

April 2017

The ERA in Debate - What Can It Mean for Church Law?

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Recommended Citation

Rev. Msgr. Anthony J. Bevilacqua (1979) "The ERA in Debate - What Can It Mean for Church Law?," *The Catholic Lawyer*. Vol. 24 : No. 2 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol24/iss2/2>

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THE ERA IN DEBATE — WHAT CAN IT MEAN FOR CHURCH LAW?

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I. INTRODUCTION

On March 22, 1972, the Congress of the United States of America proposed to the states for ratification the twenty-seventh amendment to the United States Constitution:

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.

During the period of discussion of this proposed amendment in Congress, an editorial in the *Wall Street Journal* suggested: "Well, we're all for the ladies, but even so, before we write some new words into the Consti-

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tution it'd be nice to know what they really do mean."¹

Faced with a similar quandary, the Canon Law Society of America, at its October 1977 National Convention, approved a resolution authorizing the Board of Governors to "appoint a special Task Force to investigate whether or not the Equal Rights Amendment is an effective instrument for the achievement and protection of the rights of women and thus deserving of the endorsement of the Canon Law Society of America"

More specifically, the Task Force was asked by the Board of Governors to study the following areas:

1. Is the Equal Rights Amendment (ERA) an effective instrument for the achievement and protection of the rights of women?
2. Is it deserving of the endorsement of the Canon Law Society of America?
3. What would the impact of the passage of the ERA be on the Roman Catholic Church, particularly given the sex qualifications required for certain positions (i.e., to be clergy, to hold certain offices, etc.)?

While entrusting this charge to the Task Force, the Board of Governors emphasized that "the Task Force is not requested to come in with a recommendation for or against the ERA, but to do a technical analysis of the ERA in the light of the above questions." There are many additional issues that the Task Force could have considered in its study. Because the subject areas frequently associated with the ERA are so numerous, however, the Task Force is necessarily selective. The presentation, its length notwithstanding, is still intended to be an illustrative summary, not an exhaustive survey, of a topic with far-reaching consequences for persons of both sexes.

II. HISTORICAL BACKGROUND

Congressional Approval Background

On August 20, 1920, the nineteenth amendment to the United States Constitution was ratified and American women finally achieved the right to vote. Spurred on by this victory, several women's groups, especially the National Woman's Party, initiated a campaign for complete legal equality between men and women and, in 1923, succeeded in having a bill introduced in Congress which was substantially similar to today's proposed ERA. The National Woman's Party contended that suffrage did not make women full citizens. It argued that full citizenship would not be achieved until inequality was eliminated in all areas, including jury service, property rights, marriage and divorce.

While there was widespread cooperation among women's organizations in the suffrage movement, the ERA fomented profound disagreement. It received the endorsement of some women's groups. Other politically active organizations attacked it as vicious, doctrinaire, hysterical

¹ Wall St. Journal, Aug. 13, 1970, at 6, col. 1.

feminism, and a direct threat to protective legislation for women.²

By the mid-1920's and through the 1930's, opposing camps were at war with each other over the ERA. The proponents of the amendment adhered to the position that women were exactly the same as men in all their principal attributes while their opponents argued that women were a weaker sex whose rights needed to be safeguarded by special legislation. The controversy between the two feminine camps was probably one of the major factors which diverted congressional attention away from the amendment itself and also prevented formulation of a comprehensive legal theory of its meaning.³

Since 1923, the ERA has been introduced into every Congress. In the House of Representatives, it never got past the Judiciary Committee until 1970 when it reached the floor. In the Senate, the Judiciary Committee carried out extensive hearings during the 1940's and 1950's and on several occasions, debated the proposal before the full Senate. In fact, in 1950 and 1953, the resolution on the amendment received the necessary two-thirds vote but with the so-called "Hayden rider" attached, which provided that the amendment "shall not be construed to impair any rights, benefits or exemptions conferred by law upon persons of the female sex."

Between 1953 and 1970, the amendment, introduced biennially, languished in Congress but the women's movement suddenly took on new life in the political arena. This was also the period of judicial concern for civil rights in the Warren Court and many felt that a more expansive interpretation of the equal protection clause of the fourteenth amendment by the Supreme Court would bring equality in the rights of women.

By 1970, many proponents of equality for women concluded that the Supreme Court decisions were not going to achieve equal rights for women in the immediate future. Instead, they revived the campaign for the ERA. Hearings were held by Congress, scholarly articles were published, and lobbying was carried out by active women's groups. On August 10, 1970, the House of Representatives for the first time since 1923 voted on the ERA and passed it by a majority of 350 to 15. The Senate did not act upon it, however, and it died in that 91st Congress. It was reintroduced in the 92nd Congress and finally received the necessary approval by both the House and Senate. The House adopted the resolution for passage of the Amendment on October 12, 1971 by a vote of 354-24. The Senate approved the resolution on March 22, 1972 by a vote of 84-8.

Process of Ratification

After both Houses of Congress have approved a proposed amendment by a two-thirds vote, the amendment is forwarded to the Administrator of the United States General Services Administration. The Administrator

² See B. BABCOCK, A FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 129 (1975) [hereinafter cited as *CAUSES*].

³ *Id.* at 130.

publishes the text in the United States Statutes at Large and sends a certified copy to the governor of each state who transmits it to the state legislature. If favorably voted upon by both houses of the state legislature, a certificate to that effect is forwarded to the General Services Administrator and filed in the United States Archives. When the Administrator has received certificates of approval from three-fourths of the states, he prepares a certificate of ratification which is published in the Federal Register and in the Statutes at Large. This action constitutes the official proclamation of the ratification. No action is required by the President of the United States nor by the governor of a state in the ratification process. Similarly, neither the President nor a governor has a right of veto in this process.

When Congress voted favorably on the ERA, it required that the ratification by three-fourths of the states be completed in 7 years; that is, by March 22, 1979, and that the amendment would take effect 2 years after ratification. On October 6, 1978, Congress voted for an extension of the ratification deadline to June 30, 1982.

Present Status

Twenty-two states ratified the amendment in the same year as its passage in Congress. Eight ratified it in 1973, three in 1974, one in 1975 and the last one in 1977. At this date, therefore, thirty-five states have ratified the amendment. Approval is required from three more states of the fifteen which have not ratified for the ERA to become law.

It should be noted that three states that originally ratified the amendment have since rescinded their approval. All three — Tennessee, Idaho, Nebraska — had given approval in 1972.

The legal effect of rescission by these states is controverted and will become a heated issue if the amendment is ratified by a 1- or 2- state margin.

III. MEANING AND INTERPRETATION

General Principles

The leading legal scholars supporting the ERA as well as the legal scholars opposing it are in substantial agreement on the basic theory of the amendment, which can be briefly summarized as follows: sex cannot be a factor in determining the legal rights of men or of women. In essence, the amendment mandates absolute legal equality of treatment of both sexes.⁵

⁴ Kentucky, which ratified the Amendment in 1972, also rescinded its approval but the rescission was vetoed by the Acting Governor.

⁵ S. REP. NO. 689, 92d Cong., 2d Sess. 2 (1972) [hereinafter cited as S. REP. NO. 689]; CALIFORNIA COMMISSION OF THE STATUS OF WOMEN, IMPACT ERA 176-77 (1976) [hereinafter cited as IMPACT ERA]. For a thorough analysis and discussion of the import of the ERA, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as *Constitutional*].

One exception to this absolute equality occurs in the rare instance when differentiation is required due to "unique physical characteristics" attributable to members of a particular sex.⁶ According to this exception, physical factors, not emotional, psychological or social factors, found exclusively in one sex may be the basis for legal differentiation. Usual examples are laws dealing with wet nurses, sperm donors, childbearing as distinct from childrearing, and determination of paternity.⁷ A second exception to the absolute prohibition of the ERA, to the extent that it is recognized, is where the constitutional right of privacy construed by the Supreme Court permits the maintenance of separate personal facilities such as public restrooms.⁸ This latter exception is the subject of considerable debate, and is discussed in detail later.⁹

Despite these qualifications, one commentator has stated:

[T]he term "absolute" is still accurate to distinguish the standard of review from those applied under the fourteenth amendment The principles of "separate but equal," "reasonable classification," "suspect classification," "fundamental right," "strict scrutiny," and "compelling governmental interest" would not be applicable under the Equal Rights Amendment.

Further indication that Congress intended the absolute standard is demonstrated by the repeated refusal of both the House and Senate to amend the Equal Rights Amendment with any limiting or crippling amendments.¹⁰

A clear grasp of the basic theory of the ERA is indispensable to a proper understanding of the implications of this amendment and of the controversy which has accompanied it throughout its history. It is the absolute, inflexible rigidity of equality between the sexes demanded by the amendment that has played a large part in fomenting the anxieties and fears about its possible consequences.

An elaboration of this brief summary of the theory underlying the Amendment will help clarify its meaning. The following general principles

Basis]. This article is considered by both proponents and opponents as a masterpiece of scholarship and the best indication as to what will be the Supreme Court's interpretation of the ERA. The clear thesis of this article is that the equality demanded by the proposed Amendment is absolute. "Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment. From this analysis it follows that the constitutional mandate must be absolute." *Constitutional Basis, supra*, at 892.

⁶ S. REP. No. 689, *supra* note 5, at 2; A. BINGAMAN, CALIFORNIA COMMISSION ON STATUS OF WOMEN'S RIGHTS AMENDMENT, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 18 (1975).

⁷ See BINGAMAN, *supra* note 6, at 35-36; B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 30 (1977) [hereinafter cited as WOMEN'S RIGHTS]; Ferrell, *The Equal Rights Amendment to the United States Constitution—Areas of Controversy*, 6 URBAN LAW. 853, 867 (1974).

⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right of privacy exception is discussed in *Constitutional Basis, supra* note 5, at 900-02. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-28 (1978).

⁹ See notes 115-140 and accompanying text *infra*.

¹⁰ Ferrell, *supra* note 7, at 865-66 (footnotes omitted).

are an expansion of the absolute equality theory of the ERA as discussed above:

1. Psychological and social differences between men and women are not acceptable as bases for differentiation since the evidence is not certain that such qualities are unique to one sex or the other. "Unless the difference is one that is characteristic of *all* women and *no* men, or of *all* men and *no* women, it is not the sex factor, but the individual factor which should be determinative."¹¹ If, for example, one sex could be characterized by a special trait, for example, physical strength, intelligence, longer life, the presence of that trait to a greater degree in one sex will not justify classification by sex rather than by the particular trait.¹² When a legal classification of persons is necessary, the law must make it on the basis of traits which are sex-neutral and common to both sexes.¹³

2. Except for the unique characteristics and right of privacy qualifications discussed above, all federal, state and local laws and regulations must treat every person, male or female, as an individual.¹⁴ The law must always deal with the individual attributes of the particular person and not make any broad applications based upon the irrelevant factor of sex.¹⁵

3. The aim of the Amendment is equal status of men and women. This is accomplished only by merging the rights of men and women into a "single system of equality."¹⁶ To achieve equality of both sexes and self-fulfillment of the individual, the egalitarian principle of the Amendment must be applied "comprehensively and without exception."¹⁷ Just as in racial equality, a unified and universal recognition of equal rights between men and women is imperative.¹⁸ The constitutional mandate must be absolute. The ERA will tolerate neither a separate-but-equal status nor any differentiation even if it is reasonable, or is beneficial rather than "invidious," or is justified by "compelling reasons." To repeat, equality of rights under the Amendment means that sex is never a factor.¹⁹

As noted above, opponents of the ERA agree with its proponents on the absolute interpretation of the Amendment. It is this absoluteness that causes their opposition, which is apparent from Professor Philip Kurland's observation that the Amendment "would command the treatment of men and women as if there were no differences between them, even at the price of removing protections and benefits that have otherwise been afforded to

¹¹ See Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R. — C.L. L. REV. 225, 226 (1971) (emphasis in original).

¹² See *Constitutional Basis*, *supra* note 5, at 889.

¹³ See Bellamy, Goodman, Kelly, Ross & Stanley, *The Proposed Equal Rights Amendment: A Brief in Support of its Ratification*, Prepared for the League of Women's Voters of the U.S. 2 (1977).

¹⁴ See Bayh, *The Equal Rights Amendment*, 6 IND. L. REV. 1, 12 (1972).

¹⁵ See Emerson, *supra* note 11, at 225.

¹⁶ See *Constitutional Basis*, *supra* note 5, at 890.

¹⁷ *Id.*

¹⁸ *Id.* at 892.

¹⁹ *Id.* at 892, 902; BINGAMAN, *supra* note 6, at 38-39; WOMEN'S RIGHTS, *supra* note 7, at 14.

females. It was a demand for legal 'unisex' by constitutional mandate."²⁰ Another commentator, Senator Sam Ervin, has noted that:

[i]f the Equal Rights for Women Amendment is approved, I believe that the Supreme Court will reach the conclusion that the ERA annuls every existing federal and state law making any distinction between men and women however reasonable such distinction might be in particular cases, and forever robs the Congress and the legislatures of the fifty states of the constitutional power to enact any such laws at any time in the future.²¹

To the same effect is the position taken by Dean Roscoe Pound, Professor Paul Freund and others which states:

Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. . . . The proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. . . . The basic fallacy in the proposed amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction. . . . That the proposed equal rights Amendment would open up an era of regrettable consequences for the legal status of women in this country is highly probable. That it would open up a period of extreme confusion in constitutional law is a certainty.²²

Public vs. Private Sphere

The ERA requires that equality of rights under the law shall not be denied or abridged "by the United States or by any State." All agree that this limits the direct application of the Amendment to governmental or state action and that it does not apply to private or individual action.²³ In view of several decisions under the fourteenth amendment, particularly in the area of racial discrimination, it can be safely predicted that the ERA will apply also to private entities when they are so intertwined with the state that there is either "significant state involvement" or they are performing a "governmental or public function."²⁴ It is not very likely, however, that the "public function" criterion will be applied to private institutions. Presuming that the ERA will be applied in a manner analogous to the fourteenth amendment's ban on racial discrimination, courts will prob-

²⁰ Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. C.R. — C.L. L. REV. 243, 246-47 (1971).

²¹ S. REP. NO. 689, *supra* note 5, at 33.

²² 118 CONG. REC. 11-12 (1972). These views are shared by several additional legal authorities. *E.g.*, P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 68 (1977); J. WITHERSPOON, *COMMENTS ON THE EQUAL RIGHTS AMENDMENT, MEMORANDUM TO NATIONAL RIGHT TO LIFE COMMITTEE* 1 (1975).

²³ See S. REP. NO. 689, *supra* note 5, at 12; CAUSES, *supra* note 2, at 90-94; IMPACT ERA, *supra* note 5, at 60.

²⁴ S. ROSS, *THE RIGHTS OF WOMEN* 22-23 (1973); *Constitutional Basis*, *supra* note 5, at 905; Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. C.R. — C.L. L. REV. 216, 220 (1971).

ably follow the lead of the fourteenth amendment cases which have held constitutional restrictions inapplicable to churches, private schools, private single-sex clubs, or other nonpublic establishments, under the public function rationale.

The standard that will be followed in most cases will be the "significant state involvement" test. Factors which determine a finding of "significant state involvement" include state regulation of the private institution, tax exemption, public funding and state licensing. If there is enough state involvement, the private institution will be within the ambit of the ERA.²⁵ For example, if a private institution receives a large amount of government funding, the possibility of its subjection to the ERA increases. This would be especially relevant where the issue of applicability involves private colleges, universities and hospitals.²⁶

A question arises concerning Church-related elementary and high schools as well as other private institutions which are tax-exempt. Will this tax-exempt status by itself subject them to the ERA? The Supreme Court, in *Walz v. Tax Commission of the City of New York*,²⁷ indicated that tax-exempt status, without additional connections with the state, would not bring private schools into the sphere of government action. "Thus it appears that, in the absence of special factors, under present court decisions on state action private educational institutions would remain within the private sector, not subject to the constitutional requirements of the Equal Rights Amendment."²⁸

Two recent developments indicate a contrary position and tend to link tax-exemption by itself to "significant state involvement." The first is the 1978 Group Ruling on Federal Taxes and Tax Returns issued on July 11, 1978 and sent to all dioceses by the United States Catholic Conference. The letter advises that special attention be paid to Revenue Procedure 75-50. Revenue Procedure 75-50 sets forth guidelines and recordkeeping requirements relating to racially nondiscriminatory policies which must be complied with by private schools, including church-related schools, in order to establish and maintain tax-exempt status. Under this procedure, private schools are required to file an annual certification of racial nondiscrimination with the IRS. Private school compliance with Revenue Procedure 75-50, the letter continues, is the target of a recent program implemented by the IRS calling for increased monitoring of the racial nondiscrimination policies and practices of private schools. Failure to comply with the directive, it is warned, could jeopardize the exempt status of the school

²⁵ See BINGAMAN, *supra* note 6, at 21-23.

²⁶ See Rice, Testimony on ERA Before Joint Hearing of Indiana Senate Committee on the Judiciary and House Human Affairs Committee 5 (1977); Ferrell, *supra* note 7, at 864.

²⁷ 397 U.S. 664 (1970).

²⁸ See *Constitutional Basis*, *supra* note 5, at 907; cf. Babcock, *Impact of the Equal Rights Amendment*, 3 HUMAN RIGHTS 132, 135 (1973) (the ERA "would be greatly felt in the schools, private and parochial as well as public").

and, in the case of a school operated by a church, the exempt status of the church itself.

A departure from the *Walz* holding is also reflected in a tax exemption case involving racial discrimination based on religious beliefs. In *Goldsboro Christian Schools, Inc. v. United States*,²⁹ a North Carolina district court held that a private school, which systematically denied admission to blacks based on its interpretation of the Bible, is not a § 501(c)(3) exempt organization and must pay federal withholding, FICA and unemployment taxes. Such enforcement of federal public policy against racial discrimination, the court reasoned, does not violate the First Amendment Establishment and Free Exercise Clauses.³⁰

It should also be observed that the national experience indicates that our legislation abhors two different legal policies in significant areas, such as discrimination. While there may be a formal distinction between government action and private action, in application, such as in racial discrimination, Congress has utilized the Commerce Clause and states have resorted to their police powers to bring the private sphere in line with the public standard. As this was the experience in the areas of discrimination based on race, religion, color or national origin, it can be anticipated to occur with the ERA.³¹

Invalidation — Extension — Amendment of Unconstitutional Statutes

When a statute is determined to be unconstitutional under the ERA, several alternatives are available to legislatures to effectuate compliance therewith. The statute could be completely invalidated, or extended to the other sex so that it applies to both sexes, or amended so that the new law treats both sexes equally. For example, each of these options may be adopted where the inquiry concerns a statute allowing a half-hour rest period for women workers but not men. Clearly unconstitutional under the ERA, this statute could be: invalidated so that no one receives a rest period; extended so that both sexes receive a half-hour rest period; or, amended so that both sexes are allowed a fifteen minute rest period.

Several rules of interpretation will guide the application of these alternatives. In the face of an unconstitutional statute under the ERA, the court must determine what alternative the legislature would have followed had it foreseen that all or part of the statute was invalid. In making this determination, the legislative history and intent must be scrutinized by the court. Additionally, laws which impose a burden on one sex will be invalidated, while laws which confer benefits or privileges will generally be extended to the other sex. Where the extension of benefits or privileges would be industrially or economically disruptive, however, the statute would be

²⁹ 436 F. Supp. 1314 (E.D.N.C. 1977).

³⁰ *Id.* at 1316.

³¹ See Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 *Nw. U.L. Rev.* 789, 791 (1973); Bellamy, *supra* note 13, at 3.

invalidated. Finally, courts have followed the traditional rule that penal laws are to be interpreted strictly so that a criminal statute which discriminates will generally not be extended to the other sex but eliminated entirely.³²

IV. MILITARY SERVICE AND THE ERA

The Constitution of the United States, in Article I, Section 8, empowers Congress "to raise and support Armies, . . . to provide and maintain a Navy." Since the Constitution made no distinction between men and women in this particular section, Congress has always had the power to draft women. While federal legislation on the draft never included women,³³ World War II did see the establishment of separate branches of the military services for women and women's entitlement to veterans' rights.³⁴

Since the military services have always been male-dominated, it is correct to conclude that differences in treatment of men and women have existed and, to a great degree, still exist. Until 1974, women were subject to more exacting enlistment standards than men. Requirements for acceptance to Army Officer Candidate School are more severe for women than for men. Direct appointments to a number of positions in the Navy and Marines are restricted to males. Women cannot be assigned to naval vessels other than hospital ships and transports.³⁵ In all branches of the armed services, women are excluded from certain occupational fields, particularly those relating to combat. Several grounds for discharge apply only to women—a woman who becomes pregnant must be discharged as well as a woman with dependent children. Because most high-ranking positions are accessible only by men, women naval officers are given a longer tenure of commissioned service than men before mandatory discharge for want of promotion.³⁶

A consequence of the male dominance of the military is the very limited number of women who enter the armed services. In turn, the many and substantial medical, educational, vocational training, employment, housing and insurance benefits that accrue to those who serve in the armed forces are available to only a miniscule number of women. This reality is seen as a form of discrimination against women.³⁷

The effect of the ERA relative to military service is significant. The amendment will allow no exceptions in the military between males and females. "Neither the right to privacy nor any unique physical characteris-

³² See generally *Constitutional Basis*, *supra* note 5, at 913-20.

³³ See, e.g., The Military Selective Service Act of 1967, 50 U.S.C. §§ 451-471a (1976).

³⁴ Lexen, *The Equal Rights Amendment*, 31 *FED. B.J.* 247, 254 (1972) (Israel, Vietnam).

³⁵ See *CAUSES*, *supra* note 2, at 170, 173; Conlin, *Equal Protection Versus Equal Rights Amendment—Where Are We Now?*, 24 *DRAKE L. REV.* 259, 320 (1975).

³⁶ See *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Constitutional Basis*, *supra* note 5, at 974-75; Conlin, *supra* note 35, at 268.

³⁷ See Conlin, *supra* note 35, at 321.

tic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women."³⁸ Any differential treatment between men and women, such as in exemption from the draft, enlistment standards, assignment, training, in-service conditions, grounds for benefits, veterans' benefits, would be stricken as violative of the Amendment's absolute prohibition of sex discrimination.³⁹

The following specific consequences of the ERA illustrate the pervasive impact it would have on military institutions and policies: women would be subject to a draft law; all occupational specialties, including positions as engineers or fighter pilots, would be open equally to men and women; all traces of separate promotional systems would be eradicated; women would be assigned to any area of the military, including combat duty and duty aboard navy vessels; women with dependent children could not be discharged unless men with dependent children were likewise discharged; and, except where privacy can be respected as a factor, all facilities, such as officers' clubs, social facilities, athletic facilities and eating facilities, must be open to both men and women.

While there is substantial agreement on the meaning of the ERA as it relates to the military, the opponents foresee different results from those envisioned by the proponents of the Amendment. Opponents view the eligibility of women to the draft and to all military assignments equally with men as "contrary to our customs and mores, and to the wishes of the overwhelming majority of American citizens."⁴⁰ They predict the destruction of the family since, under the rigid equality required by the ERA, mothers with dependent children would be placed in combat areas alongside of men.⁴¹ Opponents of the Amendment claim that women in general do not have the physical strength for meeting the challenges of combat duty.

This condition of fitness is not attained through physical training alone, but rather by developing, through training, a natural inborn physical strength normally found in men but not in women. Army tests at Fort Jackson and West Point show conclusively that most women do not have this strength. For example, reports show that women suffer a very high injury rate, as a rule are miserable in the field and cannot keep their minds on what they are supposed to do, lack upper body strength, have trouble with long road marches, and just don't like to beat people up when participating in hand-to-hand combat training.⁴²

³⁸ See *Constitutional Basis*, *supra* note 5, at 969.

³⁹ See S. REP. No. 689, *supra* note 5, at 13-14, 36-38.

⁴⁰ SCHLAFLY, *supra* note 22, at 96.

⁴¹ See *id.*; Note, *The "Equal Rights" Amendment—Positive Panacea or Negative Nostrum?*, 59 Ky. L.J. 953, 983 (1971) [hereinafter cited as *Positive Panacea*].

⁴² Gatsis, *Testimony Before North Carolina House Constitutional Amendment Committee* (1977).

A similar reaction came from Brigadier General (Ret.) Elizabeth Hoisington: "I think we should continue to have a legal bar against women in combat units — not because they are women but because the average woman is simply not physically, mentally and emotionally qualified to perform well in a combat situation for extended periods."⁴³

On the issue of women in combat areas, opponents cite the experience of the Israelis who drafted women and assigned them to combat duty during the 1948 war. As a result of their experience, especially of what happened to the women prisoners-of-war, the Israelis no longer place them in combat areas.

At the time when Congress was considering approval of the ERA, the Defense Department sent a letter to Senator Birch Bayh, leading proponent of the Amendment. This letter highlighted certain problems which would arise in the military as a result of the passage of the Amendment, concentrating on the two basic problems of women on combat duty and separate facilities to protect the privacy of men and women. It was noted that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces. On the other hand, if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, a disproportionate number of men serving more time in the field and on board ship may result since a reduced number of positions would be available for their reassignment. Secondly, even if segregation of living quarters and facilities are permitted under the Amendment, during combat duty in the field there are often no facilities at all, and privacy for both sexes might be impossible to provide or enforce.⁴⁴

Proponents of the ERA acknowledge and in fact fought for interpretation of the Amendment that would subject women to the draft and to combat duty equally with men. They argue that there should not be a traumatic fear of mothers being snatched away from their children. In the event of a draft, mothers would be eligible for deferment equally with fathers. Several possible alternatives to the present deferment provisions exist. For example, neither parent in a family with children would be drafted, or one parent, but not both would be drafted. Deferment could be granted to that parent who actually takes care of the child or who receives a higher lottery number, or the parents could be allowed to choose between themselves as to who will go and who will be deferred.⁴⁵ In other areas, women will be eligible for deferment for the same reasons as men. Thus, women may claim deferment as public officials due to their employment in essential operation, because of physical deficiencies, or as female ministers. In addition, women, like men, may claim status as conscientious objectors.

⁴³ U.S. NEWS & WORLD REPORT, Feb. 13, 1978, at 53.

⁴⁴ See S. REP. NO. 689, *supra* note 5, at 37.

⁴⁵ See *Constitutional Basis*, *supra* note 5, at 973; East, *Impact of the ERA*, 3 HUMAN RIGHTS 138, 144-46 (1973).

The controversy over women in combat occasioned a series of counter-arguments by proponents of the Amendment. It was noted that very few women would ever be assigned to combat duty. When the draft was in operation, only one per cent of the national pool of available males was assigned to combat duties. Within the armed services, only fourteen per cent of the men are assigned to combat units.⁴⁶ Since present technological warfare minimizes the need for physical strength, proponents have proposed the image of a woman in combat in the next war sitting at a computer table pressing a button. Moreover, women are physically capable to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations.⁴⁷ The proponents also urge that no evidence has been found which would indicate that the presence of women in combat units will create difficult problems. Women in other countries have served effectively in this manner. There is no reason to assume, state the proponents, that in a dangerous situation women will not be as serious and well-disciplined as men.⁴⁸

V. EMPLOYMENT AND THE ERA

Melissa A. Thompson, Legislative Coordinator for the National Organization for Women, told a University of Maryland audience: "What does the Equal Rights Amendment really mean? Money! Money in the pockets of women. The heart of all discrimination against women is money"⁴⁹

The chief source of money for women is employment outside the house. Since the 1950's, there has been an accelerating influx of women into the labor market. The explosion took place in the last several years since 1970. The 1977 Bureau of Labor Statistics showed 48.9% of women over 16 years of age in the work force. Women made up 42% of the whole labor force with totals of 40.5 million women versus 57.2 million men.⁵⁰

The rapid surge of women into the labor market can be attributed to

⁴⁶ 118 CONG. REC. 9332 (1972) (remarks of Sen. Bayh). The authors of *Sex Discrimination and the Law* commented on Senator Bayh's statement:

At the end of his statement, Senator Bayh quoted a letter from Colonel Stella Levy of the Israeli Armed forces, which said that women in that country did not actually engage in combat, nor did they receive the same combat training as men. The senator implied that the same conditions could prevail in American armed forces were the amendment to pass. This position illustrates the tendency of advocates of the amendment, of whom Bayh was the most ardent, to "waffle" on the issue of equal military service for women. Apparently they were themselves uncomfortable with the idea of women in combat, or at least saw this as the most politically sensitive question of ERA interpretation.

CAUSES, *supra* note 2, at 166.

⁴⁷ See *Constitutional Basis*, *supra* note 5, at 977.

⁴⁸ *Id.*

⁴⁹ Address by Melissa A. Thompson, Legislative Coordinator for the National Organization for Women (April 18, 1977), *reprinted in* CONG. DIG. 182 (1977).

⁵⁰ N.Y. Times, Nov. 29, 1977, at 28, col. 1.

a variety of economic, demographic, technological and social forces. Women marry later, have fewer children, divorce more frequently, have longer life spans, outnumber men in undergraduate colleges, and are entering professional schools, such as law and medicine, in increasing numbers. Other factors suggested by experts are inflation requiring the wife to assist in maintaining a style of life, the break-up of families compelling many mothers to find their own means of support, and the women's movement which motivated many women to seek full independence.⁵¹

As more and more women enter the work force, employment increases in importance as a vital focus of the movement for equal rights between men and women. Paradoxically, much of the discrimination against working women which the movement seeks to eliminate flowed from labor laws originally passed to protect women. In the late nineteenth and early twentieth centuries, states passed numerous protective laws which restricted the occupations which women could enter and regulated the conditions of their employment. Many labor laws granted benefits to women only, such as minimum wages, day of rest, rest periods, meal periods, special rest-rooms, separate lunchrooms and seats at assembly lines. Other statutes specifically excluded women from certain types of employment, such as mining and bartending, or regulated certain conditions of employment of women, such as maximum number of hours per day and week, night work, prohibition of lifting of weights above a certain maximum and prohibition from working for a determined period before and after childbirth.

Since the 1950's, many observers have viewed such "protective" laws more as liabilities than assets since often they tend to have a discriminatory impact upon women. The inequities thus created in the labor market were evident from the higher earning power of men, the higher rate of unemployment for women, the lower status in seniority of women, and, finally, the lower percentage of women obtaining professional jobs or other positions offering significant opportunities for advancement.

Both supporters and opponents of the ERA agree that most of the sex-based discrimination in the area of employment has been eliminated through present legislation and court decisions. The result is that passage of the Amendment will have little impact in this area of employment and will be largely symbolic.⁵²

Approval of the Amendment, however, would remove the vestiges of sex-based discriminatory legislation and practices in the labor field and also confirm the equality between sexes already achieved. It is helpful, therefore, to list the effects on labor laws and practices that would flow from the ERA keeping in mind that most of these effects have already been accomplished.

⁵¹ *Id.*

⁵² See IMPACT ERA, *supra* note 5, at 93-94; Ferrell, *supra* note 7, at 875.

General Impact of ERA on Labor Laws

The guiding principle of the Amendment, that both sexes be treated equally, demands extension of employment legislation to both sexes or invalidation of the laws for everyone. Laws which are discriminatory, restrictive, exclusionary in regard to one sex will be invalidated. Similarly laws which confer benefits or privileges to women will probably be extended to men.⁵³ In cases where the extension of benefits or privileges to both sexes would be industrially or economically disruptive, equality would require total elimination of the benefits or privileges.⁵⁴ While the ERA will not directly affect discrimination in private employment, it will have an impact on private employment through state laws and through the Commerce Clause of the Constitution.⁵⁵

*Specific Impact of ERA on Labor Laws*⁵⁶

Pregnancy-related disability of working women will be treated like any other disability in regard to disability insurance or in regard to any other areas of employment. The ERA will compel repeal of laws and regulations requiring pregnant women to terminate working for certain periods before and after childbirth. Maternity leave will hinge on women's desire or ability to work. Since child-rearing is not unique to women, men will have the option to take child-care leave.

The ERA would invalidate any workers' compensation laws granting death or disability benefits exclusively to one sex or which would automatically award dependency benefits to women while not awarding similar benefits to men unless dependency was proved. The Amendment will nullify statutes which grant public pension benefits only to widows of public employees, laws excluding women from such jobs as bartending and mining, and regulations which discriminate against one sex on the basis of customer preference, viz., female attendants on airlines, lingerie sales clerks. In addition, practices which have traditionally excluded one sex from certain employment where the discrimination was not based on a unique physical characteristic of one sex will be invalidated. Thus, the ERA would not permit employment of resident managers of apartment houses to be restricted to married couples, nor would it allow the exclusion of women as part of truck driver teams even though the wives of the male

⁵³ See S. REP. NO. 689, *supra* note 5, at 15; *Constitutional Basis*, *supra* note 5, at 927, 936; cf. SCHLAFLY, *supra* note 22, at 113 (holding that benefits will not be extended).

⁵⁴ See Ferrell, *supra* note 7, at 874; Hillman, *supra* note 31, at 817.

⁵⁵ See WOMEN'S RIGHTS, *supra* note 7, at 220; *Constitutional Basis*, *supra* note 5, at 926 n.107; Hillman, *supra* note 31, at 790-92.

⁵⁶ See BINGAMAN, *supra* note 6, at 215, 221-22; WOMEN'S RIGHTS, *supra* note 7, at 226, 228-42, 254; *Constitutional Basis*, *supra* note 5, at 929, 932-36; Elsen, Coogan, Ginsburg, *Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J.L. SOC. PROB. 77, 79-80 (1973); Ferrell, *supra* note 7, at 876; Hillman, *supra* note 31, at 799-800, 808-09, 824-29; League of Women Voters of New York State, ERA Campaign Kit 34 (1975).

drivers objected. Moreover, it has been suggested that in regard to statutes extending job preferences to veterans, the Amendment will probably require either the repeal of all such veterans' preferences or a broader application of such preferences to include the spouses of the veterans.⁵⁷

The foregoing list of effects of the ERA constitutes the thrust of its proponents' arguments with respect to employment. Their position is summarized in the Senate majority report:

Ratification of the Equal Rights Amendment will result in equal treatment for men and women with respect to the labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit, which offer real protection, will, it is expected, be extended to protect both men and women.⁵⁸

Opponents of the ERA argue that there is no necessity for the Amendment since equality of rights in the area of employment has, for all practical purposes, been achieved. Among the measures adopted by Congress designed to prohibit discrimination on account of sex are the following:

1. The Equal Pay Act of 1963, as amended,⁵⁹ prohibits discrimination because of sex with respect to payment of wages for work that requires equal skill, effort, or responsibility and that is performed under equal working conditions.

2. Civil Rights Act of 1964⁶⁰ — Title VII of the Act prohibits employment discrimination on the basis of sex with respect to hiring, job classification, promotion, compensation, fringe benefits, and discharge unless sex is a "bona fide occupational qualification." Title VII's coverage includes any private employer who employs fifteen or more persons.

3. The Nurse Training Act of 1971⁶¹ requires nondiscrimination on the basis of sex for entrance to all federally assisted schools in the health professions.

4. The Comprehensive Health Manpower Training Act of 1971⁶² prohibits the use of federal funds for health profession programs which discriminate on the basis of sex. Schools of medicine, osteopathy, dentistry, veterinary, optometry, pharmacy, podiatry, public health, and nursing are subject to this prohibition.

5. The Higher Education Act of 1972⁶³ — Title IX extends the Equal Pay Act to all employees of educational institutions and prohibits discrimination because of sex in all federally assisted education programs.

⁵⁷ The problem with extension of benefits to spouses of veterans is that both receive the preferences — a double reward for service only by one. *But see* BINGAMAN, *supra* note 6, at 221.

⁵⁸ S. REP. No. 689, *supra* note 5, at 15.

⁵⁹ 29 U.S.C. § 206(d) (1976).

⁶⁰ 28 U.S.C. § 1447 (1976); 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976).

⁶¹ 42 U.S.C. § 296 (1976).

⁶² *Id.* § 292b.

⁶³ 20 U.S.C. §§ 1001, 1003, 1005a, 1006-1-11, 1021-1024, 1027, 1031, 1033, 1034, 1041, 1042, 1051-56, 1061 (1976).

6. Equal Employment Opportunities Act of 1972⁶⁴ — The Equal Employment Opportunities Commission is established by Act to file suit against employers who discriminate because of sex.

7. The Comprehensive Employment and Training Act of 1973⁶⁵ prohibits discrimination because of sex, race, creed, color, national origins, or political affiliation with regard to both employees of the program and recipients of its benefits.

Elimination through existing legislation of almost all sex-based discrimination in the field of employment is admitted by most proponents of the ERA. Proponents contend, however, that the ERA is still needed as a symbol of equal rights in labor and also to insure that discriminatory legislation is not reinstated.⁶⁶

While those supporting the ERA are almost unanimous in admitting that the goal of legal equality for working women has been achieved, they argue that in fact there is still discrimination against women in the labor market regarding wages, promotions, hiring and discharge. Those opposed to the Amendment retort that if women are not enjoying the full benefit of legislation which has granted equality to workers of both sexes, it is the result of inadequate enforcement and not the lack of fair laws and regulations. The ERA will not necessarily affect enforcement. The Amendment is not self-enforcing. Women will still be obliged to sue in court to enforce their rights with no more remedies than are presently available.⁶⁷

VI. FAMILY AND THE ERA

General Observations

Under English common law from which our state laws concerning the family are principally derived, a woman who married lost most of her legal rights. She could no longer make contracts, sue or be sued, manage or control her property. Blackstone wrote:

By marriage, the husband and wife are one person in law . . . the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything . . . Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage.⁶⁸

⁶⁴ 5 U.S.C. §§ 5108, 5315, 5316 (1976); 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (1976).

⁶⁵ 18 U.S.C. § 665 (1976); 29 U.S.C. §§ 801, 802, 811-22, 841-51, 871-75, 881-85, 911-29, 951-56, 981-92 (1976); 42 U.S.C. § 2571 (1976).

⁶⁶ See S. REP. No. 689, *supra* note 5, at 16; BINGAMAN, *supra* note 6, at 204-05; WOMEN'S RIGHTS, *supra* note 7, at 217; M. RAWALT, THE EQUAL RIGHTS AMENDMENT FOR EQUAL RIGHTS UNDER THE LAW 6 (1976); IMPACT ERA, *supra* note 5, at 95; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, IN PURSUIT OF EQUAL RIGHTS: WOMEN IN THE SEVENTIES 6 (1976) [hereinafter cited as IN PURSUIT OF EQUAL RIGHTS]; Bayh, *supra* note 14, at 13; Ferrell, *supra* note 7, at 873.

⁶⁷ See S. REP. No. 689, *supra* note 5, at 28-29.

⁶⁸ 1 W. BLACKSTONE, COMMENTARIES 442 (6th ed. 1774).

This common law fiction meant, for all practical purposes, that the wife had no legal identity.

During the late 19th century, aspects of this exclusive patriarchal authority during marriage were removed by passage of various state laws recognizing the rights of married women to their own earnings and separate property. This change was probably prompted by a marked increase in the number of women and children working in factories to help meet the needs of the family.

As conditions improved in the 20th century, larger numbers of women were not obliged to work and found themselves in a situation where their exclusive role was the care of a household and children. The housewife-and-maintenance marriage became the popular model and the law began to develop ways to protect the family unit and insure rights for each partner.

Today, there is a continuing movement directed toward achieving a partnership marriage in which the wife would have equal rights with the husband. According to some authors, "the effect of the Equal Rights Amendment on marriage and divorce law will be to move the law more directly, more forcefully and more expeditiously in the direction it is already going."⁶⁹

The effects on the family of this movement was the subject of a series of articles last November in the *New York Times*, which enumerated the following changes in the modern family:⁷⁰ the divorce rate has doubled in the last 10 years; two out of five children born in this decade will live in single parent homes for at least part of their youth; the number of households headed by women has increased by more than thirty-three per cent in this decade and more than doubled in one generation; more than one-half of all mothers with school-age children now work outside the home, as do more than one-third of mothers with children under three years of age; one out of every three schoolchildren lives in a home headed by only one parent or relative; day care of irregular quality is replacing the parental role in many working families; there has been an extraordinary growth in the number of "latchkey" children, that is, children unsupervised for portions of the day, usually in the period between the end of school and the working parent's return home; the average number of children per family dropped from a high of 3.8 in 1957 to 2.04 in 1977, signifying a further constriction of the natural nuclear family but an expansion of legal kinships through divorce and remarriage.

What the general impact of the ERA will be on the family has been described differently by the two camps. Proponents foresee the Amendment instrumental in creating an ideal situation where husband and wife are completely equal and causing great blessings to flow from this egalitarian partnership. One proponent wrote: "An ERA future is a world of

⁶⁹ *Constitutional Basis*, *supra* note 5, at 937.

⁷⁰ *Men and Women*, *N.Y. Times*, Nov. 27-30, 1978, at 1, col. 1.

changed reproductive needs and this change will affect an ever-widening circle of other institutional needs and demands. The benefits to both men and women of a strengthened and more viable union between them are, in and of themselves, incalculable."⁷¹

Other proponents see the Amendment as a final liberation of women with the community assuming more and more the responsibility of providing care for the children. Only with the assistance of government-funded day care centers, they maintain, can women attain equal opportunities in life, in marriage, and in employment.⁷²

Opponents, on the other hand, see a bleaker future for the family if the ERA receives the necessary two-thirds ratification. Professor Ryman of Drake University Law School concluded a study he made on family property rights and the ERA:

[I]t seems probable that many states will adopt a wildly permissive approach should the proposed Amendment be adopted. This would minimize legal reinforcement of cultural mores supportive of family life, tend to degrade the homemaker role, and support economic development requiring women to seek careers. Plato's concept of common women and common children (public child care is implied by degrading the homemaker role) may not be far away. It remains to be decided whether that is an improvement in the status of women. It seems clear that a cultural revolution of proportions beyond the ken of the proponents of the Amendment is implied.⁷³

In testimony before a Senate Committee, Dr. Jonathan H. Pincus, Professor at Yale Medical School, prophesied a negative future for the family resulting from the Amendment: "I would predict that the Equal Rights Amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and possible sexual deviation."⁷⁴

The possible consequences of the Amendment on family life have occasioned more controversy than any other issue. We consider now some of the more specific areas of family law which involve sex discrimination and upon which the ERA will surely have an impact.

Age of Marriage

As of 1977, twenty-three states had statutes establishing different ages at which men and women could marry with or without parental consent. Traditionally, marriage laws permitted girls to marry at 16 with the consent of their parents and at 18 without such consent. Boys, on the other

⁷¹ IMPACT ERA, *supra* note 5, at 141.

⁷² Lexcen, *supra* note 34, at 256-57; Ohio Task Force for the Implementation of the Equal Rights Amendment, Report 18 (1975); U.S. Commission on Civil Rights, Sex Bias in the U.S. Code 214 (1977).

⁷³ Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505, 514 (1973).

⁷⁴ S. REP. NO. 689, *supra* note 5, at 48.

hand, were allowed to marry at 18 with parental consent and at 21 without it. Passage of the ERA will invalidate all laws which establish different ages for marriage depending on sex and require that the age at which a person can marry be the same for both sexes.⁷⁵

Domicile of Wife

The common law rule concerning a wife's domicile provided that upon marriage the wife's domicile was that of her husband. In addition, the wife was obliged to follow him if his choice of a new domicile was reasonable. Her refusal to accompany him was regarded as desertion or abandonment. This common law rule is still the law in many states.

Domicile affects many legal rights of a wife, such as tuition at state universities, jury service, taxes, voter registration, jurisdiction of courts in lawsuits, jurisdiction over estates, welfare and running for public office.

The ERA would render unconstitutional any laws which determine domicile for women in a manner different from men. It would, in other words, allow the husband and wife to establish separate domiciles. Furthermore, the ERA would invalidate statutes entailing that refusal of a wife to follow her husband would constitute desertion or abandonment unless the same consequence held for husbands who refused to accompany their wives to a new location.⁷⁶

Domicile of Children

In all states, the domicile of children born to married parents follows that of the father. The domicile of children born out of wedlock is that of the mother.

Passage of the ERA would invalidate all such rules since the determination of the child's domicile is based on the sex of one person. Writers offer several solutions, such as allowing children over a certain age to choose their own domicile, while the actual residence of children below that age would control, or adopting actual residence in all cases, or using the criterion which serves the "best interest of the child."⁷⁷

*Change of Name at Marriage*⁷⁸

At the time of marriage, the traditional practice has been for women to give up their surname and assume that of their husband. To a limited

⁷⁵ See BINGAMAN, *supra* note 6, at 172; WOMEN'S RIGHTS, *supra* note 7, at 101; *Constitutional Basis*, *supra* note 5, at 938-39; Conlin, *supra* note 35, at 326.

⁷⁶ See BINGAMAN, *supra* note 6, at 172; WOMEN'S RIGHTS, *supra* note 7, at 113; *Constitutional Basis*, *supra* note 5, at 941.

⁷⁷ See BINGAMAN, *supra* note 6, at 174; WOMEN'S RIGHTS, *supra* note 7, at 116-17; *Constitutional Basis*, *supra* note 5, at 942-43.

⁷⁸ See WOMEN'S RIGHTS, *supra* note 7, at 102-08; SCHLAFLY, *supra* note 23, at 92-93; *Constitutional Basis*, *supra* note 5, at 940; Conlin, *supra* note 35, at 281-84.

degree, women are also expected in marriage to be addressed under their husband's first name.

The common law rule, which still holds in most states, permits a person even though married, to use any name he or she chooses as long as it is not done to deceive or defraud. Hawaii is the only state that requires by statute that a woman assume at marriage the name of her husband.

In spite of the common law rule, many states have enacted statutes that presume that the wife has taken the name of her husband. These laws provide, for example, that a name change by a husband automatically changes the name of his wife and children, that a wife use her husband's name for voting, for vehicle registration and for exercising other rights of citizenship, and that divorced women may be permitted by an order to resume their prior surname.

The ERA would make unconstitutional any statute which requires that a wife assume the name of her husband. Invalid also would be any statutory rules, such as in registration and licensing procedures, that presume that a wife has taken her husband's name.

Under the Amendment, the husband and wife could each retain their own names as before marriage, or they could decide to use the same name which could be the name of the husband, or that of the wife, or a combination of both, or a completely new name. In addition, the state could require the husband and wife to use the same name provided the husband and wife were allowed to choose what the same name would be.

*Children's Names*⁷⁹

State regulations generally require that a child of married parents have the name of the father while a child of unmarried parents is traditionally given the name of the mother. The ERA will invalidate any rule requiring that a child automatically be given the surname of one parent or granting to one parent the sole authority to choose the child's name. It will be the combined decision of both parents which will determine the surname of children. In the case of a child born out of wedlock and where paternity has not been established, the mother will choose the name of the child and she will be free to choose any name. Furthermore, the Amendment will nullify any regulation which requires children to continue using their father's or mother's name throughout minority. Minors of sufficient age and maturity would be allowed to change their name on their own authority or object to a change of name sought by one or both parents. After a divorce, courts are generally hesitant to allow a divorced woman to change the name of the children to her maiden name or to that of their step-father. The ERA would give the mother as much right to decide the children's name as the father. The Amendment, however, would provide

⁷⁹ See BINGAMAN, *supra* note 6, at 173; WOMEN'S RIGHTS, *supra* note 7, at 108-11; *Constitutional Basis*, *supra* note 5, at 941.

no help for the resolution of conflicts between the parents as to choice of name for their child.

*Consortium*⁸⁰

Consortium is the term given to the right of one spouse to the love, affection, companionship, society and sexual relations of the other spouse. At common law, only the male spouse could sue for the loss of consortium as a result of a negligent injury to his wife by a third party. The wife had no right to sue for loss of services of her husband. As a result of court decisions and legislative action, this discrimination based on sex has been eliminated in all but six states which still retain the common law rule. The ERA would invalidate statutes that limited the cause of action for loss of consortium to the husband. Either the cause of action must be extended to both spouses or be completely eliminated.

It should be pointed out that the Amendment would not tolerate the sex-based definitions of conjugal function which is the basis for the common law rule on consortium. Thus, it could not be assumed that women have a juridical obligation to do housework or to provide affection and companionship and sexual relations unless the husbands were under an equal obligation.

*Marital Property*⁸¹

Upon marriage, the financial status of the wife is changed significantly depending on the laws on marital property of the state in which she and her husband live. Two different systems of laws on marital property co-exist in the United States—the common law system and the community property system. The wife's rights in both systems mature primarily with the death or separation of her husband.

The common law system holds in forty-two states. Under this system, each spouse retains full ownership and management of any earnings or property which he or she may acquire during the marriage. The other spouse has no legal right or interest in this property. In the same way, all property which either spouse brought to the marriage or inherited remains the distinct property of the spouse owning it and that same spouse retains sole management and control of it. Under this system, therefore, the rights of ownership and control of earnings and property of either spouse remain legally the same after the marriage as they were before.

The sex-discriminatory aspect of the common law system is most apparent in cases where the wife does not work. While she may be rendering

⁸⁰ See BINGAMAN, *supra* note 6, at 173; WOMEN'S RIGHTS, *supra* note 7, at 118-19; *Constitutional Basis*, *supra* note 5, at 943-44; Conlin, *supra* note 35, at 277-78.

⁸¹ See BINGAMAN, *supra* note 6, at 161-62; WOMEN'S RIGHTS, *supra* note 7, at 165-66; IMPACT ERA, *supra* note 5, at 116-24; IN PURSUIT OF EQUAL RIGHTS, *supra* note 66, at 9-10; *Constitutional Basis*, *supra* note 5, at 946-49; Ferrell, *supra* note 7, at 889-90; Ryman, *supra* note 73, at 503-14.

the valuable services of housekeeping and child-rearing, the employed husband retains full ownership and control of his income. She can acquire an interest in his earnings only if he makes a gift to her by placing the property jointly in both names or in her name alone.

The community property system exists in eight states. Similar to the common law system, each spouse retains the ownership and control of property brought to the marriage or inherited during it. Unlike that system, all earnings of either spouse acquired during the marriage become community property of both so that each spouse has a one-half interest in that property. The one-half interest in the earnings of one spouse would belong to the other spouse even if the latter were unemployed. Since 1972, six of these community property states have given to the wife equal right of control over the property.

The property rights of a wife who survives her husband vary according to the state controlling the inheritance. Without describing all the possible variations, it can be said that in nearly all common law system states, some protection is given to the surviving wife. The trend is toward giving her the "widow's right of election" by which she receives absolute ownership of one-third to one-half of all the property owned by her husband at the time of death, regardless of any provision in his will.

In the eight community property states, a widow receives her one-half ownership interest in the community property. Her husband is able, just as she is, to bequeath his one-half interest to anyone he wants.

In cases of divorce, many courts under the common law system have the discretionary power to divide the property equitably where the wife has no vested property rights in her husband's earnings. In all eight of the community property states, the law requires a division of property upon divorce, generally resulting in equal shares.

The ERA will invalidate all laws concerning marital property which discriminate against one sex, such as those relating to the management and control of property during marriage and the distribution of property upon death or divorce. Laws which give a special protection to surviving wives, such as the "widow's right of election", would be either declared invalid or be extended to the surviving husband. Property division upon divorce must be based on sex-neutral criteria focusing on the financial circumstances, needs and earning abilities of the parties.

The ERA will not mandate any particular system of marital property rights. Many authors suggest that the most acceptable approach would be adoption in all states of the community property system provided that both spouses have equal management of the property.⁸²

Family Support

In all states, the primary responsibility for support of the wife rests

⁸² See BINGAMAN, *supra* note 6, at 162-63; WOMEN'S RIGHTS, *supra* note 7, at 187-90; *Constitutional Basis*, *supra* note 5, at 944-95; Conlin, *supra* note 35, at 275, 331-32.

on the husband. In many states, the wife is never obligated to support her husband, while in about sixteen states the wife is liable to support her husband only if he is incapacitated or indigent. This obligation of the husband to support his wife is reinforced in many jurisdictions by criminal non-support laws. Moreover, it is independent of the wealth of the wife and cannot be eliminated or diminished by an agreement between the spouses.

All fifty states give primary responsibility to the father to support children of the marriage. In most jurisdictions, the mother is legally liable to support the children only if the father fails or refuses to support them. Criminal non-support laws will penalize either father or mother who fails in his or her duty to support the children.⁸³

While the law places the primary responsibility of support on the husband, in practice his obligation is rarely enforced since courts have been reluctant to interfere with existing marriages. Realistically enforceable are the so-called "necessaries" laws enacted in many states. These laws require one spouse, typically the husband, to pay a merchant for such necessities as food, clothing or shelter purchased by the other spouse either for the use of the purchasing spouse or for their children.

The family support responsibility of the husband continues after divorce through alimony for his former wife and support payments for the children. Studies have shown that reality does not always conform to the legal duty. Alimony is awarded in only ten per cent of divorce cases and even when awarded frequently it cannot be collected. Although child support by the father is decreed in practically every case where the mother receives custody, forty-two per cent of the fathers default in the first year and by the tenth year, seventy-nine per cent are in total noncompliance.⁸⁴

Finally, it should be noted that in an ongoing marriage, the law assumes that the wife, in return for the husband's protection and support, will fulfill her part of the marital contract which is to perform the domestic services and rear the children. In the area of family support, passage of the ERA will have a broad impact. Statutes which place the husband as head of the household would be unconstitutional. The Amendment would invalidate provisions assigning specific roles to the husband and wife within the family. Thus, it would nullify the duty of the wife to be the husband's companion, to carry out household and domestic services, and to rear children, for instance, unless these same obligations were required of the husband. On the other hand, it would invalidate the legal obligation of the husband which assigns him the primary responsibility of family support. Thus, family support would become the equal responsibility of both depending on resources, earning power and non-monetary contributions to the family welfare, especially homemaking and childcare services. The

⁸³ IMPACT ERA, *supra* note 5, at 189-90; Ferrell, *supra* note 7, at 886.

⁸⁴ See BINGAMAN, *supra* note 6, at 157-82; THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS, CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN 1-11 (1972); KRAUSKOPF, LEGAL MEMORANDUM ON THE EQUAL RIGHTS AMENDMENT 6.

Amendment would invalidate criminal non-support laws penalizing only men for non-support of their wives, although criminal nonsupport laws which oblige both mothers and fathers to support children would remain. Finally, the Amendment would require that alimony be equally available to both husbands and wives.⁸⁵ In short, the ERA eliminates the legal duties that presently constitute the marriage contract and requires that the marital responsibilities of each spouse be based on individual abilities and needs rather than on the sex of the parties.

Opponents of the ERA agree with the foregoing statement concerning the impact of the Amendment on family support. However, they see certain deleterious implications and consequences flowing from this impact. Since the ERA would invalidate laws requiring the husband to be the primary supporter and would require both spouses to assume the responsibility, it places an unfair burden on the woman who would have the double responsibility of financial motherhood and homemaking. According to the opposition, equal application of the support obligation under the ERA would enable an irresponsible husband to refuse to work or assume any domestic duties. In such an instance, if the wife takes a job to support her children, she would also have the legal obligation to support her irresponsible husband and, in fact, she would be subject to criminal penalties if she did not support him and pay his debts. Under the Amendment, it will not be a crime for a husband to abandon his wife. In short, opponents foresee a devastating effect on the family structure and on the present legal rights of the wife.⁸⁶

Child Custody

Upon dissolution of a marriage, a crucial question concerns custody of the children. Most courts today utilize the "best interests of the child" test as the standard of their decisions. In spite of this criterion, however, many presumptions regarding the ability of parents exist. In most states, the mother is preferred in custody proceedings involving children of tender years. The factual result of statutes, presumptions and custom favoring the mother is that mothers are given custody in ninety-five per cent of child custody cases.⁸⁷

Under the ERA, judicial preference for mothers would be unconstitutional, and sex-neutral standards for awarding custody must be employed. The Amendment would prohibit all statutory and common law presumptions based on sex which would determine which parent was the more suitable guardian.⁸⁸

⁸⁵ S. REP. NO. 689, *supra* note 5, at 17; IN PURSUIT OF EQUAL RIGHTS, *supra* note 66, at 5; *Constitutional Basis*, *supra* note 5, at 945-46; Ferrell, *supra* note 7, at 888-89.

⁸⁶ See SCHLAFLY, *supra* note 23, at 70-81.

⁸⁷ See BINGAMAN, *supra* note 6, at 157; Kanowitz, *The Male Stake in Women's Liberation*, 8 CALIF. W.L. REV. 424, 428 (1972).

⁸⁸ See BINGAMAN, *supra* note 6, at 195-200; KRAUSKOPF, *supra* note 84, at 7-8; *Constitutional Basis*, *supra* note 5, at 953; Conlin, *supra* note 35, at 289-92.

Courts frequently deny custody to a mother if it is borne out that she was guilty of adultery or misconduct, while they often do not bar the father for similar improper behavior. Under the ERA, courts could not consider misconduct which did not affect that parent's relationship with the child.⁸⁹

Some opponents of the ERA see harmful effects in the mandate of the Amendment that custody of children be based on equality of the sexes. "Equality might mean that the courts would award one child to the mother and one to the father. Or it might mean that the courts would award custody to the father in approximately half the cases, ordering the mother to pay child support."⁹⁰

Grounds for Divorce or Annulment

One out of every three marriages ends in divorce or civil annulment and the rate is increasing. The trend today in divorce laws is inexorably toward "no fault" divorce, that is, where "irretrievable breakdown" of the marriage will be the sole or an additional ground for divorce. The most common grounds of divorce admittedly are sex-neutral. In some states, however, vestiges of sex-discriminatory grounds of divorce or annulment remain. For example, a husband may obtain a divorce if his wife was pregnant at the time of their wedding without his knowledge or collusion. A wife may obtain a divorce if her husband was addicted to drugs but he may not divorce his wife for the same reason. A wife may divorce her husband for drunkenness alone, for non-support, as a result of his vagrancy, due to his having been a notoriously licentious person before the marriage or because of his indignities to her person. A husband may divorce his wife if she refuses to move with him to another location, or due to her having been a notorious prostitute before the marriage.⁹¹

The ERA will invalidate all grounds for divorce or annulment which apply to only one sex or will require the extension of such grounds to the other spouse. For example, non-support by the husband would be eliminated as grounds for divorce by the wife or it would be extended to the husband so that he could sue his wife for divorce if she failed in her responsibility to support him. The ERA would likewise invalidate statutes that granted the husband a divorce because at the time of the marriage he did not know that his wife was pregnant by another man, or it would allow the wife grounds for divorce if at the time of the marriage she did not know that her husband had impregnated another woman.

The other approach that would be acceptable under the ERA would be the substitution of no-fault grounds for divorce whereby the sole ground would be the "irretrievable breakdown" of the marriage or "irreconcilable differences."⁹²

⁸⁹ See BINGAMAN, *supra* note 6, at 197.

⁹⁰ SCHLAFLY, *supra* note 23, at 82-83.

⁹¹ See BINGAMAN, *supra* note 6, at 180-82; WOMEN'S RIGHTS, *supra* note 7, at 184; Conlin, *supra* note 35, at 284-85; *Positive Panacea*, *supra* note 41, at 980-81.

⁹² See BINGAMAN, *supra* note 6, at 180, *Constitutional Basis*, *supra* note 5, at 951.

VII. HOMOSEXUALITY AND THE ERA

A controversial issue between proponents and opponents of the ERA is whether or not the Amendment would require legalization of marriage between persons of the same sex. The many benefits conferred on married couples motivate homosexuals and lesbians to seek legal recognition of their unions. Married persons, for example, enjoy the right to file joint income tax returns, gift tax exemptions and deductions, estate tax marital deduction, the right to inherit from one's spouse, the privilege not to testify against one's spouse, tort recovery for wrongful death of one's spouse, the ability to adopt children, eligibility for family insurance policies, social security survivor's benefits and numerous other rights and privileges. In addition to legal benefits, marriage would confer acceptance and respectability sought by many homosexuals.

Proponents of the ERA hold that the Amendment does not demand any change in state laws forbidding marriage between homosexuals. States may legislate against marriage between two men as long as it also forbids marriage between two women. Similarly, under the Amendment "if a state permits single sex marriage between two males it must likewise permit such marriage between two females."⁹³

Several of the leading proponents of the ERA, including Senator Birch Bayh and Professor Thomas I. Emerson of Yale Law School, reaffirm the position that state laws prohibiting marriage between members of the same sex would not be invalidated by the Amendment and that the Amendment would not require recognition of the validity of homosexual marriages.

The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman — or if a State says it is wrong for a woman to marry a woman, then it must say it is wrong for a man to marry a man.⁹⁴

In support of their interpretation of the ERA on this issue, adherents of the Amendment have received corroboration from the Supreme Court of the State of Washington. Washington has its own equal rights amendment and its Supreme Court in 1974 held that the state law prohibiting same sex marriages does not violate the equal protection clause of the fourteenth amendment and furthermore, it ruled that its decision was supported by both the state equal rights amendment, and the proposed federal ERA.⁹⁵

In brief, the proponents are insistent that the Amendment relates solely to gender, not to the sexual orientation of a man or woman. Distinc-

⁹³ RAWALT, *supra* note 66, at 6.

⁹⁴ 118 CONG. REC. 9331 (1972) (remarks of Sen. Bayh).

⁹⁵ *Singer v. Harris*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

tions on sexual orientation would be prohibited only to the degree that they treat men and women differently. As long as all homosexuals are treated equally, there is no sex discrimination.⁹⁶

Opponents of the ERA, on the contrary, argue that the Amendment will require the legal recognition of marriages between persons of the same sex. The testimony of Professor Paul Freund of Harvard Law School before the Senate Judiciary Committee in 1971 is quoted in the Senate Report: "Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."⁹⁷ In the same report, Professor James White of the Michigan Law School, speaking against the Amendment, noted that the ERA would result in litigation on the sexual requirements of the marriage ceremony and that "conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex."⁹⁸

Two articles in law school journals give further support to the opinion that the ERA will require legalization of homosexual marriages. An article in the *University of California, Davis Law Review* argues that the wording of the ERA seems to demand recognition of homosexual marriages but that in fact the courts will probably not interpret it in that manner:

There can be no more literal example of denying rights "on account of sex" than denying marriage to same sex couples because of the genitals of the applicants. . . .

Thus, even though the wording of the amendment lends merit to the argument that it would compel recognition of same sex marriage, courts are not likely to so interpret the amendment because of the physical differences of the sexes and because of the intent of Congress.⁹⁹

A 1973 Yale Law Journal article analyzed the general question of the legality of homosexual marriage. Relating the discussion to the ERA, the author concluded that under the Amendment it would not be possible to deny marriage to homosexuals:

The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex. A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines. . . .

. . . .
With no relevant or countervailing interests to place against the rule of

⁹⁶ See CAUSES, *supra* note 2, at 179-80; K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 112-13 (1974) [hereinafter cited as DISCRIMINATION].

⁹⁷ S. REP. NO. 689, *supra* note 5, at 47.

⁹⁸ *Id.*

⁹⁹ Sullivan, *Same Sex Marriage and the Constitution*, 6 U. CAL. D.L. REV. 291, 293 (1973).

“absolute” equality of treatment, the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples.¹⁰⁰

Professor Charles E. Rice of Notre Dame Law School also predicts the legitimacy of homosexual marriages under the ERA. In testimony before joint committees of the Indiana legislature, he stated: “The inflexible judicial scrutiny that would be required by the ERA is the reason for the well-grounded expectation that the ERA would require, among other things, . . . that homosexual marriages be treated the same as heterosexual.”¹⁰¹

In the light of the controversy over whether the ERA will require the legalization of homosexual marriages, it is significant to note that the canons in the present Code of Canon Law on the nature of and consent required for marriage use sex-neutral terms. Canon 1012 speaks of the matrimonial contract between baptized “persons”. Canon 1081 describes marriage as resulting from “consent of the parties lawfully manifested between legally capable persons.” Such sex-neutral wording may be used to argue for recognition by the Church of marriages between parties of the same sex, even though the whole context of the law on marriage presupposes that it is a special relationship between a man and a woman. Possibly to avoid any such challenge, the scheme of the Proposed Revised Code explicitly describes marriage as resulting from the “consent between a man and a woman.”

VIII. ABORTION AND THE ERA

Among the more volatile debates on the impact of the ERA concerns the question of the consequences of the passage of the Amendment on abortion legislation. There have been repeated accusations with equally vociferous denials concerning the effect of the ERA on the ability of the states to pass abortion laws, on efforts to achieve passage of a Human Rights Amendment and on the possibility of obtaining Supreme Court reversal of its 1973 abortion decisions in *Roe v. Wade*¹⁰² and *Doe v. Bolton*.¹⁰³

In this particular controversy, the line of demarcation between the two camps is not clearly drawn. It would be unfair to classify every person in favor of the ERA as a pro-abortionist or to conclude that every pro-lifer is against the ERA. It is our intention to list the prophecies of those who deny a close relationship between the ERA and abortion and of those who see a close connection between the two.

In its newsletter, *ERA Yes*, the League of Women Voters responded to the accusations of opponents who claimed that the Amendment would repeal all and every kind of future anti-abortion law. The newsletter la-

¹⁰⁰ Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583, 588 (1973).

¹⁰¹ Rice, *supra* note 27, at 2.

¹⁰² 410 U.S. 113 (1973).

¹⁰³ 410 U.S. 179 (1973).

beled the charge a red-herring and argued to the contrary first, that the Supreme Court's 1973 decision of *Roe v. Wade* in effect overturned all state laws which prohibited a woman from voluntarily terminating her pregnancy in the first trimester period. Thus, the liberalization of abortion laws, it was contended, had begun in the absence of the ERA which Congress approved in 1972. Second, from a legal standpoint, the newsletter stated, there is no direct connection between the ERA and abortion. Two separate legal principles are involved. The right to privacy implicitly embodied in the Constitution was used by the Court to justify a woman's decision to terminate pregnancy. The principle of equal protection of the laws was not an issue in the abortion decision.¹⁰⁴

Often cited by those who deny a connection between the ERA and abortion is a statement by J. William Heckman. As Chief Counsel for the Senate Subcommittee on Constitutional Amendments, he commented in February 1974 on the ERA and abortion:

That decision [*Roe v. Wade*] was based on the right to privacy which, though not explicitly mentioned in the Constitution, the Court held to be protected by the Due Process Clause of the Fourteenth Amendment. . . . The Equal Rights Amendment, on the other hand, has nothing to do with privacy or the Due Process Clause; rather it is concerned with equal protection of the laws. . . . Since abortion by its nature only concerns women, sex discrimination in this area is a biological impossibility. The proposed 27th Amendment, if ratified, would have no applicability whatever to the question of abortion.¹⁰⁵

The legislative history of the ERA reveals very little on this question of abortion. The leading sponsor of the Amendment in the House of Representatives, Congresswoman Martha Griffiths, responded on the House floor to a direct question as to the effect of the ERA on state abortion laws that "the equal rights amendment has absolutely no effect on any abortion law of any State."¹⁰⁶

Among the leading authors who foresee deleterious effects on abortion with passage of ERA is Professor Charles Rice of Notre Dame Law School. In a statement at a joint hearing of two committees of the Indiana legislature on January 4, 1977, he stated that if the ERA were adopted, it may disable the states from imposing on abortion any restrictions whatsoever more severe than those placed on sexually neutral operations such as appendectomies or gall bladder removals. Another devastating, but likely effect of the ERA in the abortion area, Professor Rice continued, would be on the conscience laws which have been enacted in various jurisdictions. The ERA would very probably prevent the states from affording this protection to the consciences of doctors and nurses. A doctor or nurse in a

¹⁰⁴ League of Women Voters, ERA Yes, No. 6, at 2 (1975).

¹⁰⁵ Quoted in ERA Campaign Kit, *supra* note 66, at 42; ERA Yes, *supra* note 104, at 2; In Pursuit of Equal Rights, *supra* note 66, at 17.

¹⁰⁶ 117 CONG. REC. 35,302 (1971) (remarks of Rep. Griffiths).

public or quasi-public hospital setting could well be compelled, under the ERA, to perform or participate in abortions, notwithstanding his or her religious objections. Rice concluded that while it is true that the adoption of the ERA could not legally prevent the subsequent adoption of a Human Life Amendment to prohibit abortion, the ERA's prohibition against sexual distinctions would survive the adoption of a Human Life Amendment and would becloud the interpretation of that amendment.¹⁰⁷

Professor Joseph Witherspoon of the University of Texas Law School likewise foresees the possibility of a direct impact of the ERA on abortion. In a 1975 memorandum on the Amendment, he wrote:

My main objection to ERA, however, is that it is at least ambiguous relative to whether or not it outlaws anti-abortion legislation and permits mothers and their physicians to kill their unborn children. It is my opinion that the Supreme Court might well construe ERA as providing an additional constitutional provision requiring the result it reached in its 1973 decision in *Roe v. Wade*.¹⁰⁸

Former Senator Sam Ervin is quoted by several sources as in agreement with the position that the ERA will consolidate the alleged right of women to abortion: "ERA will give every woman a Constitutional right to have an abortion at will."¹⁰⁹

Clarence Manion, former Dean of Notre Dame Law School, wrote: "With ERA in the Constitution, State anti-abortion laws, since they are designed on the basis of sex, would be a violation of the ERA . . . [as they are] essentially sexist and cannot be applied to men."¹¹⁰

Professor John T. Noonan, Jr. is concerned about the pro-abortion interpretation that would be given to the ERA by the federal judiciary. Professor Noonan warned:

The chief problem about ERA and abortion is that ERA would be interpreted by federal judges who in a great number of cases have shown tremendous sympathy for the ideology of abortion. With this amendment in force, these judges might well go on to, say, compel the funding of abortion. The Catholic sympathizers of ERA seem to me to read the amendment in the air, abstractly without sensitivity to the great political battle that is now going on about abortion and without awareness that the majority of the federal judiciary are members of what can be fairly be described as the pro-abortion party. It would, I think, be a great mistake to give this party a new legal tool with which to promote the abortion cause.¹¹¹

Among writers supporting the ERA, there is almost a total absence of any reference to the connection between the Amendment and abortion.

¹⁰⁷ Rice, *supra* note 27, at 2-3.

¹⁰⁸ Witherspoon, *supra* note 23, at 3.

¹⁰⁹ E. VOGEL, *ABORTION AND THE EQUAL RIGHTS AMENDMENT: A CALL TO COMMON SENSE!* 9 (1978); Schlafly, *supra* note 23, at 88.

¹¹⁰ Letter of Nov. 12, 1974, reprinted in VOGEL, *supra* note 109, at 8.

¹¹¹ Letter of John T. Noonan, Jr. (Aug. 10, 1978).

One legal author, Esther Helms Lexcen, discussing the subject, concluded: "The ratification of the Equal Rights Amendment could result in national legislation which would allow a pregnant woman to determine whether or not to have an abortion."¹¹²

As is well known, the forty-eight member Administrative Committee of the National Conference of Catholic Bishops on May 1, 1978, unanimously refused to authorize the NCCB Committee on Women in Society and the Church to issue a statement in support of the ERA. The abortion issue was a significant factor in the decision. In its statement the Administrative Committee expressed its belief that "it would not be appropriate for us to authorize issuance of a statement in support of the Equal Rights Amendment because of uncertainty as to its legal and constitutional consequences for family life, the abortion issue and other matters."¹¹³ Archbishop John R. Roach, who made the announcement of the Administrative Committee's decision, noted that the Church supported a human life amendment and added: "To an extent, the ERA could pave the way" to more abortions.¹¹⁴

IX. RIGHT TO PRIVACY AND THE ERA

One of the most controversial and emotionally-charged areas in the ERA debate relates to the right to privacy in such places as public toilets, locker rooms in public facilities and sleeping quarters in public institutions. Many proponents of the Amendment have tried to avoid the issue by a *reductio ad absurdum*. Thus, they have labeled it "ridiculous", a "red-herring", the "potty problem." Many opponents, aware of the emotional content of the question, have tended to magnify the issue to a degree greater than it deserves.

The leading scholars of both sides of the ERA realize that the right to privacy is an important question and, consequently, they try to deal with it in intellectual terms. The proponents argue that the Amendment will not necessitate, and perhaps not even permit, integration of male and female facilities for such activities as disrobing, sleeping and personal body functions. Nor will the Amendment require integration of such facilities in places of public accommodation, in prisons, in schools, or in the military.¹¹⁵

The supporters of the ERA admit that the Amendment calls for absolute equality. They argue, however, that in the case of acts of personal privacy, the basic principle of the ERA must be understood within the total framework of the Constitution. Accordingly, the Amendment would not prohibit a reasonable separation of persons of different sexes where privacy is involved. In the words of the Senate Report, two principles

¹¹² Lexcen, *supra* note 34, at 256.

¹¹³ N.Y. Times, May 2, 1978, at 18.

¹¹⁴ *Id.*

¹¹⁵ Bellamy, *supra* note 13, at 11; Emerson, *supra* note 11, at 231-32; Ferrell, *supra* note 7.

justify separation of the sexes under the ERA in this area of activities relating to personal privacy:

One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.

Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.¹¹⁶

The right of privacy first received constitutional recognition by the Supreme Court in *Griswold v. Connecticut*.¹¹⁷ In that decision, the Court held that a married couple's right of privacy in the conjugal relationship prohibited the state from legislating against their use of contraceptive devices.¹¹⁸ In a 1972 case, *Eisenstadt v. Baird*,¹¹⁹ the Supreme Court held that the right of privacy also protected unmarried persons' right to receive contraceptive information.¹²⁰ Again, in 1973, the two famous Supreme Court abortion cases, *Roe v. Wade*¹²¹ and *Doe v. Bolton*,¹²² held that it was the right of privacy which protected a woman, married or unmarried, during the first trimester of pregnancy from interference by the state in her decision whether to have an abortion.¹²³

It is admitted by supporters of the Amendment that the constitutional right of privacy has been utilized only in cases relating to contraception and abortion.¹²⁴ They argue, however, that since the Court has invoked this right of privacy for the protection of a person's bodily functions in the two important areas cited, there is "strong support to the belief that it will in fact use the right to decide the relatively less important questions of the constitutionality of sexually-segregated bathrooms and dormitories under the Equal Rights Amendment."¹²⁵

Professor Emerson and his co-authors insert, almost *obiter dictum*, an important qualification to the position of the proponents that the right of

¹¹⁶ S. REP. NO. 689, *supra* note 5, at 12; THE NEED FOR THE EQUAL RIGHTS AMENDMENT 14 (1973) (published by Common Cause).

¹¹⁷ 381 U.S. 479 (1965).

¹¹⁸ *Id.* at 485-86.

¹¹⁹ 405 U.S. 438 (1972).

¹²⁰ *Id.* at 454.

¹²¹ 410 U.S. 113 (1973).

¹²² 410 U.S. 179 (1973).

¹²³ *Id.* at 201; *Roe v. Wade*, 410 U.S. 113, 155, 164 (1973).

¹²⁴ When the right to privacy was first put forth as a constitutional right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), it would seem to have been primarily a right of conjugal privacy. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), it was extended beyond the marital limitations to become the right of privacy of anyone, married or unmarried, to procreate, thereby foreshadowing its use again in the later abortion decisions.

¹²⁵ BINGAMAN, *supra* note 6, at 34.

privacy will prohibit sexual integration of rest rooms and sleeping facilities. The scope of the right of privacy in the area of equal rights, the Emerson article states, is contingent on the contemporaneous customs and mores of the community: "Existing attitudes towards relations between the sexes could change over time — are indeed now changing — and in that event the impact of the right of privacy would change too."¹²⁶

Eminent legal scholars have taken an opposing position regarding the impact of the ERA on the right to privacy and have questioned the validity of the principles relied upon by the proponents for their position. Professor Paul Freund of Harvard testified that the ERA "would require that there be no segregation of the sexes in prison, reform schools, public restrooms and other public facilities."¹²⁷ Professor Philip Kurland of the University of Chicago Law School also agreed that the Amendment would nullify laws which require separate restrooms for males and females in public schools and public buildings "unless the separate but equal doctrine is revived."¹²⁸ This position is similar to that of former Senator Sam Ervin when he was chairman of the Judiciary Committee. Recognizing the Amendment's basic principle of absolute equality between the sexes, he concluded that the Amendment necessarily requires that "all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. Also, men and women will be thrown together with no separation on the grounds of sex in the military."¹²⁹

Opponents of the ERA do not accept the right of privacy as a clearly established constitutional right which prohibits sexual integration of restrooms, or dormitories, for example. Senator Ervin criticized the use of the constitutional right to privacy in this area on the ground that the proponents overlooked a constitutional law rule of interpretation to the effect that:

[t]he most recent constitutional amendment takes precedence over all sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exceptions for elements of publicly imposed sexual segregation on the basis of privacy between men and women.¹³⁰

Professor Hillman also criticizes the application of the right of privacy in this sphere since it is inconsistent with the absolute standard demanded by the proponents. If that absolute equality, he argued, is now to be accommodated to current mores in the area of public toilets and sleeping quarters under the guise of a right to privacy, then "the Amendment must become a less definitive and more equivocal source of equal treatment than first envisioned."¹³¹ The same writer then questions the right of privacy itself:

¹²⁶ *Constitutional Basis*, *supra* note 5, at 902.

¹²⁷ S. REP. NO. 689, *supra* note 5, at 46.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Hillman, *supra* note 31, at 832.

"In any case, the amorphous right of privacy which emerges from the six separate opinions in *Griswold* seems less than a clear validation of the continuance of sexually segregated restrooms despite ERA The Court was torn asunder in its effort to identify the constitutional source of the right and to define its essential character."¹³²

The tenuous nature and scope of the constitutional right of privacy was weakened by the 1976 Supreme Court decision, *Doe v. Commonwealth's Attorney*.¹³³ In this decision, the Court upheld a Virginia statute prohibiting sodomy by consenting adults which had been challenged as violative of the constitutional right of privacy. An extensive analysis of this case concluded that by this decision "the Supreme Court raised grave doubts about the scope of a constitutional right of privacy, and — perhaps deliberately — left doctrinal matters in this area in a state of profound uncertainty."¹³⁴

Both Professors Witherspoon and Freund found serious problems with the use of the right of privacy by proponents to justify an exception to their absolute standard of sexual equality under the ERA. If the right of privacy, though not expressed in the Amendment, constitutes a basis for exception from the standard of absolute equality between sexes, then it can be asked: when will the right prevail and when will it not? As an illustration, they point to the constitutional right of freedom of association which clearly enjoys a longer and firmer recognition than privacy. Yet, freedom of association may not be used to undercut the force of equal protection in the area of racial discrimination. If the right of privacy can justify separate restrooms and sleeping facilities, can it be invoked for separate physical education classes in public schools or separate cells for men and women in prisons?¹³⁵

The authors of *Sex Discrimination and the Law* foresee additional difficulties with the invocation of the right of privacy particularly when coupled with the qualification that it is dependent on current mores. They contend that the doctrine might encourage the proliferation of exceptions to the absolute equality required by the ERA beyond those contemplated by the proponents. Examples of such exceptions may be a requirement that only male policemen guard males or that only female nurses care for female patients.¹³⁶ The authors question the reference by the Senate Report to the "traditional power of the state to regulate cohabitation and sexual activity by unmarried persons" as a justification for laws that would require separate restrooms and other public facilities. They undermine the

¹³² *Id.* Chief Justice Burger, in his dissenting opinion in *Eisenstadt*, referred to the right of privacy's "tenuous moorings to the text of the Constitution . . ." 405 U.S. at 472 (Burger, C.J., dissenting).

¹³³ 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

¹³⁴ Jones, *Doe v. Commonwealth's Attorney: Closing the Door to a Fundamental Right of Sexual Privacy*, 53 DEN. L.J. 564 (1976).

¹³⁵ Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R. — C.L. L. REV. 234, 240-41 (1971); Witherspoon, *supra* note 23, at 2.

¹³⁶ CAUSES, *supra* note 2, at 160.

force of that power, by noting that "[c]onsistent interpretation of the Equal Rights Amendment requires that no state interest, not even the police power, be allowed to justify a law or regulation containing a sex-based classification."¹³⁷

The scope and force of this power can also be questioned today in the light of the Supreme Court's decision in *Eisenstadt* protecting from the state the right of unmarried persons to receive contraceptive information and the abortion decisions protecting married and unmarried women from interference by the state in their decisions whether or not to have an abortion. Granted that the right of privacy will be recognized and that it will justify separate but equal restrooms, locker rooms or sleeping quarters in public institutions, the question arises if this right can be waived. The authors of *Sex-Based Discrimination* feel that the Senate Report's reference to the traditional power of the state to regulate cohabitation and sexual activities of the unmarried was intended to discredit the argument that privacy is a personal right and therefore waivable.¹³⁸

A note in the Yale Law Journal discussed this question in reference to the impact of the ERA on the military and concluded:

Since privacy is an individual right, the possibility of waiver raises special problems. Presumably, if a group of service personnel waived their right to be housed separately, the Equal Rights Amendment would require that they be assigned quarters on the basis of sex-neutral criteria, which might result in voluntary coeducational sleeping facilities.¹³⁹

A Harvard Law Review article on the ERA contends that the right of privacy can be waived in certain circumstances and that the waiver might compel the state to integrate facilities.

If harm from the very fact of segregation were shown, a state might be required to provide sexually integrated facilities for those who want them (as by rearranging existing dormitory space so that students could freely choose between all-male, all-female, and mixed housing) or be forbidden from distinguishing facilities by sex at all.¹⁴⁰

X. ROMAN CATHOLIC CHURCH LEGISLATION AND MINISTRY AND THE ERA

In discussing the impact of the ERA on Church legislation and ministry, two major issues should be considered:

1. What effect would the passage of the ERA have upon the policy and activities of the Catholic Church?
2. What would be the effect of the Amendment on the Church's

¹³⁷ *Id.* at 927; see notes 176-77 *infra*.

¹³⁸ See *DISCRIMINATION*, *supra* note 96, at 111.

¹³⁹ Note, *The Equal Rights Amendment and the Military*, 82 *YALE L.J.* 1533, 1545 n.73 (1973), quoted in *CAUSES*, *supra* note 2, at 172.

¹⁴⁰ Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 *HARV. L. REV.* 1499, 1516 (1971) [hereinafter cited as *Sex Discrimination*].

policy of excluding women from the priesthood?

The passage of the ERA may raise important questions for the Catholic Church in its religious activity, its self-government and its non-ecclesiastical but related activities. Today, the Establishment Clause of the first amendment compels government to "stay out of the church's religious activities, its internal government, and the operations of the church hierarchy." With the passage of the ERA, the historical tradition and case law interpretation of disputes involving church law, wherein the federal courts have repeatedly warned state legislatures and state courts to refrain from interference, will not change. This nonintervention will apply even where church activities exclude women, so long as the exclusive activity is religious in nature. Nevertheless, there may be changes in areas such as education, where single sex institutions supported by the church could be forced to convert to coeducation or lose government funding.

The first amendment language that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"¹⁴¹ historically has stood for strict prohibition of governmental interference in ecclesiastical matters. It is firmly established that the first amendment severely restricts the courts in deciding religious disputes, "even if such controversies affect civil rights."¹⁴² As the Supreme Court wrote in a 1947 decision: "We could not approve the slightest breach."¹⁴³

In this highly sensitive area "only the gravest abuses endangering paramount interests" give occasion for permissible limitation via the state's police power. As an example, acceptable religious practice was held an insufficient justification to exempt Mormons from prosecution under the laws prohibiting polygamy.¹⁴⁴ The Court noted that it was not attempting to impose its views on the religious practices of Mormons, but rather that it was the state's paramount interest in marriage, a civil institution, that necessitated regulation.¹⁴⁵ Where public safety was involved, the Court of Appeals of Kentucky upheld the state's restrictions on certain harmful activities even though they were part of the religious service. This limited intervention was viewed only as affecting the freedom to act, and not the freedom to believe.¹⁴⁶

In the most recent Supreme Court case, the Court held that there must be a balancing between the state's legitimate interest in universal education and other fundamental rights and interests specifically protected by the Free Exercise Clause of the first amendment.¹⁴⁷ The parents

¹⁴¹ U.S. CONST. amend. I.

¹⁴² See *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); Abuhoff, *Title VII and the Appointment of Women Clergy: A Statutory and Constitutional Quagmire*, 13 COLUM. J.L. SOC. PROB. 257, 267 (1977).

¹⁴³ *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

¹⁴⁴ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁴⁵ *Id.* at 164-65.

¹⁴⁶ See *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942).

¹⁴⁷ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

of Amish school children challenged the state's authority to require education beyond the eighth grade as contrary to Amish religion and way of life. The Court acknowledged the state's traditional and accepted interest in universal formal education, but stated that even this paramount interest is not totally free from a balancing approach where it impinges on fundamental religious beliefs protected by the first amendment. The Court noted that the interests of the individuals had to be religiously grounded to be entitled to constitutional protection: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."¹⁴⁸ The record established at trial was held to support the claim that the traditional life-style of the Amish was not "merely a matter of personal preference, but one of deep religious conviction"¹⁴⁹ and therefore, it was incumbent upon the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. In the absence of such proof, the Amish children were permitted to terminate their public education after the eighth grade.¹⁵⁰

Matters of church government and internal administration historically have been placed beyond the jurisdiction of the civil authorities.¹⁵¹ There are no instances where government has regulated the religious doctrine of any group, nor has government intervened where church tribunals have determined disputes in accordance with that church's own procedures for self-governance. Property disputes which arose incidental to controversies between rival churches seeking recognition by the official church hierarchy were held to be non-reviewable by civil courts. Where the real issue was "which church was the recognized one, and therefore entitled to the property", the civil courts upheld the church action and would not become involved. In *Watson v. Jones*,¹⁵² two factions struggled for control of church property, and one had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing body of that church. The court ruled that civil courts were bound by the ecclesiastical ruling:

whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.¹⁵³

¹⁴⁸ *Id.* at 215.

¹⁴⁹ *Id.* at 216.

¹⁵⁰ *Id.* at 218.

¹⁵¹ See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁵² 80 U.S. (13 Wall.) 679 (1871).

¹⁵³ *Id.* at 727.

Similarly, in a dispute involving the property of the Russian Orthodox Church in New York, the Supreme Court held that "legislation that regulates church administration, the operation of the churches or the appointment of clergy . . . prohibits the free exercise of religion."¹⁵⁴

In the same decision, the Supreme Court commented on previous decisions relating to noninterference of the state in church matters by noting that throughout these opinions there exists "a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."¹⁵⁵

An obvious question arising from the ERA will be the role of women in the church. Will the state interfere with church policy regarding admission of women to the priesthood or to certain ecclesiastical offices or in performance of ceremonial rituals? The answer is "no." In cases already decided, the constitutional prohibition against civil interference with church doctrine and governance has been extended to the selection of the church ministry. In instances concerning dismissal from a ministry, removal from a particular pulpit, and a refusal of appointment to a chaplaincy based on Canon Law, courts invariably have held that no jurisdiction existed for civil court review of ecclesiastical action.

In a 1929 case, *Gonzalez v. Roman Catholic Archbishop*,¹⁵⁶ the petitioner, a Roman Catholic priest, brought an action to compel the Archbishop to appoint him to a chaplaincy. The Archbishop refused to appoint him on the ground that according to the canons of the new Code of Canon Law he did not then have the qualifications required for the chaplaincy. In upholding the decision of the Archbishop, the Supreme Court said:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.¹⁵⁷

In the later case of *Kedroff v. St. Nicholas Cathedral*,¹⁵⁸ the Supreme Court stated: "Freedom to select the clergy, where no improper methods

¹⁵⁴ See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952). The Supreme Court subsequently applied its *Kedroff* rationale in *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960).

¹⁵⁵ 344 U.S. 94, 116 (1952).

¹⁵⁶ 280 U.S. 1 (1929).

¹⁵⁷ *Id.* at 16. In *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Supreme Court held that the "arbitrariness" exception in *Gonzalez* was inconsistent with the first amendment mandate that the courts accept the decisions of the highest ecclesiastical tribunal on matters of doctrine and church government.

¹⁵⁸ 344 U.S. 94 (1952).

of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference."¹⁵⁹ The Court explained in a footnote that the "improper methods" meant the "fraud, collusion, or arbitrariness" exceptions in *Gonzalez*.¹⁶⁰ It can be safely concluded that, except for the limited circumstances given above, "the *Kedroff* opinion . . . grants religious organizations absolute freedom to select their clergy."¹⁶¹

In more recent cases, decided after the civil rights legislation and the landmark Supreme Court decisions of the 1960's, the courts continued to strike down state interference in clergy selection. The fifth circuit, for example, upheld a church's decision to oust its pastor, despite the pastor's claim that his civil rights were denied and that he was dismissed because of his views on race and the color of his wife's skin.¹⁶² The court stated that the fundamental question of who will preach from the pulpit of a church and who will occupy the parsonage is to be answered by the church and not a civil court: "[That] determination . . . is at the very heart of the free exercise of religion, which plaintiffs would corrode with an overlay of civil rights legislation and other parts of the Constitution. The people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes."¹⁶³ In view of the church's exclusive power over such questions, the court dismissed the plaintiff's claim that his own right to the free exercise of his religious beliefs was denied by the church's action, stating that he was not prevented from worshiping, but merely precluded from preaching to them. Though he might have a breach of contract action under state law, as any other employee of a church, the court stated, he has no right under the Free Speech Clause of the first amendment to be paid for preaching to a congregation that did not want to hear him. Moreover, if he was dismissed according to procedures established by the church, his remedy was to follow church procedure and appeal to the superior church authorities.

Similarly, legal precedent requires courts to refrain from interfering with church actions where a sex discrimination charge was brought under present federal law. In a Title VII (discrimination in employment) action, plaintiff McClure, a Salvation Army ordained minister, alleged that she received a lower salary and fewer fringe benefits than male ministers holding the same rank and responsibilities. The court refused to review dismissal of her claim on the grounds that Title VII did not cover the employment relationship between a church and its ministers, and that reading of Title VII to cover McClure's employment as a minister (other employees of the church in nonreligious work might be covered) would bring the statute into direct conflict with the first amendment: "The relationship

¹⁵⁹ *Id.* at 116.

¹⁶⁰ *Id.* at 116 n.23 (quoting *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929)).

¹⁶¹ Abuhoff, *supra* note 142, at 274.

¹⁶² *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974).

¹⁶³ *Id.* at 492.

between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."¹⁶⁴

Considering the facts in *McClure v. Salvation Army*, discussed above, and the court's unwillingness to intervene in the dispute, it is unlikely that any court would consider an action brought by women for admission to the Catholic priesthood. The Salvation Army allowed women into the ministry. Thus, a decision in *McClure* compelling equal treatment of both men and women holding similar positions in the church would not have touched upon the basic teachings of the church. In other words, the court could have held that the petitioner in *McClure* was arbitrarily denied these benefits, and the Salvation Army would have had no first amendment "freedom of exercise" claim since church doctrine and belief were not in issue. Because the *McClure* court did not rule that such a discriminatory practice was invalid even where it was not predicated on church dogma, a fortiori the courts would not invalidate sex-based discrimination in internal church administration where such action is predicated on and directly concerns a specific tenet of Catholic teaching:

In the Catholic Church, women are not permitted to become priests or to hold specified executive or decision-making posts in the Vatican. The Catholic Church's position has not waived even after the ministries of other churches have begun admitting women. The Vatican statement asserted that female priesthood is inconsistent with the fact that Christ was a man. For the celebrant of the Mass to successfully express Christ's role in the Eucharist, he must physically resemble Christ. Moreover, the exclusion of women from the priesthood is not only a traditional practice based on church history, but is held to be an important component of the Catholic Church's teaching.

There should be no apprehension that the ERA would cause judicial intervention in religious practices. Where such practices directly contradicted constitutional doctrine, there is already precedent for nonintervention. For example, until this past year, the Mormon Church welcomed blacks as members but did not admit them to the ministry. There is no instance of government intervention to change that policy.

The Catholic Church is involved in many activities beyond its primary religious one. It operates schools, hospitals and other social service institutions. It is the recipient of large amounts of government subsidies for these activities, and it receives a tax exemption on all property that it owns and on income it receives, as do other nonprofit religious, charitable, and cultural organizations. It is perhaps in these "support" activities where the ERA may have an impact on the church.

There is one reported instance where a church-run institution was denied government funds because its policies were "unconstitutional." In

¹⁶⁴ *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

Bob Jones University v. Johnson,¹⁶⁵ plaintiff, a Fundamentalist school in South Carolina, taught that the Bible forbids the intermarriage of the races. It therefore denied admission to unmarried nonwhites. The courts upheld the position of the Federal Veterans Administration, which refused to grant Veterans Benefits to students attending Bob Jones. This is a lower court decision and, although affirmed by the circuit court,¹⁶⁶ is the only decision of its kind. Moreover, as an example of the possible difficulty for the Catholic Church, it is readily distinguishable in that women are welcome to join the Catholic Church. The exclusion of women is from the ministry, not from membership. A closer analogy may be drawn from the experience of the Mormon Church which welcomes blacks as members, but until this past year did not accept them into the ministry. Unlike Fundamentalist institutions, Mormon churches and schools continue to enjoy their tax exemption and to receive government benefits that were granted to other church schools. If the fifth amendment did not affect Mormon churches by reason of their position on blacks serving as clergymen, the ERA will not affect the Catholic Church by reason of its position on women clergy.

The Catholic Church, although organized for religious and not commercial purposes, would nevertheless be considered an "employer" engaged in an industry affecting commerce. On this basis, it would be subject to legislation relating to social interests and policies. "Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes."¹⁶⁷

One of the leading scholars in favor of the ERA, Professor Ruth Bader Ginsburg of Columbia Law School, expressed her assurances that the Amendment would not conflict with church doctrine and practices, especially in relation to restrictions on women entering the ordained ministry. Asked whether ratification of the ERA would affect the tax-exempt status of churches and church schools if they continued to prohibit women from becoming ministers, Professor Ginsburg responded: "A high wall of separation between church and state is basic to our system. It appears virtually certain that, in the event of a challenge, courts would construe ERA in a manner that avoids collision with religious doctrine and practice relating to the ministry."¹⁶⁸

It is reasonable to predict that the ERA will have no direct effect on Catholic religious belief, church legislation on the ministry, internal church administration or other policies based on tenets of religious belief. The Amendment may have an indirect effect on policies and activities of church-administered institutions (schools, hospitals, social service agencies). It is likely, however, that such an effect would be manifested mainly

¹⁶⁵ 396 F. Supp. 597 (D.S.C. 1974).

¹⁶⁶ 529 F.2d 514 (4th Cir. 1975).

¹⁶⁷ McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972).

¹⁶⁸ Letter from Professor Ruth Bader Ginsburg to Barbara Burton of the League of Women Voters (June 10, 1975).

by the denial of government aid programs to such religious institutions. That is, while the ERA would not dictate a change in the programs or practices of any of these agencies, it may result in the denial of federal funding to them. Given the existing precedent, however, it is unlikely that the Amendment would have any effect on tax exemption, curriculum or selection of clientele. As admission to the priesthood and other ecclesiastical offices restricted to clerics is determined by criteria predicated on religious beliefs, it would be unaffected by the ERA.

XI. IS THE ERA THE PROPER VEHICLE FOR REFORM?

While few dispute the lofty aims of the ERA, many have contended that something less than a constitutional mandate can achieve its goal. As Professor Paul A. Freund wrote: "The issue has always been over choice of means, not over ends."¹⁶⁹

There are three possible vehicles whereby unjust sex discrimination may be eliminated: the legislative approach through the revision of federal and state laws; the judicial approach through the application of the equal protection clause of the fourteenth amendment (and its equivalent in the fifth amendment); or the constitutional amendment.

The primary argument for the necessity of an amendment can be summarized in a syllogism:

There is still extensive sex discrimination in current law in the United States.
Neither legislative changes nor judicial action has removed the discrimination.

Therefore, a constitutional amendment is necessary.

The chief counterargument of the opponents can likewise be encapsulated in the following syllogism:

There are vestigial laws which still impose unjust discrimination on account of sex.

Such legal discrimination can be eliminated by legislative changes and judicial action.

Therefore, a constitutional amendment is not necessary.

Much of the dispute over the means of achieving equality centers on the interpretation of Equal Protection Clause of the fourteenth amendment and the different tests applied by the Supreme Court to determine if there has been a violation of this Clause. A few basic observations on this amendment and the judicial criteria will help to understand the opposing positions.

The Equal Protection Clause of the fourteenth amendment, ratified in 1868, reads: "Nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws."¹⁷⁰ In deciding whether or not there has been a violation of this Clause, the Supreme Court has devised

¹⁶⁹ Freund, *supra* note 135, at 234.

¹⁷⁰ U.S. CONST. amend. XIV.

two major tests: The "minimum scrutiny" or "reasonableness" test, and the "strict scrutiny" test.

"Minimum Scrutiny" or "Reasonableness" Test

Under the "minimum scrutiny" or "reasonableness" test, a court will uphold a statute as constitutional if two criteria are met: The purpose of the statute is a valid one, and the classifications made or the persons to which the law applies are "reasonably" related to the purpose for which the statute was passed.

Because of the vast police powers of the states, the first criterion of the validity of purpose is almost always fulfilled. The second criterion is met if the court itself can imagine any reason whatsoever for the classification made in a law.

Under this lenient test, the person attacking the constitutionality of an act has the burden of proving that the law is completely devoid of any reason for its classification of the persons subject to the law. Since the court can almost invariably imagine some reason to provide at least a minimum rational basis why the state may have enacted the statute in question, a state law is almost always sustained against an equal protection challenge under the "minimum scrutiny" or "reasonableness" test.

"Strict Scrutiny" Test

Under the "strict scrutiny" test, the state has the burden of proving both that it had a "compelling state interest" for enacting the statute, and that classification of persons to whom the law applies was necessary to fulfill the state's "compelling interest."

Because of the heavy burden of proof placed on the state, a law challenged under this "strict scrutiny" test is almost always declared unconstitutional.

This test is generally applied for cases involving "suspect classifications" and "fundamental interests." The Supreme Court has thus far labeled as "suspect classifications" those based on such qualities as race, alienage and nationality. It has not included sex as a "suspect classification." Identified by the Court as among "fundamental interests" are voting, hearings for the criminally accused, interstate travel, and probably first amendment liberties.

History of the Equal Protection Clause and Sex Discrimination

After the ratification of the fourteenth amendment in 1868, the Supreme Court, using the "minimum scrutiny" or "reasonableness" test, upheld a number of statutes which differentiated between men and women.¹⁷¹ Not until over a hundred years later, in 1971, did the Court hold

¹⁷¹ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

a sex-based classification unconstitutional. In the landmark case of *Reed v. Reed*,¹⁷² the Supreme Court held as unreasonable and in violation of the Equal Protection Clause of the fourteenth amendment an Idaho statute which gave preference to men over women as administrators of a decedent's estate.

This was followed in 1973 by *Frontiero v. Richardson*¹⁷³ in which the Supreme Court, in an 8-1 decision, held unconstitutional an Air Force regulation which automatically granted dependency benefits to wives of male officers but gave similar benefits to husbands of female officers only if they proved actual dependency on their wives. Significant in this decision was the fact that four of the justices held sex to be a "suspect classification" and to be treated as such in future cases.

In 1974, the Supreme Court applied the "reasonableness" test to uphold two statutes involving sex-based classifications. In *Kahn v. Shevin*,¹⁷⁴ the Court upheld a Florida law which awarded a \$500 property tax exemption to all widows but not to widowers. In *Geduldig v. Aiello*,¹⁷⁵ the Court sustained a California statute which excluded from unemployment insurance all disabilities related to pregnancy. The majority held that this exclusion did not involve discrimination based on sex.

In 1975, the Supreme Court overruled its prior holding which permitted certain exemptions from jury service in favor of women only.¹⁷⁶ By its decision in *Taylor v. Louisiana*,¹⁷⁷ the Court struck down as unconstitutional a jury system which automatically exempted from jury duty all women but required all men to register for service. In that same year, the Court applied the "reasonableness" test in *Schlesinger v. Ballard*¹⁷⁸ and upheld a regulation which accorded to female Navy officers three years more than the time granted to male officers in which to receive a promotion or be discharged. *Weinberger v. Wiesenfeld*¹⁷⁹ was the third sex-discrimination case of 1975. In this case, the Court declared unconstitutional a Social Security statute which restricted survivors' insurance benefits to mothers of dependent children and allowed none for fathers in similar circumstances. The last sex-discrimination case of 1975 was *Stanton v. Stanton*.¹⁸⁰ In this case, the Court, applying the "reasonableness" test, held unconstitutional a Utah statute setting different ages of majority for males and females.

In the 1976 case of *Craig v. Boren*,¹⁸¹ the Supreme Court declared unconstitutional an Oklahoma statute that established a minimum drink-

¹⁷² 404 U.S. 71 (1971).

¹⁷³ 411 U.S. 677 (1973).

¹⁷⁴ 416 U.S. 351 (1974).

¹⁷⁵ 417 U.S. 484 (1974).

¹⁷⁶ *Hoyt v. Florida*, 368 U.S. 57 (1961).

¹⁷⁷ 419 U.S. 522 (1975).

¹⁷⁸ 419 U.S. 498 (1975).

¹⁷⁹ 420 U.S. 636 (1975).

¹⁸⁰ 421 U.S. 7 (1975).

¹⁸¹ 429 U.S. 190 (1976).

ing age of 21 for males and 18 for females. The Court held that "classifications by gender must serve important governmental objectives and must be related to the achievement of those objectives."

In all of these cases, the Supreme Court applied the "minimum scrutiny" or "reasonableness" test. The high-water mark was *Frontiero v. Richardson* where the Supreme Court stopped one vote short of declaring sex a "suspect classification." It was after *Frontiero* that the movement for equal rights for women became convinced that sex would not be designated a "suspect classification" and pressed for a constitutional amendment as the only solution for equality of rights.

Arguments in Favor of a Constitutional Amendment as Effective Vehicle

The following survey is illustrative of the arguments put forth by the leading scholars in favor of the ERA as the most appropriate vehicle for achieving equality between the sexes.

1. Professor Thomas I. Emerson and other authors:¹⁸²
 - a. An examination of the decisions of the Supreme Court demonstrates that there is no present likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality of rights for women.
 - b. There is need for a single coherent theory of women's equality before the law, and for a consistent nationwide application of this theory. This is scarcely possible through legislative change alone, for the creation of basic policy would be divided among multiple federal, state and local agencies.
 - c. Once passed, the Amendment will provide an immediate mandate, a nationally uniform theory of sex equality and the prospect of permanence to buttress efforts to end discrimination.
2. Majority Report of Senate Committee on the Judiciary:¹⁸³
 - a. Some legislative progress has been made toward equal rights but not enough to wipe out all discrimination against women in state and federal law.
 - b. The Supreme Court has consistently refused to apply the fourteenth amendment to discrimination based on sex with the same vigor it applies the amendment to distinctions based on race.
 - c. We cannot overlook the immense symbolic importance of the ERA. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law.
 - d. The Committee concludes that because of the pervasive legal sex discrimination which now exists, and because of the inadequacy of legislative and judicial remedies, there is a clear and undeniable need for the ERA.
3. Ruth M. Ferrell:¹⁸⁴

¹⁸² See *Constitutional Basis*, *supra* note 5, at 875, 883-84.

¹⁸³ See S. REP. NO. 689, *supra* note 5, at 6-7, 11.

¹⁸⁴ See Ferrell, *supra* note 7, at 854-63.

- a. The inadequacy of the legislative method without the impetus of a constitutional amendment is apparent. The piecemeal revision or repeal of the multitude of statutes, rules and regulations which would be required is subject to endless delay and uncertainty.
 - b. Without a constitutional amendment, there would be nothing to prevent retrogression and enactment of discriminatory laws in the future.
4. Authors of *Women's Rights and The Law*:¹⁸⁵
 - a. In light of the erratic history of the Supreme Court, the need for the ERA as a clear and uncompromising standard of sex equality is apparent.
 - b. The ERA will set a uniform standard of equality across the nation, so that men and women will not be subject to treatment held lawful in one state and unlawful in its neighbor.
 - c. The ERA is a mandate for the states to undertake or complete this process of reform.
 - d. The ERA will preclude the need for a case-by-case definition of equality with its unpredictability.
 - e. The ERA will assure the women of this country a permanent commitment to equal treatment of the sexes.
 5. *Harvard Law Review Note on the ERA*:¹⁸⁶
 - a. The most compelling argument for a constitutional amendment is that, unlike a statute, its ability to reach deep into the well of state law is unquestioned. Potentially, it can sweep away every vestige of legal sex discrimination.
 - b. An Amendment is permanent, highly symbolic.
 - c. The Amendment guarantees a hearing in the courts for everyone who claims to be oppressed by even the most obscure and seemingly trivial legal sexual distinctions.

Arguments in Opposition to a Constitutional Amendment as the Appropriate Vehicle.

Eminent scholars have expressed their reasons in opposition to a constitutional amendment as the most effective method for achieving the eradication of unjust sexual discrimination. The following survey is representative of the arguments expressed by these scholars.

1. Former Senator Sam Ervin:¹⁸⁷
 - a. Since 1971, in at least eight cases, the Supreme Court has held in substance that any law which makes any distinction whatever between the legal rights and responsibilities of men and women is unconstitutional unless the distinction is based upon reasonable grounds and is

¹⁸⁵ See *WOMEN'S RIGHTS*, *supra* note 7, at v-vi.

¹⁸⁶ BINGAMAN, *supra* note 6, at 15-16; Bayh, *supra* note 14, at 4-11; Conlin, *supra* note 35, at 321-31; Dorsen & Ross, *supra* note 25, at 216-20; *Sex Discrimination*, *supra* note 140, at 1519.

¹⁸⁷ Sen. Ervin, Jr., *Why the Equal Rights Amendment Should be Rejected* (Statement of Jan. 4, 1977 to North Carolina General Assembly), reprinted in *THE PHYLLIS SCHLAFLY REPORT*, vol. 10, No. 9, Apr. 1977; S. REP. No. 689, *supra* note 5, at 29-31.

designed to protect women in some role they enact in life. It is submitted that these holdings of the Court afford a far better way to satisfy the wishes of advocates of ratification of the ERA, whose approach would invalidate any law making any legal distinctions between men and women.

b. Recent acts of Congress, recent executive orders of the President and recent regulations of federal departments and agencies prohibit discrimination on the ground of sex in education, employment, financing, housing, public accommodations, and all other federal activities. These same acts, orders and regulations forbid states and their subdivisions and all private persons to discriminate on the basis of sex in any activity of any nature which is financed in whole or in part by federal funds. The result is that invidious discrimination against women is illegal in virtually all areas of American life.

c. The states have enacted multitudes of laws to buttress the federal laws, orders and regulations outlawing discrimination on the basis of sex. Virtually all the states have repealed their former laws discriminating against women in major respects. There may still be remaining in some states insignificant laws which discriminate against women and which the states would expunge if brought to their attention. It is submitted that the ERA is not needed to nullify any such remaining laws.

d. Recent decisions of the Supreme Court interpreting the Due Process Clause of the fifth amendment, the Due Process Clause and Equal Protection Clause of the fourteenth amendment, and other constitutional provisions and recent federal and state laws nullifying invidious legal discriminations against women make it manifest that the ERA is totally unnecessary.

2. Professor Paul A. Freund:¹⁸⁸

a. The Equal Protection Clause together with the ample legislative powers of Congress, is the best avenue to achieve meaningful equality of the sexes under law. This approach is greatly to be preferred to one that would force all the manifold legal relationships to men and women, from coverage under selective service to the obligation of family support, into a mold of mechanical unity.

b. Even if the Amendment were adopted, legislation on the state and federal level would be necessary to carry out its myriad applications.

c. If anything about this Amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen.

d. It may be suggested that the Amendment would serve importantly as a symbol — a symbol that the nation has made a commitment to

¹⁸⁸ S. REP. NO. 689, *supra* note 5, at 30; Freund, *supra* note 135, at 236-42; Statement of Paul Freund, Roscoe Pound and Other Lawyers and Legal Scholars in Opposition to the ERA, 118 CONG. REC. 9096 (1972).

justice for women under law. If, however, the Amendment is not only a needless misdirection of effort in the quest for justice, but one which would produce anomalies, confusion, and injustices, no symbolic value could justify its value.¹⁸⁹

e. To eliminate discrimination based on sex, a few significant decisions of the Supreme Court in well-chosen cases under the fourteenth amendment would have a salutary effect. In addition, Congress can exercise its enforcement power under the fourteenth amendment to identify and displace state laws that in its judgment work an unreasonable discrimination based on sex. Finally, all discrimination, private or governmental, is subject to the paramount power of Congress under the commerce clause.

3. Professor Philip B. Kurland:¹⁹⁰

a. The proper function of an amendment is to be the necessary means for protecting minorities from being imposed on by the majority and for protecting the unenfranchised against imposition by the enfranchised. Women, however, are neither a minority nor unenfranchised. Therefore, the most appropriate means for bringing about the desired changes would be by appropriate legislation rather than constitutional amendment.

b. There can be little doubt that the fourteenth amendment and the commerce clause give the national legislature more than adequate authority to ban discrimination on the basis of sex.

c. A sound program of legislative reforms would do more, especially under the mandate now received from the Supreme Court in *Reed v. Reed*,¹⁹¹ to eliminate more of the grievances that women have against their roles frequently imposed on them in our society. Legislation can get at specific problems in a way that no constitutional provision can.

4. James J. Kilpatrick:¹⁹²

a. The ERA is unnecessary. It is a sound proposition that a constitutional amendment should be viewed as a political act of last resort. If time should demonstrate the unwisdom or the undesirability of the ERA, only a monumental effort could achieve its repeal. Ratification is radical surgery. If any other effective way can be found to cure a political illness, surely the alternatives ought to be tried first. Such alternative remedies already are being applied. By legislative enactment and by court decision, most of the invidious and unwarranted discrimination against women can be corrected.

b. The Amendment is uncertain. More than a hundred years have passed since there has been a constitutional amendment as vague and ambiguous as the pending ERA.

¹⁸⁹ More and more proponents of the ERA are agreeing that the Amendment will be largely symbolic since most sex-discriminatory legislation has been eliminated or neutralized. Its direct effect will be mainly to eradicate the vestiges of any legislation that might be considered sexually discriminatory. See generally *WOMEN'S RIGHTS*, *supra* note 7, at 11; E. CARY & K. PERATIS, *WOMEN AND THE LAW* 50 (1970); *Sex Discrimination*, *supra* note 140, at 1519.

¹⁹⁰ S. REP. NO. 689, *supra* note 5, at 31; Kurland, *supra* note 20, at 243, 250.

¹⁹¹ 404 U.S. 71 (1971).

¹⁹² Kilpatrick, *The Case Against ERA*, *NATION'S BUS.*, Jan. 1975, at 9-10.

c. But as a matter of law — as a matter of actual application — what is meant by a constitutional commandment that “equality of rights under the law” shall not be denied or abridged on account of sex? No one knows.

5. Senator Orrin G. Hatch:¹³³

a. In order to end all discriminations against women, it is not necessary to abolish all legal distinctions between men and women. Yet this is precisely what the amendment seeks to accomplish. By abolishing all legal distinctions between men and women, the ERA also abolishes a number of rights and privileges which women now enjoy.

b. Because the proposed ERA speaks in such broad terms, admitting to no variations, it is generally agreed among leading constitutional scholars that there is no way of discerning the ultimate reach of the Amendment.

c. In sum, the ERA is unnecessary because it has already been preempted by major changes in the law and in judicial decisions which grant equal rights to women. It is undesirable because it deprives women of many rights which they now possess, imposes new obligations upon them which are neither wanted nor needed, and usurps the powers of the states by transferring vast powers to the federal government.

6. *Harvard Law Review* Note on the ERA:¹³⁴

a. There are several advantages to a legislative approach. First, legislation can resolve particular problems without any obligation to resolve the next problem in precisely the same way. Second, legislation is able to reconcile the principle of no sex discrimination with competing values such as privacy and claimed benefits of distinction. Finally, legislation can easily be modified in the light of experience.

b. In the Amendment's very sweep and power, lie its most serious weaknesses.

i. Unlike a statute, it cannot distinguish as easily between those laws we wish to eliminate and the few we may wish to keep.

ii. An amendment delegates to a single individual the power, through the courts, to work out the details of its governing principal, even if his views conflict with the desires of a majority of those affected. The majority of women may, for example, favor retaining sex-distinguishing laws which restrict their working conditions or protect their privacy. A single dissenting member of the class would, under an amendment, have the potential power to invalidate such laws. A broadly worded statute would also delegate to a single disaffected individual the power to achieve results out of proportion to his political power. If the results of such private litigations are displeasing, however, Congress can amend the statute. Correcting the results of individual litigation under an amendment is far more difficult.

¹³³ Hatch, *The Intelligent Woman's Guide to the Equal Rights Amendment*, Fall 1977, at 11-12, 15-16, 18.

¹³⁴ *Sex Discrimination*, *supra* note 140, at 140. See also Rice, *supra* note 27, at 1-2; Witherpoon, *supra* note 23, at 3; *Positive Panacea*, *supra* note 41, at 957-89.

APPENDIX

Canons in the Code of Canon Law Differentiating Between Men and Women

- Canon 13 The effect of particular law would affect women in a special way by reason of their ability to acquire a domicile.
- Canon 58 Can a woman execute a rescript by mandate?
- Canon 80 Women cannot grant dispensations since they do not have jurisdiction.
- Canon 88 The canonical age of puberty is defined in different ways for males and females.
- Canon 90 Inequality of law regarding quasi-domicile and domicile.
- Canon 93 Inequality of law concerning domicile.
- Canon 98 Inequality of law regarding transfer of rite on occasion of marriage.
- Canon 106 There are no rules of precedence for women.
- Canons 108-486 The section on Clerics reveals a general inequality.
- Canon 118 Crucial canon for limitation on jurisdictional power.
- Canon 133 A warning established in law against relationships with women.
- Canon 145 Women cannot hold an ecclesiastical office. (*Cf.* Canon 197).
- Canon 153 Women cannot be promoted to office.
- Canon 154 Women cannot have office involving care of souls.
- Canon 198 A woman cannot be an Ordinary.
- Canon 210 Women cannot have power of Orders.
- Canon 223 A woman cannot be a Canon Theologian.
- Canon 223 Women Superiors (example — Leadership Conference of Women Religious) are not to be invited to Councils.
- Canon 232 Women cannot be made Cardinals.
- Canon 265 Can a woman be a Legate of the Holy See?
- Canon 282 Women cannot be invited to Plenary and Provincial Councils.
- Canon 286 Women Religious have no part in Plenary or Provincial Councils.

- Canon 297 Women are not given the duty to care for souls.
- Canon 302 It appears that the Missionary Council is to be composed only of males.
- Canon 305 It appears that there is no incentive given for female vocations.
- Canon 309 A Pro-Vicar or Pro-Prefect can only have a male as his delegate.
- Canon 323 If a woman should be able to receive jurisdiction in the Church can she be an Abbess or Prelate Nullius?
- Canon 329 Women cannot be Bishops because of lack of Orders.
- Canon 358 Women are excluded from Diocesan Synods.
- Canon 360 The Synodal Commissions cannot be composed of females.
- Canon 367 A woman cannot be Vicar General.
- Canon 372 A woman cannot be Chancellor.
- Canon 372 Can a woman be a Vice-Chancellor?
- Canon 373 Women cannot be notaries in criminal cases of clerics.
- Canon 385 Can women be Synodal Examiners or Parish Consultors?
- Canon 391 The Chapter is limited to College of Clerics thereby excluding women.
- Canon 423 Women cannot be Diocesan Consultors as law demands "sacerdotes."
- Canon 429 Women cannot supply for an impeded Bishop (*virum ecclesiasticum*).
- Canon 432 Can a woman be an *oeconomus*?
- Canon 434 Women cannot be Vicar Capitular.
- Canon 445 Women cannot be Vicars Forane.
- Canon 451 Women cannot be pastors, or equivalent.
- Canons 471-78 Women cannot be any parochial vicar.
- Canon 479 Women cannot be Rector of a Church.
- Canon 488 A lay woman may never be a member of clerical religion, while a lay male can be such a member.
- Canon 497 A need for special *beneplicitem* of the Holy See to set up a House of Monasteries of Nuns.

- Canon 497 Houses of Women Religious do not have any privileges of having a connected Church or public Oratory.
- Canon 498 A Monastery of Nuns can be suppressed without Apostolic approval but it is needed for the establishment of such a Monastery.
- Canon 500 With special indult, Women's Institutes may be subjected to Men's Institutes.
- Canon 501 Women Religious are excluded from any ecclesiastical jurisdiction in any forum.
- Canon 503 Women Religious may not constitute Notaries on their own.
- Canon 506 Women cannot preside at election of their own Superior General.
- Canon 510 Bishop must countersign Quinquennial Report of Women Religious.
- Canon 512 The Ordinary must visit Nuns' Monasteries and the rules differentiate between Nuns (moniales) and Monks (monachi).
- Canon 517 Women Religious do not deal with Holy See through their own Procurator General, as male religious can.
- Canons 518-30 There are differences in appointment and availability of confessors for men and women religious.
- Canon 533 Women Religious need prior consent of Ordinary for deposit of certain funds.
- Canon 534 Nuns and diocesan religious need consent of Ordinary for alienation.
- Canon 535 An account of administration must be made to the Ordinary of the place for Women Religious.
- Canon 539 Postulancy is required for all Women Religious.
- Canon 544 Women novices do not have to present testimonial letters of Bishop of origin — men do.
- Canon 544 Women need different letters of reference.
- Canon 547 Nuns need a dowry.
- Canons 550-51 The Ordinary is involved in supervising the dowry of nuns.
- Canon 552 The Ordinary must certify freedom to enter the novitiate and profession for women religious — not for men.

- Canon 566 There are differences in establishing confessors of women novices.
- Canon 580 The permission of the Ordinary of the place is needed for nuns to change their wills.
- Canon 597 Nuns need the judgment of the Ordinary to determine the cloister limits.
- Canon 598 Women are excluded from male cloister.
- Canon 600 No one may enter a female cloister without permission of the Holy See but exceptions are more numerous.
- Canon 601 Nuns may not leave the cloister without permission of the Holy See.
- Canon 602 There are architectural norms for nuns' cloister.
- Canon 603 The Ordinary of the place has vigilance over nuns' cloister.
- Canon 607 Women Religious may not go out alone.
- Canon 609 Parishes may not be established in the churches of female religious.
- Canon 613 There is inequality in communicating privileges among men and women in the same order.
- Canon 615 Nuns not subject to male regular Superiors are also not exempt from Ordinary of the Place (nuns may not be exempt at all).
- Canon 623 Special caution when entrusting collection of alms to women religious.
- Canon 643 There is inequality regarding money when leaving the Community.
- Canon 645 The return of Fugitive or Apostate nuns is the concern of the Ordinary of the Place.
- Canon 647 Nuns in temporary vows are dismissed by Ordinary of the Place.
- Canons 651-52 There are different rules for dismissal of Religious Women in perpetual vows from rules governing men's dismissals.
- Canon 709 Women are limited in their manner of belonging to confraternities.
- Canon 712 Men may not join associations erected with Churches or Oratories of Religious Women.

- Canon 742 A preference of a male over a female as minister of baptism.
- Canon 756 A preference indicated for the particular rite of the male.
- Canon 777 There are different norms for admitting parentage of father and mother.
- Canon 802 Women cannot offer Mass.
- Canon 813 Women cannot minister at altar.
- Canons 871-72 Women may not be ministers of penance.
- Canon 876 There is special delegation required for confessions of Women Religious.
- Canons 909-10 There is a special place established for confessions of women.
- Canon 938 Women may not annoint.
- Canons 948-1011 The ordination canons (especially 968) as regards minister and recipient limited to men.
- Canon 1020 Special caution when determining women's free consent to marriage.
- Canon 1067 There is divergence in the impediment of age with regard to males and females.
- Canon 1074 The impediment of raptus — presumes against males only.
- Canon 1094 The canonical form demands a male as the official minister since it demands a priest.
- Canon 1097 There is an inequal element of choice for the place of marriage since the law favors the parish of the female.
- Canon 1112 A married woman cannot choose her own canonical effects, *e.g.*, domicile, name.
- Canon 1125 Privilege of Faith cases which permit in certain circumstances a man to choose upon baptism to live with one of several wives. No equal provision for women.
- Canon 1143 Women can receive the nuptial blessing only once.
- Canon 1146 Women cannot administer sacramentals.
- Canon 1205 Only noble women can be buried in Churches.
- Canon 1209 There is a discrimination of the question of burial site — clerics as opposed to all others.

- Canon 1223 Affirms a strict right of wife to select her own Church of funeral and cemetery.
- Canon 1225 There is a restriction of choosing the Church of burial for nuns.
- Canon 1229 A wife is to be buried in the tomb of her husband.
- Canon 1262 Legislates separate places in Church according to gender.
- Canon 1262 There are different dress codes for men and women in Church.
- Canon 1264 Women Religious should not be seen while singing.
- Canon 1267 Nuns may not reserve the Blessed Sacrament within the Monastery or choir but only in their Church.
- Canon 1283 Women cannot receive faculty to authenticate relics.
- Canon 1290 Women are not to lead processions.
- Canon 1291 Corpus Christi procession is limited to male participants.
- Canon 1327 Bishops may select only worthy men to assist in the office of preaching.
- Canon 1342 Women may not preach formally.
- Canon 1359 Women are excluded from Seminary Boards.
- Canon 1360 Women are excluded as Seminary Professors.
- Canon 1393 Women cannot be ecclesiastical censors.
- Canon 1442 Only clerics may receive a benefice, thereby excluding women.
- Canon 1456 Wife can exercise the ius patronatus on her own.
- Canon 1520 The financial administrative council is composed of men only.
- Canon 1521 Other administrative boards are composed only of men as needed in individual cases.
- Canon 1573 Women cannot be Officialis or Vice Officialis.
- Canon 1574 Women cannot be Pro-synodal Judges.
- Canon 1575 Women cannot be Consulting Assessors.
- Canon 1581 Women cannot be Auditors.
- Canon 1589 Women cannot be Defenders of the Bond or Promoters of the Faith.
- Canon 1598 Women cannot be Auditors of the Holy Roman Rota.

- Canon 1770 Nuns are not to come to Tribunal to give testimony; they are to be heard in their monasteries.
- Canon 1979 Special emphasis on the physical examination of women.
- Canon 1980 Special rules for examination of women.
- Canons 1993-98 Involve cases of Sacred Orders thereby excluding women.
- Canon 2004 Women can act in beatification process only through Procurator; men can act on their own.
- Canon 2004 Procurator in canonization causes must be a priest, therefore male.
- Canon 2017 The Notary or Chancellor in canonization causes must be a priest.
- Canon 2033 "Virorum illustrium" covers women but indicates chauvinism in wording.
- Canon 2047 There is a special norm for the beatification of female religious.
- Canon 2176 The warning of Canon 137 against relationships of Clerics with suspect women (not men) is given a special process.
- Canon 2214 Sexist language ("filios et fratres").
- Canon 2218 Sex of the delinquent is a factor in the determination of ecclesiastical penalties.
- Canon 2342 There are different norms for the violation of the cloisters of men as distinct from women.
- Canon 2353 It seems that only men can incur the penalties attached to the crime of raptus.
- Canons 2412-14 Special rules for the Superior Generals of Women Religious (Antistitae).

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