis of sex. *Parham*, 441 U.S. at 361–68 (White, J., dissenting) and *Caban*, 441 U.S. at 381–94.

One author suggested Justice Stewart established a new test in *Parham* by stating that the statute was entitled to a presumption of validity unless the discrimination is "invidious." Invidiousness was to be determined by whether or not the statute was "premised upon overbroad generalizations and excluded all members of one sex even though they were similarly situated with members of the other sex." 441 U.S. at 356–57. Note, *Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978–1979 Supreme Court Term*, 14 U. Rich. L. Rev. 515, 569–72 (1980).

analysis: although he found discrimination on the basis of sex in both cases, he concluded that the substantial relationship test had been satisfied in *Parham* but not in *Caban*.[157] These opinions reflect the two recurring problems in the Court's analysis of gender-based discrimination when a sex-specific characteristic has been raised as an issue. The first is the Court's ability to manipulate the finding of whether there exists a classification on the basis of sex.[158] The second is the subtle distinctions which may determine the outcome once the substantial relationship test is applied.[159]

Despite these difficulties, the Court has used the *Craig* test effectively to invalidate sexually biased laws when a sex-specific characteristic is not an issue. Increasing support for middle-tier analysis was evident in *Califano v. Westcott*[160] and *Wengler v. Druggists Mutual Insurance Co.*[161]

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157. In *Parham*, Justice Powell concurred, voting to uphold the statute because the father could legitimate his child by filing a petition in state court. He felt the statute was substantially related to the state's objective of "avoiding difficult problems in proving paternity after the death of an illegitimate child." 441 U.S. at 359–60 (Powell, J., concurring).

In *Caban*, however, Justice Powell authored the opinion of the Court which found the statute not substantially related to the state's purpose to promote the adoption of illegitimate children. 441 U.S. at 394. One might suppose the difference viewed by Justice Powell was the provision entitling the father to legitimate his child in *Parham* versus the almost absolute denial of the father's interest in his child in *Caban*.

158. This manipulation has occurred in at least two ways. First, although the statute may discriminate between males and females, the Court may determine they are not in fact similarly situated and, thus, apply a simple rational basis test, as the plurality did in Parham v. Hughes, 441 U.S. 347 (1979). Arguably, the Court also did this in Schlesinger v. Ballard, 419 U.S. 498 (1975). Kanowitz, *"Benign" Sex Discrimination*, *supra* note 87, at 1384 n.32. In both instances, the reason males and females were determined not to be similarly situated was because of another, discriminatory statute: in *Schlesinger*, the statute prohibited women from combat duty; in *Parham*, the statute permitted only the father, and not the mother, to sue for the child. Further, in *Parham* the additional issue of a sex-specific characteristic had been raised, while in *Schlesinger*, the sensitive area of the Court's involvement in military affairs was involved.

The second way the Court may manipulate the classification is to find that the groups legally distinguished are not entirely of one sex, as it did in Geduldig v. Aiello, 417 U.S. 484 (1974). The Court, in a highly criticized footnote, stated the exclusion of pregnancy-related disabilities from disability coverage did not distinguish between men and women, but between pregnant people and non-pregnant people, and, thus, there was no discrimination on the basis of sex. *Id.* at 496 n.20. *See supra* note 31. *Parham* could also be viewed as a classification between unwed mothers plus "legitimated" fathers versus "non-legitimated" fathers. *See* Erickson, *supra* note 63, at 596–98.

159. The substantial relationship test appears to rely heavily upon a balancing of the facts in each case. See, e.g., *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 186–87 (1977), which suggests the Court balances the "invidiousness of the particular classification" against the "advantages of the existing classificatory scheme."

160. 443 U.S. 76 (1979). All nine of the Justices agreed that an Aid to Families with Dependent Children statute violated the equal protection component of the fifth amendment. However, Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, disagreed with the majority on how to correct the unconstitutionality. *Id.* at 93–96 (Powell, J., concurring and dissenting in part). *See infra* note 163.

161. 446 U.S. 142 (1980). Only Justice Rehnquist dissented in this opinion on the ground that Califano v. Goldfarb, 430 U.S. 199 (1977) was wrongly decided. *Id.* at 153 (Rehnquist, J., dissenting). *See supra* note 138.

Westcott struck down a statute under the Aid to Families with Dependent Children program. The Act provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father, but it did not provide such benefits when the mother became unemployed.[162] The Court once again viewed the provision as one discriminating against the female wage earner and found it was "not substantially related to the attainment of any important and valid statutory goals. It is rather, part of the 'baggage of sexual stereotypes,' . . . that presumes the father has the 'primary responsibility to provide a home and its essentials,' . . . while the mother is the 'center of home and family life.' "[163]

In *Wengler,* the Court was also concerned with dependency presumptions. A Missouri workmen's compensation statute discriminated between widows and widowers, requiring the latter to prove either mental or physical incapacitation or actual dependence.[164] The Court acknowledged the discriminatory effect on both female wage earners, as in *Westcott,* and on widowers forced to justify their right to recovery.[165] Thus, rather than taking an either/or, benign/invidious approach, the Court recognized the double-edged discrimination fostered by many gender-based classifications. This realization lessened the possibility of finding any discrimination benign. The statute in *Westcott* failed to satisfy the *Craig* test, however. Even though the Court conceded that providing for needy spouses constituted an important governmental objective, it did not agree with the discriminatory means employed. The assertion of administrative convenience, based upon the presumption that women are more often dependent upon their husbands than vice-versa, failed to satisfy the burden carried by "those defending the discrimination."[166]

Westcott and *Wengler* seemed to represent a stronger and more consistent use of the substantial relationship test. A majority of the Court demonstrated an understanding that laws which discriminate on the basis of sex can cut two ways, and can hinder both sexes, including the one the laws may have been designed to protect. Evident also was the reluctance of the Court to find a substantial relationship between the law and its purpose when only financial matters were involved. When raised, the issue of sex-specific characteristics has continued to plague the Court,

162. 443 U.S. at 78.

163. *Id.* at 89 (citations omitted). As noted, *see supra* note 160, Justice Powell did not agree with the majority's decision to extend benefits to all families in which a mother had become unemployed. He felt the Court "simply should have enjoined any further payment of benefits under the provision found to be unconstitutional." *Id.* at 94 (Powell, J., concurring and dissenting in part).

164. 446 U.S. at 144–45.

165. *Id.* at 147–49.

166. *Id.* at 151. Justice Stevens filed a concurrence because, in his view, the statute only discriminated against men. *Id.* at 154–55 (Stevens, J., concurring).

with the Court appearing to be more amenable to finding the law constitutional.

Michael M. v. Superior Court of Sonoma County[167] demonstrated the Court's readiness to continue to rely upon sex-specific characteristics to defend certain statutory schemes. Authored by Justice Rehnquist, *Michael M.* tested California's statutory rape law which held males criminally responsible for the act of sexual intercourse with underage females.[168] Females, however, were not liable under the same circumstances for engaging in sexual intercourse with underage males. Although the opinion made the distinction between males and females because only the latter could become pregnant, it failed to successfully show why that should have made a difference. While *Michael M.* is only a plurality opinion, it presents some disturbing aspects which merit discussion.

First of these is the manner in which Justice Rehnquist stated the *Craig* test. After noting that the Court has never found sex to be suspect, he first reiterated Justice Powell's observation in *Craig:* "[o]ur cases have held, however, that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged."[169] He then characterized the "fair and substantial relationship" standard in *Reed* and *Craig*'s " 'substantial relationship' to 'important government objectives' " test as restatements of Justice Powell's concurrence in *Craig*.[170] Thus, Justice Rehnquist made the plurality's ruling in *Craig* subsidiary to a concurrence in the same opinion.

The way in which the *Michael M.* Court dealt with the allocation of burdens was also troublesome. The plurality accorded "great deference"

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167. 450 U.S. 464 (1981). Kirchberg v. Feenstra, 450 U.S. 455 (1981), decided the same day as *Michael M.*, held invalid a Louisiana statute which granted to the husband exclusive control over any disposition of community property. *Id.* at 456–57. During the pendancy of the appeal to the Fifth Circuit, however, Louisiana completely revised its community property code and abandoned the "head and master" concept in order to grant spouses equal control over any disposition of community property. *Id.* at 458. Therefore, Louisiana did not join on appeal. Also, because of the particular fact pattern and the Fifth Circuit's holding, this decision arguably only affected conveyances made between December 12, 1979, and January 1, 1980. *Id.* at 463 (Stewart, J., concurring). For these reasons, it is felt tht *Kirchberg* added little, if anything, to the law of sex discrimination.

168. 450 U.S. at 466. This was a somewhat unique position for Justice Rehnquist because he had not previously authored an opinion in the line of sex discrimination cases discussed in this article. Indeed, he had generally been a champion of the rational basis test, voting to strike down a gender-biased statute only in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Califano v. Westcott, 443 U.S. 76 (1979) and Kirchberg v. Feenstra, 450 U.S. 455 (1981). In *Wiesenfeld*, he filed a concurrence in his belief the statute did "not rationally serve any valid legislative purpose, including that for which [it] was obviously designed." 420 U.S. at 655 (Rehnquist, J., concurring). As recently as Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 153–54 (1980) (Rehnquist, J., dissenting), he had dissented on the ground that Califano v. Goldfarb, 430 U.S. 199 (1977) was incorrectly decided. *See supra* note 138. Thus, in critiquing *Michael M.*, one must remain cognizant of Justice Rehnquist's past track record.

169. 450 U.S. at 468.

170. *Id.* at 468–69.

to the purported goal of the statute to prevent unwanted pregnancies. The opinion stated "although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it 'could not have been a goal of the legislation,' . . . this is not such a case."[171] This signaled a serious departure from the language in earlier cases which indicated "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification."[172]

The peculiar fact pattern in *Michael M.* probably contributed to the Court's lack of unanimity on how to apply the middle-tier analysis to the statute at issue. Ordinarily, statutory rape is thought of as a crime committed by an older man against a young woman. In this particular instance, however, the defendant was only seventeen and one-half years old.[173] Thus, had the statute been gender-neutral, the girl with whom he had had sexual intercourse would have also been subject to prosecution as a perpetrator. Because a female can have sexual intercourse with an underage male in the same manner as a male may with an underage female, without force, then statutory rape can be committed by either a male or a female. Thus, such a gender-based statute does discriminate on the basis of sex between similarly situated males and females.[174]

The Court tacitly admitted that the girl could have been a perpetrator, but then focused upon her ability to become pregnant. The girl in *Michael M.* was a member of the class to which the enactment was directed in that its purported purpose was to prevent teenage pregnancies. The Court accepted the strong interest of the state in preventing such pregnancies and stated: "[w]e need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse."[175]

Michael M.'s argument that a gender-neutral statute would accomplish the government's goal equally well was rejected. Instead, the Court found persuasive the state's rebuttal argument of decreased effectiveness in enforcement, on the basis that a female would be "less likely to report violations of the statute if she herself would be subject to criminal prosecution."[176] Further, it stated: "[i]n an area already fraught with prose-

171. *Id.* at 470 (citation omitted).

172. This was the statement of the test made by the Court in Kirchberg v. Feenstra, 450 U.S. at 461. *See supra* note 167. The language comes from both Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) and Wengler v. Druggists Mutual Ins. Co., 446 U.S. at 151. The Court repeated this same language in Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331(1982).

173. 450 U.S. at 466.

174. *See, e.g.*, Rundlett v. Oliver, 607 F.2d 495, 497–98 (1st Cir. 1979). *See also* Brown and Emerson, *supra* note 13, at 957–61.

175. 450 U.S. at 471.

176. *Id.* at 473–74.

cutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement."[177] Thus, the Court found the statute to be constitutional because it "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male."[178]

Justices Stewart and Blackmun filed concurring opinions, both of which relied heavily on the pregnancy distinction and problem.[179] In dissent, Justice Brennan, joined by Justices White and Marshall, argued, even assuming the importance of the prevention of teen-age pregnancy, the state had failed to demonstrate the statute was substantially related to the achievement of its purpose.[180] Further, the dissenters noted that the state forwarded no evidence to support its claim of difficulty in enforcement, and:

> Common sense . . . suggests that a gender-neutral statutory rape law is potentially a *greater* deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violaters.[181]

Michael M. indicates that there still remain issues concerning sex discrimination which have the power to splinter the Court. These problems have been, and will continue to be, extant in the area of sex-specific characteristics. One unfortunate byproduct of *Michael M.* was Justice

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177. *Id.* at 474. Comparing his opinion with the dissent of Justice Brennan, *see infra* note 181 and accompanying text, Justice Rehnquist stated:

> Where such differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the California Supreme Court, "armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate."

Id. at n.10. Again, it is submitted this language suggests a departure from the earlier middle-tier analysis which examined the legislative history much more closely.

178. *Id.* at 476.

179. Justice Stewart also felt that "[y]oung women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate state purpose of reducing those problems and risks." *Id.* at 479 (Stewart, J., concurring). Justice Blackmun connected this with the abortion issue, seeing the statute as "a sufficiently reasoned and constitutional effort to control the problem at its inception." *Id.* at 482 (Blackmun, J., concurring).

180. Justice Brennan argued that the plurality failed to apply correctly the substantial relationship test because "a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under *Craig v. Boren*. Rather, the State must produce evidence that will persuade the Court that its assertion is true." *Id.* at 492 (Brennan, J., dissenting).

181. *Id.* at 493–94. The dissenters also noted the relatively recent vintage of the pregnancy prevention rationale and submitted:

> [T]he historical development of [the statute] demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual inter-

Rehnquist's language, which might subsequently be used to weaken the middle-tier analysis. Particularly disquieting in *Michael M.* were the twisted characterization of the *Craig* test and the Court's almost unquestioning subservience to the state's justification for the classification. As to the latter, the Court permitted itself to be distracted by a sex specific characteristic, *i.e.*, pregnancy, when that should not have been an issue in regard to the perpetrator of the crime. Once again, a gender-specific characteristic was used to find males and females not similarly situated. The great emphasis placed on the desire to protect females because of their ability to become pregnant harkened back hauntingly to earlier "protective" legislation. This rationale may prove detrimental to both males and females in the future, as it has in the past.

Before *Michael M.*, the topic of sex discrimination had come to the Court primarily in the guise of family law, social security and other benefit provisions, employment, and age of majority. Although associated at times with emotional issues, change was already occurring in these areas. Just as Title VII[182] mooted some of the issues confronting passage of the ERA,[183] it also provided a much more effective tool against sex discrimination in the employment sector than *Craig v. Boren*[184] and its progeny.[185] *Michael M.* seemed to strike a reluctant chord in the Court: a tacit acknowledgment that there existed a point beyond which the Court would not invalidate laws classifying on the basis of sex. This "tacit" acknowledgment became an overt one when the Court was confronted with the "draft" issue.

B. Draft Registration and the Court: The Final Confrontation

An extremely important issue in the ERA campaign,[186] which was heightened by the reinstatement of registration in 1980,[187] was whether women should be subject to compulsory military service. The reason why

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> course. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection.

Id. at 494–95 (Brennan, J., dissenting) (footnotes omitted).

Justice Stevens, also in dissent, delivered a well-aimed slap at earlier opinions of the court dealing with pregnancy, when he stated: "[t]he fact that the Court did not immediately acknowledge that the capacity to become pregnant is what primarily differentiates the female from the male does not impeach the validity of the plurality's newly found wisdom." *Id.* at 498 (Stevens, J., dissenting) (footnote omitted). He maintained the state had failed to justify its disparate treatment of "two equally guilty wrongdoers." *Id.* at 502.

182. 42 U.S.C. §§ 2000e–2000e-17 (1976).

183. *See supra* notes 41–42 and accompanying text.

184. 429 U.S. 190 (1976).

185. Ginsburg, *Gender, supra* note 7, at 10; Note, *Covert Sex Discrimination: Evidentiary Burdens Under Title VII and Section 1983 Compared*, 53 So. Cal. L. Rev. 1747 (1980). *But see* Note, *Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978–1979 Supreme Court Term, supra* note 156, at 534–42; Note, *Section 1985(3): A Viable Alternative to Title VII for Sex-Based Employment Discrimination*, 1978 Wash. U.L.Q. 367.

186. *See supra* notes 44–53 and accompanying text.

187. *See supra* notes 49–50 and accompanying text.

was clear: with the ERA, women would almost certainly be required to serve with men;[188] without it, the answer would depend upon Congress and the Supreme Court. Obviously, those against mandatory military service for women preferred the uncertainty and, perhaps, the malleability presented by the latter. When Congress passed the registration provision in 1980, it denied President Carter's request to include women.[189] Thus, the Court, as final arbiter, had to decide whether a male-only registration violated equal protection. *Rostker v. Goldberg*[190] held that it did not.

The Court's opinion in *Rostker,* also authored by Justice Rehnquist, opened with acknowledgments of the deference accorded by the Court to the judgment of Congress as "a coequal branch of government."[191] Further, "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality."[192] Because the case arose in the area of Congress' authority over national defense and military affairs, the Court indicated "perhaps in no other area has the court accorded Congress greater deference."[193] This deference was an important factor in upholding the provision.

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188. *See supra* note 46 and accompanying text.

189. *See supra* note 49 and accompanying text.

190. 453 U.S. 57 (1981). Justice Brennan foreshadowed the result in *Rostker* to some degree when he granted a stay of the three-judge district court's order finding the male-only registration unconstitutional:

> In the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate. . . . And my Brethren's application of the standard upon which we have finally settled in a context as sensitive as that before me cannot be predicted with anything approaching certainty. Nonetheless, it does seem to me that the prospects of reversal can be characterized as "fair."

Rostker v. Goldberg, 448 U.S. 1306, 1309 (1980) (citations omitted). This was a rather ironic position for Justice Brennan, given his consistent opposition to gender-based laws. Roberts, *supra* note 49, at 44. In fact, he joined the dissents in *Rostker,* 453 U.S. at 83 (White, J., dissenting), and 453 U.S. at 86 (Marshall, J., dissenting). *See infra* notes 200–12 and accompanying text. For the three-judge court's opinion, *see* Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980).

Actually, *Rostker* began as a district court case in 1971. Several issues were raised, including the challenge on the basis of sex discrimination. The district court denied a motion to convene a three-judge district court and dismissed the suit. Rowland v. Tarr, 341 F. Supp.339 (E.D. Pa. 1972). The Third Circuit affirmed the dismissal of all but the sex discrimination claim and remanded the case to the district court to determine whether the claim was sufficiently substantial to warrant the convening of a three-judge court and whether plaintiffs had standing to assert that claim. Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973) (*per curiam*). The district court denied a motion to dismiss as moot when the draft expired. Rowland v. Tarr, 378 F. Supp. 766 (E.D. Pa. 1974). Essentially, then, the case lay dormant until the present. *Rostker,* 453 U.S. at 61–62. *See also* Roberts, *supra* note 49, at 37–38.

Roberts also notes that the question of whether women could be constitutionally excluded from the Selective Service System was not a novel issue when *Rostker* was decided, as it had been reached by several courts during the Vietnam era. *Id.* at 52–56.

191. 453 U.S. at 64.

192. *Id.* The Court did give lip-service to its duties by stating: "[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs." *Id.* at 67.

193. *Id.* at 64–65.

Next, the *Rostker* Court addressed the issue of what was the appropriate test to be applied to male-only registration.

> The Solicitor General argues, largely on the basis of the foregoing cases emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA [Military Selective Service Act] only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose . . . and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination . . . . We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests . . . . Simply labelling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.[194]

Without restricting itself to any particular standard, the Court made a brief reference to the " 'important governmental interest' " in raising and supporting armies,[195] and then proceeded to examine the legislative history.

The Court perceived the primary purpose of the registration as being to prepare for a draft of combat troops.[196] It touched upon the ineligibility of women for combat and, without questioning that premise, commenced its constitutional analysis "with these combat restrictions firmly in mind."[197] Based upon that reasoning, the Court concluded "[m]en and women . . .

194. *Id.* at 69–70 (citations omitted). Interestingly, Justice Rehnquist also referred to Schlesinger v. Ballard, 419 U.S. 498 (1975), a pre-*Craig* ruling, as best evidencing "[t]he reconciliation between the deference due Congress and our own constitutional responsibility." *Id.* at 70.

195. *Id.*

196. This was based upon the congressional history. *See, e.g.*, 126 Cong. Rec. S6527-49 (daily ed. June 10, 1980) (Senate debate), wherein the Senate defeated an amendment which in effect would have authorized the registration of women. *See also* S. Rep. No. 96-826, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 2612 [hereinafter cited as Senate Report]. Initially, the Senate Report touched upon the "proper role of women in combat." It found that "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the committee, and forms the linchpin for any analysis of this problem." Further, "[t]he policy precluding the use of women in combat is, in the committee's view, the most important reason for not including women in a registration system." Senate Report at 157, 1980 U.S. Code Cong. & Ad. News at 2647. Because it viewed the primary purpose of a draft as being for combat troops, the committee felt there was no need to register women. Senate Report at 158–61, 1980 U.S. Code Cong. & Ad. News at 2648–51. For additional discussion of the congressional history, *see* Goldberg v. Rostker, 509 F. Supp. at 597–605; Roberts, *supra* note 49, at 57–81. *See also Restitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S.109 and S.226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. (1979).

197. 453 U.S. at 77. The combat exemptions are as follows. 10 U.S.C.A. § 6015 (West Supp. 1982) prevents women in the Navy from being assigned to vessels and aircraft that are engaged in combat missions. 10 U.S.C. § 8549 (1976) prohibits women in the Air Force from being assigned to duty in aircraft engaged in combat missions. The Army, by a matter of established policy, does

are simply not similarly situated for purposes of a draft or registration for a draft and, thus [t]he exemption of women from registration is not only sufficiently but closely related to Congress' purpose in authorizing registration."[198] The rationale was that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."[199]

Justice White, in dissent, indicated his disagreement with the conclusion that Congress operated within its constitutional limitations in determining not to mandate registration of women. He pointed to testimony to the effect that some 80,000 women could be used in the event of a draft of 650,000.[200] Even assuming the exclusion of women from combat

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not assign women to certain combat positions. *Presidential Recommendations, supra* note 46, at 20–21. The President expressed his intent to continue these restrictions. *Id.* at 22.

This article does not suggest that women definitely *should* engage in combat: there are too many unknowns from the lack of experience in this area to reach such a conclusion at this time. However, it is disheartening, to say the least, to find how few even seriously questioned the premise that women should not engage in combat.

198. 453 U.S. at 78–79. While the use of the "similarly situated" analysis here does not directly involve a sex-specific characteristic, it is submitted that the underlying rationale of restricting women from combat is indisputably related to the traditional roles of men and women in our society. *See supra* text accompanying notes 149–85.

199. 453 U.S. at 79. The Senate Report also spoke in terms of "equity." Senate Report, *supra* note 196, at 158–59, 1980 U.S. Code Cong. & Ad. News at 2648–49. Unfortunately, the Presidential recommendation also used this language: "Equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively." *Presidential Recommendations, supra* note 46, at 23.

200. 453 U.S. at 84 (White, J., dissenting). The majority had chided the district court's finding on this issue, indicating it "was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence." *Id.* at 83. The scenario in which 80,000 women could be used was subject to different interpretations. The majority pointed to the testimony that the 80,000 could be satisfied from volunteers. *Id.* at 81. *See also* Senate Report, *supra* note 196, at 158, 1980 U.S. Code Cong. & Ad. News at 2648. Justice White, however, felt that "the record . . . supports the District Court's finding that the services would have to conscript at least 80,000 persons to fill positions for which combat-ready men would not be required. . . . This number [i.e., 80,000 women draftees] took into account the estimated number of women volunteers." 453 U.S. at 84 (White, J., dissenting). Justice Marhsall, also in dissent, agreed with this proposition. *Id.* at 100–101 (Marshall, J., dissenting). Further, Justice Marshall argued: "[S]ince the purpose of registration is to protect against unanticipated shortages of volunteers, it is difficult to see how excluding women from registration can be justified by conjectures about the expected number of female volunteers . . . . In any event, the Defense Department's best estimate is that in the event of a mobilization requiring reinstitution of the draft, there will not be enough women volunteers to fill the positions for which women would be eligible." *Id.* at 105–106 (footnote omitted). *But see* Roberts, *supra* note 49, at 65–66. According to the majority, "Congress carefully evaluated the testimony that 80,000 women conscripts could be usefully employed in the event of a draft and rejected it in the permissible exercise of its constitutional responsibility." 453 U.S. at 82. What Congress rejected, in fact, was the testimony of the military experts, as Justice White noted: "[t]he Court appears to say . . . that Congress concluded [there was no need for women] and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary." *Id.* at 83 (White, J., dissenting) (citation omitted).

positions to be constitutional, Justice White's opinion differed from that of the majority:

> [O]n the record before us, the number of women who could be used in the military without sacrificing combat-readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender based discrimination involved in registering and conscripting men but no women at all.[201]

Justice Marshall, joined by Justice Brennan, also dissented.[202] He concurred with the majority's acknowledgment of the importance of the governmental interest in raising and supporting armies and observed that this could also be served by the drafting of women. He noted the effective use of women in the military and concluded the exclusion of women from registration could not have been grounded on a rationale of preventing women from serving in the armed forces.[203] Instead, Justice Marshall focused on the exclusion of women from combat in particular rather than in military service in general as the primary reason for not including women in a registration system. He did not question the correctness of the combat exemption. Nonetheless, because this restriction had already been accomplished through legislation, Justice Marshall found that "even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal."[204]

Further, he expressed confusion at the majority's supposed use of the substantial relationship test. Justice Marshall found that the majority's "similarly situated" analysis lacked consistency because "the logical conclusion from this reasoning is that there is in fact no discrimination against women, in which case one must wonder why the Court feels compelled to pledge its purported fealty to the *Craig v. Boren* test."[205] In addition, he asserted, the majority failed to require a demonstration by the Government that a gender-neutral registration would be a less effective means of preparing for a draft, centering instead upon whether a gender-neutral classification would substantially advance the Government's interest. In

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201. 453 U.S. at 85.

202. *Id.* at 86–113 (Marshall, J., dissenting).

203. *Id.* at 90. The effective use of women in the military was also conceded by the Senate Report. Senate Report, *supra* note 196, at 157–58, 1980 U.S. Code Cong. & Ad. News at 2647–48. See also H. Rogan, Mixed Company: Women in the Modern Army (1981), which discusses some of the successes and failures of women in the military.

204. 453 U.S. at 93 (Marshall, J., dissenting).

205. *Id.* at 94 n.10. *See also supra* note 151 and accompanying text.

Justice Marshall's view, *Wengler*[206] and *Orr*[207] demanded that where the government's "purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [Government] cannot be permitted to classify on the basis of sex."[208] He then concluded that the Government could not prove the registration of women would obstruct it from preparing for a draft of combat troops. In addition, Justice Marshall severely criticized the majority for its refusal to separate registration from the draft question. He foresaw situations in which a draft might be needed, but for which combat troops would not be the primary goal.[209]

Finally, Justice Marshall questioned the Court's method of framing the question in terms of need for women. Because there was evidence to the effect the military would be able to satisfy its requirements from the available men, Justice Rehnquist characterized the argument for registering women as one of "equity" only.[210] Justice Marshall perceived the issue differently: "Thus, what the majority so blithely dismisses as 'equity' is nothing less than the Fifth Amendment's guarantee of equal protection of the laws which 'requires that Congress treat similarly situated persons similarly.' "[211] He found the male-only registration not to be substantially related to the stated governmental purpose of raising and

206. 446 U.S. 142 (1980). *See supra* text accompanying notes 164–66.

207. 440 U.S. 268 (1979). *See supra* text accompanying notes 140–45.

208. 453 U.S. at 95 (Marshall, J., dissenting) (quoting Orr v. Orr, 440 U.S. at 283).

209. 453 U.S. at 97 (Marshall, J., dissenting). However, Roberts asserts that Congress viewed "registration and the draft as inseparable parts of a single process, designed to supply needed manpower in time of emergency." Roberts, *supra* note 49, at 62–63. Even given this,

> We have to look to the future, to the type of catastrophic national emergency under which Congress would authorize the President to induct young people to meet our manpower requirements in mobilization. How can we be certain that we can afford to ignore the capabilities of half our population in such an emergency? How can we be cetrain [sic] that the next war will be like the last one, or the one before that?

Senate Report, *supra* note 196, at 242, 1980 U.S. Code Cong. & Ad. News at 2665–66 (additional views of Sen. Cohen.).

210. 453 U.S. at 80. *See supra* note 199.

211. 453 U.S. at 103 (Marshall, J., dissenting). Indeed, "[a]ll four Service Chiefs agreed that there are no military reasons for refusing to register women, and uniformly advocated requiring registration of women. The military's position on the issue was summarized by then Army Chief of Staff General Rogers: '[W]omen should be required to register . . . in order for us to have an inventory of what the available strength is within the military qualified pool in this country.' " *Id.* at 99.

Also, the majority failed to acknowledge the serious discrimination still existing against women who wish to pursue the military as a career:

> Despite the removal of some impediments, women's enlistment is still limited by recruitment goals that operate as quotas. Indeed, a Department of Defense study found there are more highly qualified women willing to enlist than are accepted now. Because the military is the largest single vocational training institution in the Nation—offering on the job training at full pay and lifelong

supporting a military and, therefore, opined "[i]n an attempt to avoid its constitutional obligation, the Court today 'pushes back the limits of the Constitution' to accommodate an Act of Congress."[212]

Rostker revealed a return to two of the disturbing aspects of the *Michael M.* opinion,[213] also authored by Rehnquist. First was the great deference accorded to Congress. While a certain amount of deference might be justifiable because of the military setting, the excessive degree in *Rostker* is disturbing. It might be inferred that so long as Congress considers a gender-based discrimination in any detail, the correctness of its decision-making process will not be scrutinized with any vigor. This almost overweening grant of deference does not comport with earlier statements by the Court that the burden is on the party *defending* the classification.[214]

Second, the statement of the *Craig* test in both *Michael M.* and *Rostker* seems to indicate a disdain for middle tier analysis. In *Michael M.*, Justice Rehnquist misstated the test,[215] and in *Rostker*, he almost evaded it altogether.[216] Further, in each case, he injected a "similarly situated" inquiry into the substantial relationship test which, as Justice Marshall indicated, should be performed separately. In the past a majority of the Court required a determination that males and females were similarly situated *before* it would activate middle tier analysis.[217] In *Rostker*, the flaw in Rehnquist's use of the "similarly situated" analysis was evident in the manner in which the Court bootstrapped the registration statute to another gender-biased provision, the exemption of females from combat.[218] Because of the latter, the Court could find men and women were not similarly situated.

> postservice benefits as well—it has always been and continues to be an important route of upward mobility. In addition, military pay for men and women is considerably higher than the average annual earnings of female high school graduates who work full-time year-round. The women who are excluded are denied the practical and tangible benefits military service provides. The exclusion also denies the full citizenship and political rights historically intertwined with military service.

The Equal Rights Amendment, *supra* note 56, at 20 (footnotes omitted). Roberts asserts, however, that "[e]xcluding women from registration does not 'burden' them in the old-fashioned sense reflected in *Craig* or *Reed*. Women are not deprived of a societal benefit by the law." Roberts, *supra* note 49, at 56 (footnote omitted). In November, 1981, the Administration "put a 'pause' on increasing the number of women in the Army." *Dick and Jane in Basic Training*, 118 Time, Nov. 16, 1981, at 140.

212. 453 U.S. 113 (Marshall, J., dissenting).

213. *See supra* notes 167–81 and accompanying text. Indeed, Justice Rehnquist cites *Michael M.*, a plurality opinion, in *Rostker* at least four times.

214. *See supra* text accompanying notes 166, 171–72.

215. *See supra* text accompanying notes 169–70.

216. *See supra* note 194 and accompanying text.

217. *See supra* notes 151, 156 and accompanying text.

218. *See supra* notes 197–98 and accompanying text.

Despite the effect *Michael M.* and *Rostker* may have on the future application of the substantial relationship test, the most important aspect of *Rostker* lies in the message it contains to those who struggle towards sexual equality. *Rostker,* a relatively strong 6–3 opinion, clearly indicates that the Court is not yet ready to accept the idea of women being subject to the draft and to combat. Even though not raised on appeal in *Rostker,* the combat restriction certainly deserves more attention than the unquestioning assumption that it represents the accepted norm of today's society. One cannot dispute the gravity of the issue. Indeed, time may reveal important and, perhaps, compelling reasons for exempting women from combat.[219] Nevertheless, by finding males and females not to be similarly situated because of this prohibition, the Court has set the stage for continued discrimination against women in the military. Once more, as it did for the ERA, compulsory military service for women presented the final, and unassailable, barrier to complete sexual equality.

C. Reed to Rostker: From Here to There and Back Again?

Just as *Reed v. Reed*[220] began the trend towards recognition of sexual equality by the Court, *Michael M.* and *Rostker* may have ended it, at least temporarily. Although the ERA has failed, the efforts expended on its behalf have produced many favorable results in the struggle toward sexual equality.[221] The question now remains whether the same observation can be made concerning the court battles waged over the past eleven years.

Before *Reed,* sex discrimination remained largely ignored by the Court due to its, and society's, paternalistic view of women.[222] With *Reed,* however, the Court began to demonstrate an increasing awareness that the "traditional" roles of men and women are changing in today's society. Undoubtedly, the Court's rulings fostered many of the accomplishments which are now apparent, especially in the fields of social legislation[223] and domestic relations.[224] Nonetheless, the Court has refused to take the final steps which would ensure complete equality of the sexes. *Michael M.* and *Rostker* clearly indicate there are vestiges of sex discrimination which the Court is willing to overlook and even endorse.

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219. *Id.*

220. 404 U.S. 71 (1971). *See supra* text accompanying notes 92–98.

221. *See supra* notes 70–76 and accompanying text.

222. *See supra* notes 85–90 and accompanying text.

223. *See, e.g.,* Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), and *supra* notes 160–66 and accompanying text.

224. *See, e.g.,* Orr v. Orr, 440 U.S. 268 (1979), and *supra* notes 37–40, 140–45 and accompanying text.

Middle-tier analysis, first announced by the Court in *Craig*,[225] has been more effective in eradicating gender-based discrimination than was the rational relationship test.[226] Unfortunately, it has also been subject to manipulation by the Court, serving to uphold discriminatory schemes most recently in *Michael M.*[227] *and Rostker*.[228] In *Frontiero v. Richardson*,[229] the Court refused to elevate gender to a suspect classification, partially because of the ERA ratification process then occurring.[230] Now that June 30, 1982,[231] has passed, the Court can no longer justify its reliance on this rhetoric. While it is hoped the Court will reconsider its position, the trend of the Court's rulings appears to render this hope an empty one. Equality, for both men and women, must wait for another day.

225. 429 U.S. 190 (1976). *See supra* text accompanying notes 108–13.

226. *See supra* note 96.

227. *See supra* notes 167–81 and accompanying text.

228. *See supra* notes 190–212 and accompanying text.

229. 441 U.S. 677 (1973). *See supra* notes 99–103 and accompanying text.

230. *See supra* note 21.

231. *See supra* note 61 and accompanying text. On July 1, 1982, the day after the ERA's defeat had become a reality, the Supreme Court decided Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331 (1982). In that case, the Court held that an all-female, state-supported professional nursing school violated the equal protection clause of the fourteenth amendment. However, because the Court found the school impermissible under the *Craig* test, it did not deem it necessary to determine whether classifications based upon gender are inherently suspect. *Id.* at ___ n.9, 102 S. Ct. 3336 n.9. As noted, the opinion is disturbing because it discussed the benign discrimination doctrine as a still-viable doctrine. *See supra* note 148. In addition, *Hogan* was a relatively weak 5–4 decision.