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Wilfred R. Caron

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# THE EQUAL RIGHTS AMENDMENT: A LEGAL ASSESSMENT

WILFRED R. CARON\*

## I. INTRODUCTION

The Equal Rights Amendment (ERA) is rooted in the proposition that one's measure of justice under the law should not be diminished by the fact that the person is male or female. It would engraft on the Constitution a discrete application of the guarantees of the fifth and fourteenth amendments that all are entitled to "equal protection" under law.

In 1972, ERA's general purpose was explained as follows in the report of the Senate Committee on the Judiciary:

The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women . . . . The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected. And the Amendment only requires equal treatment of individuals.<sup>1</sup>

As a co-sponsor, Senator Hatfield offered much the same explanation when ERA was reintroduced in the Senate on January 26, 1983.<sup>2</sup> Such explanations are useful guides to the general intent of ERA, but they do

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\* General Counsel, United States Catholic Conference.

<sup>1</sup> S. REP. No. 689, 92d Cong., 2d Sess. 2 (1972). Professor Thomas I. Emerson, a recognized expert on ERA, testified in 1971 that the "basic premise of the equal rights amendment is that sex should not be a factor in determining the legal rights of women, or of men." *Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 401 (April 2, 1971).

<sup>2</sup> Senator Hatfield explained:

"There is little debate about the general intent of the proposed amendment. Essentially, it requires that the federal government and all State and local governments treat each person, male and female, as an individual. It applies only to governmental action; it does not affect private action or the purely private social relationships between men and women. By eliminating gender-based classifications in the law which specifically deny equality of rights, every Federal or State law which makes a discriminatory distinction would be invalid under the equal rights amendment."

129 CONG. REC. S535 (daily ed. Jan. 26, 1983) (statement of Sen. Hatfield).

not lay bare the legal complexities which will ultimately shape its precise effects through the judicial interpretive process.

The laws of the several states, in their diversity, have reflected the views of society with respect to the "roles" of women and men. Whether the product of a protectionist view or actual bias, the law has failed at times in its duty of fairness. However, an objective response to this historical reality will also recognize that the enlightenment of the day has led to state and federal legislation which seeks earnestly to strip away unjust distinctions based on sex.

Clearly, the evolutionary process is incomplete, despite significant strides in the law, including state ERAs and federal and state legislation targeted against sex discrimination. For example, federal statutes require equal pay for equal work, and prohibit discrimination on the basis of sex in public and private employment and in education programs receiving federal financial assistance.<sup>3</sup> However, remedial federal statutes are perceived by many as a piecemeal approach of great uncertainty because they are subject to amendment and uneven administrative enforcement. Similarly, state ERAs do not provide a uniform, national solution because the majority of states have not adopted an ERA and, even where they exist, interpretations can vary from state to state.<sup>4</sup>

A federal ERA is considered necessary in order to achieve a durable, uniform resolution to a national inequity. Its proponents are persuaded that the equal protection guarantees of the fifth and fourteenth amendments are inadequate because, in their view, they have not been construed by the judiciary with sufficient rigor in reviewing statutory and other classifications based on sex. In essence, ERA proposes to superimpose a more stringent standard upon constitutional equal protection guarantees in the discrete area of sex-based classifications. Whether it would be a question worthy of most thoughtful reflection in view of the invalidation of statutes which have discriminated on the basis of sex, experience with comparable state ERAs, and the political and philosophical realities in our contemporary society.

## II. THE JUDICIAL INTERPRETIVE PROCESS

The ERA will mean what the judiciary declares it means, within the somewhat flexible bounds of the canons of construction (discussed below). The ultimate interpretive authority will be the United States Supreme

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<sup>3</sup> See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1982).

<sup>4</sup> See 129 CONG. REC., *supra* note 2, at S539 (statement of Sen. Cranston in support of ERA).

Court. The course of this process will turn upon the language of ERA and its legislative history. Legislative clarity will give direction to this process and better assure fidelity to the will of the people.

#### *A. Legislative History Of ERA*

To the extent that legislative history may be considered by the judiciary in determining the meaning of law, the history of ERA thus far will do little to illuminate its terms in many areas of interpretational controversy and concern.

The present ERA was introduced in both houses very early in the first session of the 98th Congress which adjourned on October 12, 1984. In the House of Representatives, hearings were held in 1983 on the proposed ERA; it was reported favorably by the House Judiciary Committee with no amendment. On November 15, 1983 a motion was made to bring ERA before a full House under a suspension of the rules, which would have the effect of limiting debate and precluding amendments. The motion failed, and there was no vote on the merits of ERA at that time. The ERA has not been brought back before the full House, nor have committee hearing records or committee reports been published.

In the Senate, the Subcommittee on the Constitution of the Committee on the Judiciary held a series of hearings. No hearing records have been published to date, and the Subcommittee took no final action.

In short, the pertinent legislative history of ERA remains to be developed if it is materially to influence judicial interpretation in significant areas of concern. Yet, hope for effective clarifying history must fade somewhat in view of the course of debate thus far. For example, in response to questions on ERA's impact in several sensitive areas (*e.g.*, abortion, tax exemption, and private education), a co-sponsor repeatedly indicated that the courts would have to resolve these issues.<sup>5</sup> In the present state of the record, the canons of judicial construction take on considerable importance.

#### *B. Canons Of Construction*

Courts approach the problem of interpretation on two levels: intrinsic construction (dealing with the structure and language of the text) and extrinsic construction (dealing with history and related statutes).<sup>6</sup> Constitutional provisions are generally subject to the same rules of construction

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<sup>5</sup> *Hearings on S. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 7 (May 26, 1983) (statement of Sen. Paul E. Tsongas).

<sup>6</sup> 2A J. SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 45.13-45.14 (C. Sands 4th ed. 1972 & Supp. 1984).

as are statutes.<sup>7</sup> Courts look first to the text of the law to discern whether the meaning is plain. If the text is plain and unambiguous, courts need not look to legislative history<sup>8</sup> although they often have not hesitated to do so.<sup>9</sup> However, if language is open to more than one interpretation, courts will examine legislative history for evidence of legislative intent.<sup>10</sup> Nevertheless, when reviewing legislative history, a court will avoid what Justice Jackson called the "psychoanalysis of Congress."<sup>11</sup>

Legislative history is not very useful unless it is clear and authoritative. Courts examine a variety of legislative materials. Reports of the committee which heard testimony of interested persons and actively considered the text of the legislation are usually most persuasive in judging the intent of the legislature.<sup>12</sup> Courts will also examine reports of conference committees and floor debates where those reports or debates explain various textual changes which were made outside of committee.<sup>13</sup> Generally, however, remarks in the course of debates or hearings, except by the sponsors or drafters, are entitled to little weight.<sup>14</sup> Statements of single legislators, even sponsors, are not controlling.<sup>15</sup>

The lack of relevant, useful legislative history, however, does not relieve courts of the duty "to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question."<sup>16</sup> When the statute itself is ambiguous, courts must construe it in the manner which best effectuates its policy.<sup>17</sup> Where a

<sup>7</sup> See *Dillon v. Gloss*, 256 U.S. 368, 373 (1921).

<sup>8</sup> See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) (when statute is plain on its face, need not look to legislative history).

<sup>9</sup> See, e.g., *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976) (no rule of law forbade use of aids to construction however clear the words may appear), *rev'g* 507 F.2d 743, 746-747 (10th Cir. 1974).

<sup>10</sup> 2A J. SUTHERLAND, *supra* note 6 § 48.02, at 186.

<sup>11</sup> *United States v. Public Utils. Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). See also *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977).

<sup>12</sup> See 2A J. SUTHERLAND, *supra* note 6 § 48.06.

<sup>13</sup> *Id.* at §§ 48.08, 48.13 & 48.18.

<sup>14</sup> See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976).

<sup>15</sup> See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

<sup>16</sup> See *United States v. Bornstein*, 423 U.S. 303, 310 (1976). This task is, in other words, an application of the rule that a reviewing court is to give effect to the plain meaning of the statute as best evidenced by the legislative intent. See *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). See also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Where words have an ordinary or settled meaning, the reviewing court must infer that Congress intended those meanings unless some other evidence in the statute or its legislative history indicates otherwise. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

<sup>17</sup> See *Blanchette v. Connecticut Gen. Ins.*, 419 U.S. 102, 134 (1974). See also *United States v. An Article of Drug*, 394 U.S. 784, 799 (1969) (where statute's language imprecise, should be interpreted in light of statutory purpose).

statute expresses broad national policy, such as is often found in constitutional provisions, courts construe terms broadly to satisfy congressional objectives.<sup>18</sup> This canon accords with another generally accepted rule of interpretation: a court will liberally construe remedial legislation, such as anti-discrimination laws, in order to carry out the purposes of the enactment.<sup>19</sup> The rule of liberal construction compounds the problems of ambiguity. Among other things, ambiguity invites a judicial subjectivism which declares what Congress "must have" meant.

A British jurist once stated this salutary principle regarding legislative drafting:

[I]t is not enough to attain a degree of precision which a person reading [a law] in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.<sup>20</sup>

In the end, the limitations of language as a means of conveying ideas make it important also to stress the importance of clarity of legislative purpose as a most reliable guide to judicial interpretation.<sup>21</sup>

### III. ERA SECTION 1 - ANALYSIS OF MAJOR COMPONENTS

In very general terms, section 1 contains the substantive provisions of ERA, and section 2 authorizes Congress to enact laws to enforce those provisions. The text is identical to that of the unsuccessful amendment approved by the 92d Congress in 1972. Section 1 provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." In particular cases, the issue could well require the interpretation of practically any single word. For present purposes, however, it seems sufficient to consider its principal components, namely (1) equality of rights under the law, (2) denial or abridgment by the United States or any State, (3) on account of sex.

Before addressing those components, it will be useful to consider the principles of judicial review which measure the limits of constitutionally permissible governmental discretion in prescribing classifications of people in regard to their rights, privileges and immunities, and the level of review likely to apply to ERA.

#### *A. Judicial Review of Sex-Based Classifications Under ERA*

The equal protection precedents declare that statutory classifications

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<sup>18</sup> See *Diamond v. Chakrabarty*, 447 U.S. 303, 308-09 (1980).

<sup>19</sup> See *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870).

<sup>20</sup> *In re Castioni*, 1 Q.B. 147, 167 (1891) (Stephen, J.)

<sup>21</sup> See Conrad, *New Ways to Write Laws*, 56 YALE L.J. 458 (1947).

are subject to three different levels of judicial scrutiny, depending on the type of classification involved. A major objective of ERA is to subject sex-based classifications to a strict judicial scrutiny, akin to that applied to racial classifications under the equal protection guarantees of the Constitution. Classifications which burden fundamental constitutional rights (e.g., free speech and free exercise of religion), or which are based on race or national origin, are subject to strict scrutiny. Racial classifications are considered inherently "suspect." They are presumptively invalid<sup>22</sup> and are unlikely to survive strict scrutiny analysis.

Classifications based on sex have been subject to an intermediate level of scrutiny. They are upheld only upon a showing that the classification serves important governmental objectives.<sup>23</sup> Classifications premised upon the alleged inherent handicap, weakness or inferiority of a gender are not deemed legitimate governmental objectives under the equal protection clause. In recent years, the following classifications based on sex have been invalidated: (i) a statute that gave the husband the unilateral right to dispose of jointly owned property without his wife's consent;<sup>24</sup> (ii) a law under which survivor benefits paid to a husband in case of his wife's work-related death were less than those payable to a similarly situated widow;<sup>25</sup> (iii) a statute that provided a shorter period of parental support obligation for female children than for male children;<sup>26</sup> (iv) a provision in the Social Security Act granting survivors' benefits to widows but not widowers;<sup>27</sup> (v) a statute containing a mandatory preference for male applicants;<sup>28</sup> and (vi) an arbitrary preference in favor of males in the administration of decedents' estates.<sup>29</sup>

In general, other classifications are subject only to the requirement that they be rationally related to a legitimate governmental interest.<sup>30</sup> Classifications subject to this test are routinely upheld, in due deference to the government's need to make reasonable classifications as it carries out its functions.

It is likely that the courts would employ the standard of strict scrutiny, effectively treating classifications based on sex as inherently "suspect." To withstand strict scrutiny, gender-based classifications would have to further a "compelling governmental interest." As noted, this level of scrutiny has routinely led to the invalidation of racial classifications

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<sup>22</sup> See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>23</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>24</sup> See *Kirchberg v. Feenstra*, 450 U.S. 455, 460-62 (1981).

<sup>25</sup> See *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-53 (1980).

<sup>26</sup> See *Stanton v. Stanton*, 421 U.S. 7, 14-17 (1975).

<sup>27</sup> See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643-46 (1975).

<sup>28</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973).

<sup>29</sup> See *Reed v. Reed*, 404 U.S. 71, 74 (1971).

<sup>30</sup> See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

under the equal protection clause. However, it is unlikely that "strict scrutiny" review will be as preclusive under ERA. There will likely be situations in which courts will uphold gender-based classifications (*e.g.*, rape laws) as has happened with some state ERAs.

### B. "Equality of Rights" Analogous state ERAs

Of the sixteen state ERAs, only eight employ the phrase "equality of rights" (or like language) as does the federal ERA.<sup>31</sup> The interpretation of such a phrase varies among the states, and even within a single state. The articulated standard of equality ranges from what may be termed absolute equality between men and women, to a standard of different treatment, with a "rational basis" for such disparity.

The Maryland, Pennsylvania, and Washington ERAs have been interpreted to mandate an absolute standard of equality more stringent than traditional strict scrutiny under the equal protection clause of the fourteenth amendment.<sup>32</sup> However, even under an allegedly absolute standard, courts have carved out exceptions where differentiation between the sexes is based on unique physical characteristics.<sup>33</sup> Additionally, the Pennsylvania Commonwealth (appellate) Court has upheld a medicaid exclusion of abortion on the ground that the exception was based on indigency, not on gender.<sup>34</sup> The Colorado and Massachusetts ERAs have been interpreted to require strict judicial scrutiny,<sup>35</sup> as is required by the fourteenth amendment for racial classifications. This stan-

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<sup>31</sup> *Colorado*: "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." COLO. CONST. art. II, § 29 (1980); *Hawaii*: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." HAW. CONST. art. I, § 21 (1976); *Maryland*: "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST. DECL. OF RGTS., art. XLVI (1981); *Massachusetts*: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." MASS. CONST. pt. 1, art. I (1979); *New Hampshire*: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. II(d) (1986); *Pennsylvania*: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28 (1985); *Texas*: "Equality of the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a (1984); *Washington*: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1 (1985).

<sup>32</sup> See *Rand v. Rand*, 280 Md. 508, 511, 374 A.2d 900, 905-05 (1977); *Commonwealth v. Butler*, 458 Pa. 289, 293, 328 A.2d 851, 855 (1974); *Darrin v. Gould*, 85 Wash. 2d 859, 864, 540 P.2d 882, 888 (1975).

<sup>33</sup> See, *e.g.*, *Seattle v. Buchanan*, 90 Wash. 2d 584, 587, 584 P.2d 918, 921 (1978).

<sup>34</sup> *Fischer v. Department of Pub. Welfare*, 85 Pa. Commw. 242 (1984).

<sup>35</sup> See *People v. Green*, 183 Colo. 25, 26, 514 P.2d 769, 770 (1973) (mandating "closet" judicial scrutiny); *Commonwealth v. King*, 374 Mass. 5, 14, 372 N.E.2d 196, 206 (1977).



dard, too, has been interpreted to permit exceptions for unique physical characteristics. Where different treatment is reasonably and genuinely based on such characteristics, the sexes are not considered similarly situated and, thus, equal treatment is not required.<sup>36</sup>

In Hawaii, while not articulating precisely the required standard, a court has indicated that the state ERA may mandate the higher standard of strict scrutiny.<sup>37</sup> However, in upholding a gender-based rape statute on the grounds that the differentiation was based on unique physical characteristics, the court resorted to the fourteenth amendment standard for sex-based distinctions, *i.e.*, substantial relationship to government interests.<sup>38</sup>

The Texas Supreme Court has not addressed the standard of equality required by that state's ERA. However, intermediate appellate courts have dealt with the issue with different results. One held that the ERA required strict scrutiny with exceptions for unique physical characteristics, countervailing constitutionally protected rights, and other compelling state interests.<sup>39</sup> The other held that ERA required application of only the rational relationship test.<sup>40</sup> Finally, the standard of equality remains unclear in at least one state.<sup>41</sup>

In summary, the meaning of "equality of rights" is not uniform under the state ERAs. Nonetheless, it is fair to say generally that states' ERAs have been interpreted to guarantee the same rights as are guaranteed under the equal protection clause for racial classifications, with the most prevalent exception being for classifications justified by unique physical characteristics. Title VII of the Civil Rights Act of 1964<sup>42</sup> (prohibiting sex discrimination in employment) has been similarly interpreted where unique physical characteristics have been involved. The Supreme Court upheld the exclusion of pregnancy from an employer's disability policy against claims that it violated sex discrimination provisions of Title VII.<sup>43</sup> Because pregnancy is significantly different from the usual

<sup>36</sup> See *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 706 (1976).

<sup>37</sup> See, *e.g.*, *Holdman v. Olim*, 59 Haw. 346, 349, 581 P.2d 1164, 1168 (1978) (court may apply more stringent test of compelling state interest in scrutinizing sex-based classifications).

<sup>38</sup> See *State v. Rivera*, 62 Haw. 120, 123, 612 P.2d 526, 529 (1980).

<sup>39</sup> See *Mercer v. Board of Trustees*, 538 S.W.2d 201, 206 (Tex. Civ. App. 1976).

<sup>40</sup> See *Finley v. State*, 527 S.W.2d 553, 555 (Tex. Crim. App. 1975).

<sup>41</sup> See *Buckner v. Buckner*, 120 N.H. 402, 403, 415 A.2d 871, 872 (1980).

<sup>42</sup> 42 U.S.C. § 2000e-2(a)(1) (1982): "It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ."

<sup>43</sup> See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976). Title VII was amended in 1978 to overturn the *Gilbert* decision. 42 U.S.C. § 2000e(k) (1982); see H.R. REP. No. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749.

covered diseases or disabilities, the Court held that its exclusion was not the result of sex discrimination but of legitimate distinctions among medical conditions.<sup>44</sup>

The phrase "equality of rights" does not appear to convey, by itself, a meaning other than the concept of fair and equal treatment under the equal protection guarantees of the fifth and fourteenth amendments. The Supreme Court and lower federal courts have analyzed the phrase "equal rights" and like language in jurisdictional statutes affecting statutory and constitutional civil rights claims.<sup>45</sup> Specifically, the Supreme Court cited the origin of the relevant language in the Civil Rights Act of 1866 from which the fourteenth amendment evolved, and concluded that laws providing for "equal rights" are comparable to this fourteenth amendment forerunner.<sup>46</sup>

### C. "On Account of Sex" *Gender v. Sexual Preference or Orientation*

The text of ERA suggests no meaning for the phrase "on account of sex" other than the usual meaning of gender.<sup>47</sup> The co-sponsors have consistently indicated this understanding of the term,<sup>48</sup> as distinguished from

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<sup>44</sup> A pregnancy-based exclusion in a state disability compensation program was held not to constitute sex discrimination violative of the equal protection clause of the fourteenth amendment. The court found no risk from which men were protected and women were not, and vice versa. *Geduldig v. Aiello*, 417 U.S. 484, 494, 496 n.20 (1974).

<sup>45</sup> 28 U.S.C. § 1343(a)(3) (1982) places in the federal courts actions "[t]o redress the deprivation . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for *equal rights* of citizens . . . [emphasis added]." *Id.* 28 U.S.C. § 1443 (1982) authorizes the removal to federal court of an action:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the *equal civil rights* of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for *equal rights*, or for refusing to do any act on the ground that it would be inconsistent with such law. [emphasis added].

*Id.*

<sup>46</sup> *Id.* See *Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979). See also *Georgia v. Rachel*, 384 U.S. 780, 789 (1966); *Blue v. Craig*, 505 F.2d 830, 834-37 (4th Cir. 1974); *McGuire v. Amrein*, 101 F.Supp 414, 417-18 (D. Md. 1951).

<sup>47</sup> *Black's Law Dictionary* defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." *BLACK'S LAW DICTIONARY* 1233 (5th ed. 1979).

<sup>48</sup> See, e.g., 129 CONG. RECORD S535 (daily ed. Jan. 26, 1983). Senator Hatfield: "By eliminating gender-based classifications in the law which specifically deny equality of rights, every Federal or State law which makes a discriminatory distinction would be invalid under the equal rights amendment." *Id.* Senator Specter: "It will stand as a statement of our belief as a country that discrimination based on the immutable fact of a person's gender will not be allowed." *Id.* at S536. Senator Tsongas: "ERA is necessary because thousands of Federal, State, and local statutes - by law - treat American citizens differently depending upon their

sexual or affectional orientation or preference ("sexual preference"). In fact, Senator Hatfield cited favorably the fact that no state ERA had been interpreted as invalidating laws prohibiting the marriage of homosexual persons.<sup>49</sup> However, in 1972 Senator Sam Ervin warned that ERA could invalidate laws forbidding same sex marriage and certain homosexual activity.<sup>50</sup> Some ERA commentators perceive the same result.<sup>51</sup> Recently, several witnesses before the Senate Judiciary Subcommittee on the Constitution questioned the view that ERA would not undermine laws regulating homosexual conduct if they apply equally to male and female homosexuals.<sup>52</sup>

Courts interpreting Title VII consistently have rejected claims that sex discrimination includes employment discrimination against homosexuals or transsexuals.<sup>53</sup> As one court put it, reading Title VII to cover such claims would be "impermissibly contrived and inconsistent with the plain meaning of the words."<sup>54</sup> In the present state of the law, it is unlikely that the term "sex" in ERA would be construed other than as referring to discrimination between the genders. Yet, recent legal developments involving the right of privacy in the field of abortion and kindred areas do not put a more liberal view of the term "sex" beyond the range of possi-

sex." *Id.* at S529. Senator Sarbanes: "The ERA is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men . . . ." *Id.* at S537. Senator Cranston: "It would give constitutional force to the basic principle that government at all levels should treat women and men as individuals having equal rights under the law." *Id.* at S538.

<sup>49</sup> *Id.* at S535.

<sup>50</sup> S. REP. No. 689, *supra* note 1, at 47, citing testimony by Prof. Paul Freund of Harvard Law School and Prof. James White of the University of Michigan Law School.

<sup>51</sup> See O. HATCH, *THE EQUAL RIGHTS AMENDMENT, MYTHS AND REALITIES* 51-55 (1983); Bevilacqua, *The ERA in Debate - What Can it Mean for Church Law?*, 24 CATH. LAW. 101, 127-29 (1979).

<sup>52</sup> *Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 942.85 (May 23 and June 22, 1984)(statements by Prof. Raymond Marcin of Catholic University Law School, Prof. Eugene Hickok, Jr., of Dickinson College and Center for the Study of the Constitution, and Prof. Lynn Wardle of Brigham Young University Law School).

<sup>53</sup> See, e.g., *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (transsexualism); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (homosexuality); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (transsexualism); *Grossman v. Board of Educ.*, 11 Lab. Rel. Rep. (BNA) 1196, 1199 (D.N.J. 1975) *aff'd*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal.) (transsexualism), *aff'd*, 570 F.2d 354 (9th Cir. 1975).

<sup>54</sup> *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (male employee living as woman as prerequisite to sex-change operation). Judicial interpretations of the term "sex" as "gender" were based in part upon subsequent legislative history involving numerous unsuccessful attempts to amend Title VII to include a specific provision covering discrimination on the basis of "sexual preference." See *Sommers v. Budget Marketing Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

bility,<sup>56</sup> at least in the absence of more precision in the text or compelling legislative history.

#### D. *Discrimination Intent or Effect*

The phrase "on account of" usually means "by reason of" or "because of"<sup>56</sup> and would seem to indicate that, on its face, ERA is intended to reach only intentional discrimination.<sup>57</sup> However, ERA could possibly reach other actions which have a discriminatory effect on one gender or aid discriminatory institutions. If ERA were to yield the latter result, its reach could be substantially broader than that of the equal protection guarantees of the fifth and fourteenth amendments.

Prior to 1976 there was some question regarding the appropriate test to be used in race discrimination cases brought under the equal protection clause. Then the Supreme Court enunciated "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>58</sup> The Court observed that the discriminatory purpose might be found in a statute itself, or its application in an intentionally discriminatory manner. Subsequently, the Court upheld veterans' preferences in state civil service employment, despite their disparate effect on women, because there was no showing of purposeful discrimination against women.<sup>59</sup> Supporters of ERA have indicated that the result would have been different under ERA.<sup>60</sup>

By analogy to the equal protection clause, ERA could also be interpreted to prohibit the government from aiding private institutions that discriminate on the basis of sex. Earlier cases involving desegregation of public schools have held that government programs are invalid under the equal protection clause when they have the impermissible effect of providing significant aid to private, racially discriminatory institutions.<sup>61</sup> A

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<sup>56</sup> *But see* *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984), where the court held that the constitutional right of privacy did not include the right to engage in homosexual conduct and upheld the U.S. Navy's discharge of an individual for engaging in homosexual conduct. *Id.*

<sup>56</sup> See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) (1976).

<sup>57</sup> See, e.g., *Personnel Adm'n v. Feeney*, 442 U.S. 256, 279 n.24 (1979) (court relying on objective factors to prove discriminatory intent).

<sup>58</sup> *Washington v. Davis*, 426 U.S. 229, 240 (1976) (employment test that had disparate impact on minorities upheld).

<sup>59</sup> See *Personnel Adm'n*, 442 U.S. at 281.

<sup>60</sup> *Hearings on H.R.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (testimony of Professors Thomas I. Emerson and Ann E. Freedman).

<sup>61</sup> See *Norwood v. Harrison*, 413 U.S. 455, 466-67 (1973), and cases cited therein. *Norwood* has not been overruled by the Court.

lower court recently held that equal protection principles prohibited a federal agency from funding local agencies which it knew or should have known were engaged in racial discrimination.<sup>62</sup>

*E. Denial or Abridgement of Rights "By the United States or by Any State"*

The ERA explicitly addresses only actions taken "by the United States or by any State." That it is not intended to reach the private acts of individuals or organizations seems clear from its language and its sparse legislative history. However, in certain situations ERA could be made applicable to private organizations. The fourteenth amendment has been applied to private activity because of significant state involvement in that activity.<sup>63</sup> A similar result can be expected under ERA.

The Supreme Court employs several principals in determining whether the actions of a private organization will be deemed state action, thereby subjecting that organization to the requirements of the fourteenth amendment. First, there must be a nexus between the state and the challenged action of the private entity so close that the action may fairly be deemed that of the state itself.<sup>64</sup> Second, private discriminatory action may be considered state action where the state has required it, or has provided such significant encouragement that the action must in law be deemed that of the state.<sup>65</sup> Third, the required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state.<sup>66</sup> The ultimate issue for analysis is whether the alleged infringement of constitutional rights is "fairly attributable to the state."<sup>67</sup> Only by sifting facts and weighing circumstances can the significance of state involvement be judged.<sup>68</sup>

Applying these principles, the Court has found state action where private individuals or organizations (i) acted in concert with state officials, or under compulsion of state law, to deprive individuals of property or other protected rights;<sup>69</sup> (ii) had a symbiotic relationship with a state

<sup>62</sup> See *National Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 580-82 (D.C. Cir. 1983), cert. denied, 466 U.S. 963. (1984).

<sup>63</sup> See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The Supreme Court has indicated there is an equivalent equal protection component implicit in the Fifth Amendment, which limits the federal government. See *Regan v. Taxation With Representation*, 461 U.S. 540, 546-48 (1983).

<sup>64</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1005.

<sup>67</sup> *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

<sup>68</sup> *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1975).

<sup>69</sup> See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

from which the state received financial benefits from discriminatory acts;<sup>70</sup> and (iii) utilized the judicial system to attempt to enforce a restrictive covenant based on race.<sup>71</sup>

By analogy, under ERA, private organizations which engage in sexually discriminatory practices would not likely be subject to ERA's prohibitions unless those practices were attributable to a governmental decision or the government was significantly involved in the discriminatory practices. Under the Court's recent analysis,<sup>72</sup> receipt of substantial governmental benefits alone would not subject a private organization (e.g., a private, single sex school) to ERA's requirements. However, it must be cautioned that "state action" is a developing concept whose full implications cannot be assessed. The extent to which private organizations would be affected by ERA will depend, in part, on the development of state action doctrine under ERA. The relevance of this consideration to church institutions is discussed below.

#### IV. ERA SECTION 2 ENFORCEMENT

Section 2 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This provision is identical to the enforcement section of the fourteenth amendment, and is similar to enforcement provisions in six others.<sup>73</sup>

Under existing federal statutes,<sup>74</sup> a citizen affected by sex discrimination could sue for declaratory and injunctive relief to redress a violation of rights under ERA. When enacted in the nineteenth century, the Civil Rights Acts were aimed at eliminating racial discrimination.<sup>75</sup> Over time, the Court has expanded its understanding and use of the fourteenth amendment and has applied it to invalidate gender-based discrimination.<sup>76</sup> Accordingly, a lawsuit under existing Civil Rights Acts may be

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<sup>70</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>71</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>72</sup> *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982).

<sup>73</sup> Those six amendments which had enforcement provisions similar to the ERA are the thirteenth, fifteenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments. See S. REP. 689, *supra* note 1, at 20. The only difference in the enforcement provisions of the latter amendments is the placement of the clause "by appropriate legislation" at the end, rather than in the middle, of the section. We can see no intended textual difference in the placement of the clause. In either location it modifies the infinitive "to enforce" and answers the question "how."

<sup>74</sup> 28 U.S.C. § 2201 (1982); 42 U.S.C. § 1983 (1982). There is neither a private right nor a statutory right to seek damages under the Civil Rights Act. *Lyle v. Village of Golden Valley*, 310 F. Supp. 852, 854 (D. Minn. 1970).

<sup>75</sup> *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880). *But see Ex parte Virginia*, 100 U.S. 339, 347 (1880) (fourteenth amendment to secure "equal rights to all persons").

<sup>76</sup> See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (invalidating law treating un-

used to enjoin gender-based discrimination.<sup>77</sup> Because the Supreme Court has held that such lawsuits are not limited simply to civil rights legislation but are available to vindicate all federal rights,<sup>78</sup> the same provisions may be used to enforce the ERA. Thus, existing federal law will provide a substantial enforcement mechanism if ERA is enacted.<sup>79</sup>

In addition, the Congress will have the discretion to enact laws "necessary and proper" for the uniform interpretation and enforcement of ERA.<sup>80</sup> Under its enforcement authority, the Congress is not limited to those matters which a court itself would void as unconstitutional. Rather, the Congress through legislation may affirmatively protect rights and declare certain acts illegal in order to enforce the Amendment.<sup>81</sup> Thus by reference to fourteenth amendment principles, a court would interpret ERA as authorizing the Congress to enforce ERA guarantees by any rational means.<sup>82</sup>

Constitutional provisions such as ERA and the fourteenth amend-

married parents differently based on sex).

<sup>77</sup> See, e.g., *Lyon v. Temple Univ.*, 543 F. Supp. 1372, 1378 (E.D. Pa. 1982); *Walker v. Hall*, 399 F. Supp. 1304, 1306 (W.D. Okla. 1975) (three-judge court), *rev'd on other grounds sub nom.*, *Craig v. Boren*, 291 U.S. 190 (1976). Although section 1983 provides a cause of action for sex discrimination, by contrast, section 1981, by its own terms, is limited to racial discrimination and may not be used to challenge alleged sex discrimination. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976).

<sup>78</sup> *Maine v. Thiboutot*, 448 U.S. 1, 4, 6-8 (1980) (Social Security Act violations within scope of section 1983 action). The Court expressly rejected an argument that Civil Rights Act lawsuits are limited to civil rights and equal protection laws.

<sup>79</sup> Even where a statute did not, in so many words, provide a remedy, a court could, under the statute, infer a remedy if it would be consistent with the apparent intent of the Congress. For example, in *Markham v. Cabell*, 326 U.S. 404 (1945), the Court allowed recovery of a debt for seizure of property in World War II under a statute limited to debts existing in World War I. See also *McGhee v. United States*, 154 F.2d 101, 105 (2d Cir. 1946) (Hand., J.) (broadly interpreting a statute to allow alien seamen to sue in any U.S. district court for claims against the United States). Thus, one commentator has remarked that judges do not necessarily feel bound by rigid form when they believe justice dictates a particular end. Conrad, *New Ways To Write Laws*, 56 YALE L.J. 458 (1947).

<sup>80</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880). The enforcement power under amendments is like the power Congress enjoys under the Constitution - to make laws "necessary and proper" to the articulated powers. Any law reasonably to these purposes will be upheld. *Katzenbach*, 384 U.S. at 650-51.

<sup>81</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>82</sup> *Katzenbach*, 384 U.S. at 648-49, 651 n.10. See, e.g., *Arritt v. Grissel*, 567 F.2d 1267, 1272 (4th Cir. 1977) (applying rational basis standard to age restriction for police applicants); *Bond v. Stanton*, 555 F.2d 172, 175 (7th Cir. 1977) (allowing assessment of attorneys' fees against state officials sued in their official capacity), *cert. denied*, 438 U.S. 916 (1978). More importantly for purposes of our analysis, the enforcement provision does not allow the Congress to "restrict or abrogate or dilute" any of the rights guaranteed by the substantive provisions but only to protect or extend that substance by any means "necessary and proper." See *Katzenbach*, 384 U.S. at 651 n.10.

ment, and related statutes, are liberally construed.<sup>63</sup> It is reasonable, under ERA, to expect judicially created private rights of action which are not expressly provided under existing statutes.<sup>64</sup> The Supreme Court allowed a private right of action for sex discrimination under federal civil rights legislation.<sup>65</sup> It concluded that, by enacting the statute in question, Congress intended to benefit women as a special class, that civil rights legislation was intended to be construed broadly, and that the private right of action would promote the congressional policy against discrimination.

#### V. ERA SECTION 3 EFFECTIVE DATE

Section 3 provides that ERA "shall take effect two years after the date of ratification." The rationale for such a delay is explained in the 1972 Report of the Senate Committee on the Judiciary: "The purpose of this section is to give the States and the federal government an opportunity to review and revise their laws, regulations and practices so as to bring them into compliance with the Amendment."<sup>66</sup> The drive for ratification of the 1972 ERA has been credited with contributing to important reforms in some states.<sup>67</sup> It is reasonable to assume that, with ratification of ERA, the states and federal government would make additional efforts to bring their laws, regulations and practices into conformity with ERA's mandate.

#### VI. SALUTARY EFFECTS OF ERA

ERA would buttress the cause of fair treatment under law for all, particularly women. Its effects would reach an array of legal areas and social relationships in jurisdictions (state and federal) so numerous that they defy comprehensive and precise analysis in this document. In fact, and understandably, no document has provided such an analysis.

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<sup>63</sup> *Strauder*, 100 U.S. at 307.

<sup>64</sup> Whether a private right of action would be inferred in any given instance would depend on weighing of four factors: Whether 1) the statute was enacted for the special benefit of a class which included the plaintiff, 2) the legislature intended to create a private right as evidenced in the legislative history, 3) the existence of a private right of action would be consistent with legislative policy, and 4) a private right would be inappropriate because of overriding State concerns. *Cort v. Ash*, 422 U.S. 66 (1975). In later cases, the Court has focused heavily on Congress' intent as the key element of the analysis. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981).

<sup>65</sup> In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the legislation in question was Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

<sup>66</sup> S. REP. No. 689, *supra* note 1, at 20-21.

<sup>67</sup> B. BROWN, A. FREEDMAN, H. KATZ, A. PRICE, *WOMEN'S RIGHTS AND THE LAW - THE IMPACT OF THE ERA ON STATE LAWS*, 37-38 (1977).



### A. An Overview

It is fair to say that although there is great diversity of opinion regarding the probable salutary effects of ERA, a significant body of opinion envisions important strides in the direction of fair and equal treatment irrespective of sex. I say this based upon our exhaustive review of most if not all of the available, significant testimony and written commentary on the subject, principal examples of which are cited below.<sup>68</sup> Thus, ERA is regarded by many as a means of enhancing the economic situation of women by (i) eliminating state and federal laws or practices that exclude women from certain employment opportunities, or otherwise limit their participation,<sup>69</sup> (ii) providing for more equitable ownership

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<sup>68</sup> *Congressional Reports, Testimony and Hearings*: S. REP. No. 689, *supra* note 1; H. REP. 359, 92d Cong., 1st Sess. (1971); *Hearings on H.R.J. Res. 35 Before Subcomm. No. 4 of the House Comm. of the House on the Judiciary*, 92d Cong., 1st Sess. (1971); *Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong. (1984) testimony of: Lynn D. Wardle, Brigham Young University (June 22, 1984), Raymond B. Marcin, Catholic University (May 23, 1984), Judith Welch Wegner, University of North Carolina (April 23, 1984), Gary L. McDowell, Tulane University (February 21, 1984), Ann E. Freedman, Rutgers University (January 24, 1984), John T. Noonon, Jr., University of California at Berkley (January 24, 1984), Senator Bob Packwood, Oregon, (November 1, 1983), Eliot Cohen, Harvard University (November 1, 1983), Antonia Handler Chayes, law firm of Csaplar and Bok (November 1, 1983), Jeremy A. Rabkin, Cornell University (September 13, 1983), Donna E. Shalala, Hunter College of the City of New York (September 13, 1983), Senator Paul Tsongas, Massachusetts (May 26, 1983); *Hearings on H.R.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong. (1985) testimony of: Ann E. Freedman, Rutgers University (November 3, 1983), Jules B. Gerard, Washington University (St. Louis) (October 19, 1983), Henry C. Karlson, Indiana University (October 20, 1983), Diana Pearce, Center For National Policy Review, Catholic University (September 14, 1983), Francine Bernice Sandler, Association of Women (September 14, 1983), Tish Sommers, Older Women's League, California (September 14, 1983), Polly Madlenwald, National Federation of Business and Professional Women (September 14, 1983), Eunice Cole, American Nurses Association (September 14, 1983), Mary H. Futrell, National Education Association (September 14, 1983), Mary Purcell, American Association of University Women (September 14, 1983), Judy Goldsmith, National Organization for Women (September 14, 1983), Kathy Wilson, National Women's Political Caucus (September 14, 1983), Governor Richard Lamm, Colorado (July 13, 1983), Grover Rees, University of Texas (July 13, 1983), Mary Frances Bery, U.S. Commission on Civil Rights (July 13, 1983).

<sup>69</sup> See generally B. BROWN, A. FREEDMAN, H. KATZ, A. PRICE, *WOMEN'S RIGHTS AND THE LAW - THE IMPACT OF THE ERA ON STATE LAWS* (1977) [hereinafter *IMPACT OF ERA*]; R. EISLER, *THE EQUAL RIGHTS AMENDMENT* (1978); L. GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN, CASES IN LAW AND SOCIAL CHANGE* (1975); O. HATCH, *THE EQUAL RIGHTS AMENDMENT, MYTHS AND REALITIES* (1983); L. KANOWITZ, *EQUAL RIGHTS: THE MAL STAKE* (1981); H. KAY, *SEX-BASED DISCRIMINATION, TEXT, CASES AND MATERIALS* (2d ed. 1981); R. LEE, *A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT* (1980); P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* (1977); U.S. COMMISSION ON CIVIL RIGHTS, *THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION* (1981); U.S. COMMISSION ON CIVIL RIGHTS, *STATEMENT ON THE EQUAL RIGHTS AMENDMENT* (1978); G. WHITTEN-

and control of property acquired during marriage, (iii) requiring more equitable treatment for women under the social security system and statutes regulating private pension plans,<sup>90</sup> (iv) expanding opportunities for women in the military,<sup>91</sup> (v) eliminating gender-based wage discrimination in public employment,<sup>92</sup> and (vi) lowering the cost to women of certain kinds of insurance.<sup>93</sup>

In the important area of education, the 1972 Senate Report stated that "ERA will require that State supported schools at all levels eliminate laws, regulations or government practices which exclude women or limit their numbers."<sup>94</sup> In the particularly complex area of athletics, ERA could provide an effective means for attaining equal athletic opportunity for women, including gender-neutral rules, equal per capita expenditures, and the creation and implementation of affirmative action programs.<sup>95</sup> Exceptional female athletes could be allowed to compete with the best male athletes in their communities.<sup>96</sup> In addition, many view ERA as an effective bar to sex discrimination in other areas such as criminal law (e.g., sentencing and prison reform)<sup>97</sup> and domestic relations law.<sup>98</sup>

In addition to its legal effects, ERA could also perform an important symbolic function as part of our fundamental law, providing equal rights for individuals regardless of their sex.<sup>99</sup> The legal and extralegal impact of ERA could work in tandem to provide women new opportunities, in-

BERG, *THE ERA AND YOU* (1975).

<sup>90</sup> See generally Bevilacqua, *The ERA in Debate - What Can It Mean For Church Law?*, 24 CATH. LAW. 101 (1979); Brown, Emerson, Falk and Feedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Dow, *Sexual Equality, the ERA and the Court - A Tale of Two Failures*, 13 N.M. L. REV. 53 (1983); Emerson and Lifton, *Should the ERA Be Ratified?* 55 CONN. B. J. 227 (1981); Erikson, *Equality Between the Sexes in the 1980's*, 28 CLEV. ST. L. REV. 591 (1979); Ginsburg, *Ratification of ERA*, 57 TEX. L. REV. 919 (1979); Strong, *Contributions of ERA to Constitutional Exegesis*, 14 GA. L. REV. 389 (1980); Note, *Congressional Intent and ERA*, 40 OHIO ST. L.J. 637 (1979); Note, *Constitutional Law - Sex Discrimination under the Equal Rights Amendment*, 54 WASH. REV. 709 (1979).

<sup>91</sup> See IMPACT OF ERA, *supra* note 89, at 208-33; CIVIL RIGHTS COMM'N, *THE EQUAL RIGHTS AMENDMENT*, *supra* note 89, at 6-7; S. REP. No. 689, *supra* note 2, at 14-15.

<sup>92</sup> See IMPACT OF ERA, *supra* note 89, at 160-176; CIVIL RIGHTS COMM'N, *THE EQUAL RIGHTS AMENDMENT*, *supra* note 89, at 9-14.

<sup>93</sup> *Hearings on H.R. J. Res 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comn. on the Judiciary*, 98th Cong., 12-13 (1983) (statement of Ann E. Freedman, Associate Professor of Law, Rutgers Law School); CIVIL RIGHTS COMM'N, *THE EQUAL RIGHTS AMENDMENT*, *supra* note 89, at 15-16.

<sup>94</sup> See S. REP. No. 689, *supra* note 1, at 13-14.

<sup>95</sup> See CIVIL RIGHTS COMM'N, *THE EQUAL RIGHTS AMENDMENT*, *supra* note 89, at 8.

<sup>96</sup> See IMPACT OF ERA, *supra* note 89, at 94-96.

<sup>97</sup> S. REP. No. 689, *supra* note 1, at 16-17.

<sup>98</sup> IMPACT OF ERA, *supra* note 89, at 304-308.

<sup>99</sup> See *id.* at 307.

creased self-esteem, and psychological motivation to expand their horizons.<sup>100</sup>

### B. *Impact on Discrete Areas of Federal Law*

Because of their importance, it will be useful to review briefly the potential of ERA in two areas of federal law, *i.e.* the law governing the social security system and the military. These have generated much discussion.

#### 1. Social Security

There is an increased public awareness and concern over the numbers of women living in poverty.<sup>101</sup> The plight of older women is of particular concern.<sup>102</sup> Often they must rely on social security payments as their primary means of support. For a variety of reasons (*e.g.* years spent out of the work force as homemakers, lower average wages, part-time or short term employment), average benefits are lower for women than men under the present social security system.<sup>103</sup> ERA could require revisions in the social security system and pension laws (*e.g.*, the Employee Retirement Income Security Act of 1974 ("ERISA")) to provide for more equitable treatment of women.<sup>104</sup>

If discrimination is measured by effect rather than intent, laws which have a "disparate effect" on women would be subject to strict judicial scrutiny under ERA.<sup>105</sup> The perceived flaw in laws such as the Social Security Act and ERISA is that they do not take into account the life patterns of many women, or recognize the economic contribution made by homemakers to the family unit.<sup>106</sup> Thus, it has been observed that ERA would require Congress to review the provisions of the Social Security Act and ERISA, and make amendments where necessary to treat women more fairly.<sup>107</sup> If the "disparate effect" standard were utilized by courts, ERA could lead to additional benefits for women under the Social Security Act and other statutes affecting retirement. It is beyond the scope of

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<sup>100</sup> See *id.* at 83-91; S. REP. No. 689, *supra* note 1, at 16.

<sup>101</sup> S. REP. No. 689, *supra* note 1, at 17-18.

<sup>102</sup> IMPACT OF ERA, *supra* note 89, at 11-12.

<sup>103</sup> See Statement of Shirley Sandage, Executive Director of the Older Women's League, on Pension Equity for Women Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor (September 29, 1983).

<sup>104</sup> See Statement of Freedman, *supra* note 93, at 13. See CIVIL RIGHTS COMM'N, THE EQUAL RIGHTS AMENDMENT, *supra* note 89, at 14-16.

<sup>105</sup> See Statement of Freedman, *supra* note 93, at 13; IMPACT OF ERA, *supra* note 89, at 17-19.1

<sup>106</sup> See Statement of Freedman, *supra* note 93, at 13.

<sup>107</sup> *Id.*

this article to attempt a delineation of what those benefits might be, how they would be funded, or what effect they might have on other participants in the affected programs.

It should be noted that Congress has already taken some steps to eliminate inequities in the Social Security Act and ERISA. In the Social Security Amendments of 1983, certain gender-based distinctions were eliminated from the Social Security Act.<sup>108</sup> Congress also required the Department of Health and Human Services to prepare a report analyzing the potential impact of various "earnings sharing" proposals on the social security system.<sup>109</sup> Generally, under "earnings sharing" the combined earnings of a husband and wife during the period of their marriage would be divided equally between them for benefit purposes, providing each spouse with social security protection in his or her own right.<sup>110</sup> The Retirement Equity Act of 1984 made several amendments to ERISA, designed to provide greater pension equity for women by taking into account changes in work patterns and in marriage as an economic partnership.<sup>111</sup>

## 2. The Military

The legislative history of the 1972 ERA strongly suggested that ERA could have a substantial impact on the role of women in the military. It indicated that women would be allowed to volunteer for service, and be subject to conscription, on the same basis as men,<sup>112</sup> and that like men, women could be assigned to various duties depending on their qualifications and the service's needs.<sup>113</sup> Although it is incomplete, thus far there is nothing in the legislative history of the present ERA to indicate a contrary intent in this area.<sup>114</sup> Expanding opportunities in the military for

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<sup>108</sup> Social Security Admendments of 1983, Pub. L. No. 98-21, §§ 301-310, 97 Stat. 109-17 (1983) (codified as amended at 42 U.S.C. 1305 (Supp. 1 1983)). To illustrate, the amendments provide that illegitimate children would be eligible for benefits based on their mothers' earnings as previously had been the case with respect to their fathers' earnings. The Amendments also extend to men certain benefits that had been limited to women, e.g., aged divorced husbands can now receive benefits based on their former wives' earnings records.

<sup>109</sup> *Id.* at § 343, 97 Stat. 136-37 (1983). The report has not yet been submitted to Congress. However, a statement on its status by Martha A. McSteen (Acting Commissioner of Social Security before the Task Force On Social Security and Women of the House Select Comm. on Aging) on April 12, 1984, points out the complexity and difficult policy choices inherent in any substantial revision of the social security system.

<sup>110</sup> *Id.*

<sup>111</sup> Retirement Equity Act of 1984, Pub. L. No. 98-397, § 101, 98 Stat. 1426 (1984) (codified at 29 U.S.C. § 1001 (Supp. II 1984)).

<sup>112</sup> S. REP. No. 689, *supra* note 1, at 13-14.

<sup>113</sup> *Id.* at 13.

<sup>114</sup> See Testimony of Prof. Eliot Cohen, Harvard University, and Antonia Handler Chayes,

qualified women would be beneficial in several respects.<sup>115</sup> It is reasonable to expect that more women would be able to take advantage of the numerous benefits of military service (*e.g.*, education, technical training, medical care and veterans' benefits), and that more women would be eligible for veterans' preferences in government employment.<sup>116</sup>

Regarding combat assignments, it has been observed that only a relatively small percentage of the military actually serves in combat, and only women that could meet the qualifications would be assigned to combat units.<sup>117</sup> Whether present proscriptions<sup>118</sup> against the use of women in combat units would survive judicial scrutiny under ERA will ultimately depend on the standard of review adopted by the courts. If, as some urge,<sup>119</sup> all explicit gender-based classifications would be impermissible under ERA, the survival of a policy prohibiting only women from serving in combat is unlikely.<sup>120</sup> On the other hand, courts have traditionally accorded great deference to Congress in matters involving national defense and military affairs.<sup>121</sup> In the absence of clear legislative history to the contrary, it seems improbable that the judiciary would abandon its usual deference in this sensitive area and invalidate rational, longstanding prohibitions on the use of women in combat units.

### C. *Impact on Discrete Areas of State Law*

Of the various state laws potentially affected by ERA, those dealing with domestic relations and employment are especially important and warrant particular attention.

#### 1. Domestic Relations

Generally speaking, ERA could substantially affect state domestic relations laws. Under ERA, they would have to be based solely on individ-

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Esq., before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary (November 1, 1983).

<sup>115</sup> S. REP. No. 689, *supra* note 1, at 13.

<sup>116</sup> *Id.*

<sup>117</sup> IMPACT OF ERA, *supra* note 89, at 977.

<sup>118</sup> Women are generally excluded from serving in combat units by statute (Navy and Air Force) or as a matter of established policy (Army and Marine Corps). See *Rostker v. Goldberg*, 453 U.S. 57, 76-78 (1981), and authorities cited therein.

<sup>119</sup> IMPACT OF ERA, *supra* note 89, at 889-93. See Testimony of Thomas I. Emerson, Lines Professor of Law Emeritus, Yale Law School, before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm. (October 19, 1983); IMPACT OF ERA, *supra* note 88, at 14.

<sup>120</sup> Some commentators have concluded that existing proscriptions against women serving in combat would be invalid. See Testimony of Prof. Eliot Cohen and Antonia Handler Chayes, *supra* note 114.

<sup>121</sup> *Rostker*, 453 U.S. at 64-65.

ual circumstances and needs, not on assumptions based solely on an individual's sex.<sup>122</sup> Thus, a declaration of invalidity is probable with respect to such presumptions that may exist, *e.g.*, the father's primary responsibility for the support of the family.<sup>123</sup> The support obligations of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources, and contributions (other than financial) to the family welfare.<sup>124</sup> Upon dissolution of a marriage, it is suggested that ERA would require states to provide for an equitable interspousal distribution of assets acquired during the marriage,<sup>125</sup> thereby effectively recognizing the tangible contributions made to the marriage by nonworking spouses (usually women). It should be noted that without ERA, many states have adopted more equitable methods for division of marital property in matrimonial cases.<sup>126</sup>

ERA could require changes in other areas of domestic relations law. Some have concluded that the statutory age at which a state permits an individual to marry would have to be the same for men and women.<sup>127</sup> It has also been suggested that ERA would lead to the invalidation of statutes or practices requiring wives to use their husbands' surnames, or requiring children to use their fathers' surnames.<sup>128</sup> Further, some are of the view that legal requirements establishing the domicile or residence of individuals could not be based on sex, thus eliminating any presumptions that the domicile or residence of a married woman follows that of her husband.<sup>129</sup>

## 2. Employment

ERA could be violated by laws, to the extent they still exist, that explicitly restrict or limit the occupations or conditions of employment for women only, *e.g.*, laws limiting the maximum number of hours worked, excluding women from working in mines, and requiring rest periods.<sup>130</sup> The 1972 Senate Report indicated that under ERA restrictive laws (*e.g.*, excluding women from certain occupations) would be invalidated, whereas others that are truly protective (*e.g.*, providing rest periods)

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<sup>122</sup> S. REP. No. 689, *supra* note 1, at 17. See IMPACT OF ERA, *supra* note 89, at 97-207.

<sup>123</sup> See R. LEE, *supra* note 89, at 69.

<sup>124</sup> S. REP. No. 689, *supra* note 1, at 17.

<sup>125</sup> See IMPACT OF ERA, *supra* note 89, at 160-76.

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* at 101.

<sup>128</sup> See *id.* at 102-111.

<sup>129</sup> Special rules governing married women's domicile can result in differences in eligibility for resident tuition at state schools, jury duty, voter registration, tax liability, and jurisdiction over estates. *Id.* at 113.

<sup>130</sup> S. REP. No. 689, *supra* note 1, at 14-15. See also IMPACT OF THE ERA, *supra* note 89, at 209-94.

could be extended to protect both men and women.<sup>131</sup>

ERA would prohibit sex discrimination in employment practices in state and local governments. In this area, ERA would overlap with Title VII of the Civil Rights Act of 1964 and state fair employment practice statutes which now prohibit sex discrimination in public employment. ERA could fill gaps in statutes such as Title VII which does not apply to members of Congress<sup>132</sup> and certain state elected officials,<sup>133</sup> and could further provide impetus for the more vigorous enforcement of anti-discrimination laws and policies.

## VII. IMPLICATIONS OF CONCERN FOR CHURCHES AND THE PEOPLE THEY SERVE

The implications of ERA have also given rise to concerns in diverse areas of law and public policy. There follows a discussion of certain areas of major concern to churches and the people they serve. Such an analysis is essential to an objective consideration of ERA, and to provide balance in the public debate by augmenting the available public commentary.

### A. *Abortion*

#### 1. Substantive Abortion Rights

The potential effect of ERA on a woman's right to terminate her pregnancy is limited because *Roe v. Wade*<sup>134</sup> and kindred cases are the law. Courts will not attribute to Congress an intent to do an unnecessary act.<sup>135</sup> There is no explicit indication in the text or legislative history that Congress intends ERA to reinforce a right of abortion. Indeed, the legislative history reveals the absence of a congressional consensus on abortion.<sup>136</sup>

Notwithstanding the foregoing, it is reasonable to consider ERA as possessing the potential to buttress the substantive right of abortion. The possible permutations of fact and legal principle under the doctrine of *Roe v. Wade* have not been exhausted. There is some room for the regulation of the abortion right based upon the compelling interest of the state in the life and health of the mother (second and third trimester) and unborn child (third trimester). This approach in the theory of the cases has

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<sup>131</sup> S. REP. No. 689, *supra* note 1, at 15.

<sup>132</sup> 42 U.S.C. § 2000e-16(a) (1982).

<sup>133</sup> 42 U.S.C. § 2000e(f) (1982).

<sup>134</sup> 410 U.S. 113 (1973).

<sup>135</sup> See, e.g., *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977).

<sup>136</sup> Similarly, ERA proponents have argued that ERA and abortion are unrelated, the former being a matter of economic equity and the latter being a health/privacy issue. JOHNSON & CUNNINGHAM, *ERA AND ABORTIONS: REALLY SEPARATE ISSUES?* 150 (1980).

already been criticized by three members of the Supreme Court,<sup>137</sup> and the future course of the law seems somewhat uncertain. Although it is unlikely the Court will overrule the *Roe v. Wade* line of cases in their fundamental precepts, it is not unreasonable to anticipate more favorable consideration of well-founded restrictions of abortion in the law. The present Court has manifested its willingness to reassess its decisions in other vital areas,<sup>138</sup> and no reason appears why abortion must be an exception to that salutary process.

These observations counsel a sensitivity to the more subtle potentialities of ERA in the field of abortion. If there is any room for the meaningful restriction of abortion under present legal theory or future holdings, ERA could serve to diminish those prospects. In *Roe v. Wade*, the Court grounded the woman's right to terminate her pregnancy in considerations of her health.<sup>139</sup> The right to protect one's health and reproductive interests is grounded in the constitutional right to privacy.<sup>140</sup> Under ERA, the Court would likely view abortion as a type of medical treatment, although not identical, to other types.<sup>141</sup> Accordingly, there is a legitimate concern that ERA could lead to the invalidation of laws which deny to women a right not denied to men, namely, access to forms of medical "treatment" needed to protect health, including abortion. In this way, ERA could buttress the *Roe v. Wade* right of abortion. It could fortify the principal holding in *Roe v. Wade*, *i.e.* the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy."<sup>142</sup>

## 2. Public Funding of Abortion

Although *Roe v. Wade* and other cases have established a woman's right to terminate her pregnancy, there is presently no federal constitutional right to public financing of abortion.<sup>143</sup> The denial of such funding does not deprive women of any constitutional right, including rights under the equal protection clause.<sup>144</sup> However, under ERA it is likely that funding restrictions would be invalidated if certain established principles are applied.

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<sup>137</sup> *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (O'Connor, J., dissenting).

<sup>138</sup> See, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (first amendment establishment clause test); *New York v. Quarles*, 467 U.S. 649 (1984) (Miranda rule).

<sup>139</sup> *Roe*, 410 U.S. at 153; see also *Harris v. McRae*, 448 U.S. 297, 316 (1980) (state not required to pay for medically necessary abortions).

<sup>140</sup> See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>141</sup> *Harris v. McRae*, 448 U.S. 297, 325 (1980).

<sup>142</sup> *Roe*, 410 U.S. at 153.

<sup>143</sup> *Harris*, 448 U.S. at 297.

<sup>144</sup> *Id.*



Like pregnancy and childbirth, abortion is a procedure which only women can undergo. Because ERA would probably render sex-based classifications suspect in the sense that term is used under the equal protection clause, a law excluding abortions from a comprehensive government-sponsored medical program would be subject to strict judicial scrutiny. The Supreme Court has already held that the government's interest in fetal life does not become compelling until after viability.<sup>145</sup> Consequently, a law excluding pre-viability abortions from a comprehensive health benefit program might well not survive strict judicial scrutiny, whether the program is based on the state's interest in fetal life or in encouraging childbirth over abortion.<sup>146</sup> Further, in view of the mother's somewhat qualified right to terminate her pregnancy after viability, the same result could follow for this period of gestation as well.

In a very recent decision, a majority of the Pennsylvania Commonwealth Court upheld the state's exclusion of funding for abortions (with certain exceptions) against claims that it violated the equal protection clause and Pennsylvania's ERA.<sup>147</sup> The court held (two judges dissenting) that the exclusion did not involve a gender-based classification cognizable under the state's ERA. The decision has been appealed to the Pennsylvania Supreme Court. The fact that the court was divided points up the genuineness of this question with respect to the federal ERA. The case also confirms the difficulties of predicting results under ERA. Further, one decision involving a state ERA by a state intermediate appellate court is of slight precedential value. This is especially so since the court did not apply the standard of strict judicial scrutiny, as ERA seems likely to require.

### *B. Rights of Homosexual Persons*

An issue which has caused concern is the potential of ERA to sanction a homosexual lifestyle by incorporating it in the legal fabric in various ways, for example, by compelling recognition of the marriage of ho-

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<sup>145</sup> *Roe*, 410 U.S. at 163.

<sup>146</sup> *Harris*, 448 U.S. at 325. The Supreme Court in *Harris* concluded the abortion funding restriction was discrimination based not on "sex" but on "indigency." The Court reaffirmed that "indigency" is not a "suspect classification." *Id.* at 323. When the Court in *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974), rejected an argument that a classification based on pregnancy in a state disability compensation format was sex discrimination and found instead it was based on medical condition, the dissent charged that the Court was backing away from its decisions applying greater scrutiny to gender-based classifications. On another occasion, one of the *Geduldig* majority explained that the absence of an ERA was an important reason the Court decided not to apply "strict scrutiny" to such classifications. See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

<sup>147</sup> *Fischer v. Department of Pub. Welfare*, No. 283 C.D., slip op. at 14-16 (Pa. Commw. Ct. Sept. 20, 1984), appeal docketed, No. 67-MD-1984 (Pa. Oct. 3, 1984).

mosexual persons, and by prohibiting employment and like policies which exclude such persons (*e.g.*, in employment by churches and other religious organizations). The implications are self-evident in the discussions below of areas of concern, such as ERA's potential on tax-exempt status. The issue of marriage is distinct and warrants separate consideration.

Arguments that the refusal to permit same-sex marriages constitutes unlawful sex discrimination have been rejected uniformly. In denying such claims, courts generally have relied upon the traditional definition and usage of the term "marriage" as a heterosexual union.<sup>148</sup> Thus, a Kentucky court held that two persons of the same sex had no constitutionally protected right to marry. It concluded that the two women involved were not prevented from marrying by the statutes of Kentucky, but "rather by their own incapability of entering into a marriage as that term is defined."<sup>149</sup> Most recently, a Pennsylvania Superior Court found that history, public policy, and ordinary definition argue against expansion of the concept of common law marriage to include same-sex marriage.<sup>150</sup>

Perhaps the most relevant case for present purposes is *Singer v. Hara*<sup>151</sup> which was decided under a state ERA (Washington) substantially similar to the proposed federal ERA.<sup>152</sup> *Singer* held that the statutory prohibition against same-sex marriages did not violate the state ERA or the equal protection clause of the fourteenth amendment. In the court's view, the state ERA did not create new rights, but merely mandated that existing rights be equally available to members of both sexes. Because by definition marriage is a union between a man and a woman, the court determined that the right sought by applicants did not exist, and therefore they were not denied a "right" (marriage license) on account of sex. The court emphasized the "state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children . . . . [M]arriage exists as a protected legal

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<sup>148</sup> See *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Ca. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); see also *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (restricting marriage to couples of opposite sex was not irrational or invidious discrimination violative of the equal protection clause). The appeal in *Baker* was dismissed for want of substantial federal question, which operates as a decision on the merits. See *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 747 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971). See generally *Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

<sup>149</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

<sup>150</sup> *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).

<sup>151</sup> 11 Wash. App. 247, 522 P.2d 1187 (1974).

<sup>152</sup> The text of the Washington ERA is "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1 (1972).

institution primarily because of societal values associated with the propagation of the human race."<sup>153</sup> Similarly, in a case not involving an ERA, the court stated: "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised."<sup>154</sup>

Some have suggested that ERA's potential for legitimizing marriage between homosexual persons finds support in the miscegenation case of *Loving v. Virginia*.<sup>155</sup> In *Loving*, the Supreme Court held Virginia's miscegenation statutes unconstitutional under the equal protection clause of the fourteenth amendment because they were based "solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."<sup>156</sup> The analogy to the *Loving* case proposes that a law permitting a man to marry a woman, but not a man, creates a classification based solely on sex,<sup>157</sup> and that under the strict scrutiny standard such a classification is as unconstitutional as one based on race.<sup>158</sup>

The analogy to *Loving* has been rejected in at least two cases based on the essential nature of marriage as a heterosexual union. In one, the court stated *Loving* does not indicate that all state restrictions on the right to marry are beyond the reach of the fourteenth amendment. But in common sense and a constitutional sense, there is a clear distinction between a marital restriction based merely on race and one based upon the fundamental difference in sex.<sup>159</sup> In *Singer*, the court found in the term "marriage" no sex-based classification which would trigger application of the ERA.<sup>160</sup> This "definitional response" to the issue has been criticized as producing a "chicken-or-egg type of quandary,"<sup>161</sup> and as reflecting an

<sup>153</sup> *Singer*, 11 Wash. App. at 258, 522 P.2d at 1195.

<sup>154</sup> *Adams*, 486 F. Supp. at 1124.

<sup>155</sup> 388 U.S. 1 (1967).

<sup>156</sup> *Id.* at 11.

<sup>157</sup> Even if the strict gender discrimination argument were rejected, it can be argued that discriminatory treatment of sexual minorities constitutes discrimination based on sexual stereotype, which is itself a form of sex discrimination. See *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976), which interpreted the Colorado ERA as follows: "This amendment prohibits unequal treatment based exclusively on the circumstance of sex, social stereotypes connected with gender, and culturally induced dissimilarities" (emphasis added). *Id.*

<sup>158</sup> See Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 72-86 (1970) (testimony of Prof. Paul Freund of Harvard Law School).

<sup>159</sup> *Baker*, 191 N.W.2d at 187.

<sup>160</sup> *Singer*, 11 Wash. App. at 252, 522 P.2d at 1191. See BLACK'S LAW DICTIONARY 876 (5th ed. 1979).

<sup>161</sup> See *supra* note 52.

anachronistic understanding of the marital institution.<sup>162</sup>

A cautious assessment of ERA in this sensitive area of such pastoral importance cannot overlook the fact that laws, and the interpretation of laws, necessarily reflect the contemporary mores. What seems an ineluctable interpretation of "sex" (gender) today may seem less clear to some in years to come. Indeed, some commentators have already felt winds of change. One law professor has stated: "The constitutional right to privacy was developed in *Griswold [v. Connecticut]*,<sup>163</sup> and its progeny because the procreational model of sexuality could no longer be sustained by sound empirical or conceptual argument. Lacking such support, the procreational model could no longer be legally enforced on the grounds of the 'public morality . . . .'<sup>164</sup> Another has suggested that the extension of the *Griswold* privacy rights to single people "signaled a new understanding of marriage in the background of constitutional rights. It's the individual who has the rights, not the couple, not the status entity."<sup>165</sup> Of interest is the dissent of one judge in a case which upheld the constitutionality of Virginia's criminal sodomy statute.<sup>166</sup> He wrote: "A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern."<sup>167</sup>

As observed earlier in this article, the phrase "on account of sex" should not be construed other than as referring to gender. However, the developing constitutional "right of privacy", considered in light of ever-shifting mores and societal permissiveness, opens the door to a more liberal construction. The phrase "on account of sex" has obvious interpretational latitude.

### C. Tax-Exempt Status of Church Organizations

There are two ways in which ERA could adversely affect the tax-

<sup>162</sup> *Id.*

<sup>163</sup> 381 U.S. 479 (1965).

<sup>164</sup> See Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 981 (1970). Further, Professor Richards suggests that:

[i]n the contraception and abortion decisions, the Court impliedly rejected the legitimacy of both the classic Augustinian view of human sexuality and the associated judgments about the exclusive morality of marital procreational sex. The enforcement of majoritarian prejudices, without any plausible empirical basis, could be independently unconstitutional as a violation of due process rationality in legislation.

*Id.* at 982.

<sup>165</sup> See *supra* note 52.

<sup>166</sup> *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) (three judge court), *aff'd*, 425 U.S. 901 (1976).

<sup>167</sup> *Id.* at 1203 (Merhige, J., dissenting).

exempt status of churches and their institutions and organizations. First, ERA could be used to support an extension of the reasoning in *Bob Jones University v. United States*<sup>168</sup> to deny tax-exempt status under section 501(c)(3) of the Internal Revenue Code ("Code")<sup>169</sup> to organizations that discriminate "on account of sex." Second, ERA could be interpreted as independently prohibiting the government from providing tax benefits to organizations that discriminate on the basis of sex. The first is a matter of statutory construction, the second of constitutional construction.

#### 1. Section 501(c)(3)

In *Bob Jones*, the Supreme Court held that a private educational institution which followed racially discriminatory policies based on religious beliefs was not charitable within the meaning of section 501(c)(3) of the Code. Noting that such exemptions are justified on the basis that an exempt entity confers a public benefit,<sup>170</sup> the Court concluded that the racially discriminatory schools (i) violated the fundamental public policy against racial discrimination in education, and therefore (ii) could not be deemed to confer a benefit on the public.<sup>171</sup> In the Court's view, education immersed in racial discrimination is robbed of its charitable character. The Court also concluded that the government's fundamental policy against racial discrimination in education, and its interest in denying its support to discriminatory schools, substantially outweigh any burden which denial of tax-exempt status might impose on the institution's rights under the free exercise clause of the first amendment.<sup>172</sup> The Court noted that the financial impact on the schools would not prevent them from observing their religious tenets.<sup>173</sup>

Perhaps significantly, the Court pointedly observed that it was dealing with a religious school, not with churches or other purely religious institutions, and that the governmental interest was in denying public support to racial discrimination in education.<sup>174</sup> Confined to its facts, the immediate impact of *Bob Jones* is limited to racially discriminatory educational institutions.

#### (a) *The Church Itself - Clergy*

Under the *Bob Jones* rationale, it could be argued that a church

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<sup>168</sup> 461 U.S. 574 (1983).

<sup>169</sup> IRC § 501(c)(3) (1983).

<sup>170</sup> *Bob Jones*, 461 U.S. at 582.

<sup>171</sup> *Id.* at 585 n.21.

<sup>172</sup> *Id.* at 590.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 590 n.29.

which limits its clergy to men violates ERA's fundamental national policy against discrimination on account of sex, thereby negating any benefits the church might otherwise confer on the public. If the argument succeeded, forfeiture of tax-exempt status would result—at least until the allegedly discriminatory practice is terminated.

The *Bob Jones* decision was founded on the government's compelling interest in eliminating racial discrimination in education. In matters involving the internal affairs of churches or religious doctrine, the government has no legitimate interest. It is well established that religious freedom under the first amendment encompasses the right of religious bodies to decide matters of church governance and of faith and doctrine, free from state interference.<sup>175</sup> Freedom to select clergy has been afforded federal constitutional protection.<sup>176</sup> Denial of tax-exempt status to churches, because of the manner in which they select clergy, would raise important constitutional questions, requiring a balancing of the religious freedom protected by the first amendment with the policy against sex discrimination declared in ERA.

A limitation on religious liberty can be justified by showing that it is essential to accomplish an overriding governmental interest.<sup>177</sup> There is no question that the loss of tax exemption would place a substantial burden on the free exercise of religion by churches or religious orders. But such a burden was allowed in *Bob Jones*. The courts have sustained burdens on free exercise rights in other contexts when an overriding government interest required. Under ERA, it would be arguable that the free exercise clause does not require an exception for the churches or religious orders from a requirement that tax exemption be denied to organizations that discriminate on the basis of sex. In the area of race discrimination, at least twice the Court has stated that the Constitution tolerates but will not support private discrimination.<sup>178</sup> Under ERA, *Bob Jones* and earlier cases<sup>179</sup> could be used to support a contention that tax benefits should be denied to churches that discriminate on the basis of sex, even for religious

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<sup>175</sup> See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (1976).

<sup>176</sup> See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

<sup>177</sup> *United States v. Lee*, 455 U.S. 252, 257-58 (1982). The free exercise clause of the first amendment can require exceptions from laws of general applicability, unless such exceptions would unduly interfere with a compelling state interest. *Id.*; *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). However, as was the case in *Lee*, where an employer was required to pay into the social security system, despite his religious beliefs to the contrary, the Court has upheld limitations on religious liberty in order to accomplish an overriding governmental interest. *Lee*, 455 U.S. at 260.

<sup>178</sup> *Runyon v. McCray*, 427 U.S. 160, 176 (1976); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

<sup>179</sup> *Bob Jones*, 461 U.S. at 585, 590 n.29.

reasons.

*(b) Sex Distinctions in Educational Institutions*

Catholic schools which differentiate on the basis of sex in admissions or activities could very well be the target of efforts to extend the *Bob Jones* reasoning beyond racial discrimination to sex discrimination.

The passage of ERA would surely bolster the argument that single-sex private schools, or private schools that otherwise differentiate on the basis of sex (e.g., in the level of extra-curricular activities offered), violate fundamental public policy, one of the two critical elements in the *Bob Jones* rationale. The other, i.e. that such schools should not be deemed to confer a public benefit, might also be supported by ERA. It could be argued that sexually discriminatory schools exert a pervasive influence over the entire educational process, outweighing any public benefit that they might otherwise provide.<sup>180</sup> Thus, under the reasoning of *Bob Jones*, the tax-exempt status of such schools may well be jeopardized.

Seminaries and novitiates differ from other Catholic schools, and the schools in *Bob Jones*, in that their primary function is the education and training of priests and members of religious orders. Thus, the *Bob Jones* reasoning seems less relevant. However, as with churches, it could be argued that seminaries and novitiates that differentiate on the basis of sex are not entitled to tax exemption under section 501(c)(3) because they violate the fundamental public policy of ERA.

*(c) Other Church Organizations—E.g., Hospitals and Social Welfare Agencies*

Whether the *Bob Jones* reasoning could logically be extended to discrimination in charitable areas other than education presents another difficult question. Organizations that perform public service functions (e.g., hospitals and social welfare agencies) are similar to educational institutions in their broad public purposes. If they discriminate on the basis of sex (e.g., by refusing to perform or fund abortions), they could be said to violate fundamental public policy thereby meeting the first criterion of *Bob Jones*. As in *Bob Jones*, it could also be argued that their practices undermine whatever benefits they confer on the public. Thus, ERA could extend the *Bob Jones* reasoning to charitable organizations other than educational institutions. As previously noted for the other categories, it is questionable whether these organizations could successfully raise free exercise defenses in the event of denial of tax exemption.

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<sup>180</sup> The Court in *Bob Jones* declined to decide whether other kinds of charitable organizations could also be denied exempt status if they violated public policy. *Id.* at 586 n.21.

## 2. ERA as an Independent Source for Denial of Tax-Exempt Status

The previous discussion focused on the effect of ERA on the interpretation of section 501(c)(3) of the Code. The issue here is whether ERA would operate *independently* to prevent the government from extending tax exemption to organizations that discriminate on the basis of sex. Neither the legislative history of ERA nor relevant case law provides definitive guidance on this point. By analogy to equal protection principles, there are two theories upon which it could be argued that ERA prohibits the grant of tax exemptions to discriminatory organizations, namely through the application of the "state action" doctrine, and through the adoption of a standard under ERA which prohibits the government from aiding discriminatory institutions.

### (a) State Action

Current state action principles developed under the fourteenth amendment require some nexus between the government and the discriminatory practice of a private organization before the latter will be treated as state action. The Supreme Court recently held that the grant of substantial funds to a private school did not so involve a state government in the internal decisions of that school as to warrant treating those decisions as state action.<sup>181</sup> Despite some earlier lower court decisions to the contrary,<sup>182</sup> under current state action principles it is not likely that the discriminatory acts of a private organization would be considered state action merely because that organization receives a governmental benefit in the form of a tax exemption, unless there is also significant governmental involvement in the discriminatory acts themselves.

### (b) Aid To Discriminatory Institutions

Arguably, ERA could be interpreted as prohibiting governmental programs which have the practical effect of providing aid to discriminatory institutions.<sup>183</sup> There is precedent in the equal protection area to support this contention.<sup>184</sup> In *Bob Jones*, however, the Court did not

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<sup>181</sup> *Rendell-Baker v. Kohn*, 457 U.S. 830, 833 (1982).

<sup>182</sup> See *Falkenstein v. Department of Revenue*, 350 F. Supp. 887 (D. Or. 1972), *appeal dismissed*, 409 U.S. 1099 (1973); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Pitts v. Department of Revenue*, 333 F. Supp. 662 (E.D. Wis. 1971).

<sup>183</sup> Maryland's ERA has recently been interpreted by a trial court as prohibiting a property tax exemption for a country club which limits its membership to males. See *Bainum v. Maryland*, Equity No. 85397 (Cir. Ct. Montgomery County Sept. 13, 1984).

<sup>184</sup> See *Norwood*, 413 U.S. at 466-67; *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981), where standing was found in an equal protection challenge to a state tax exemption as applied to private racially discriminatory institutions.



reach an analogous question, *i.e.* whether denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the fifth amendment.<sup>185</sup> Thus, until the Court finally resolves the issue, equal protection precedents provide no definitive guidance as to how ERA would independently affect tax exemption.

Because of the potentially devastating impact that loss of tax exemption could have on churches and their institutions, clarity is sorely needed on this issue. *Bob Jones* demonstrates clearly that free exercise rights can be burdened in the area of race discrimination.

#### D. *Government Aid Programs-Participation of Church Organizations*

Churches and their related organizations participate in numerous federal and state aid programs involving substantial funds. Programs of particular importance include education, health and social services. In the absence of statutory prohibitions against sex discrimination in aid programs, would ERA independently preclude participation by organizations which differentiate on the basis of sex (*e.g.*, *hospitals*, in relation to abortion procedures; *schools* whose admissions policies or programs differentiate between the sexes; and *church agencies* which exclude women from its ministry)? The answer to that question is governed by considerations already discussed in the area of tax exemption.

As already indicated, mere receipt of governmental benefits would not establish the necessary nexus with the discriminatory acts of the private organization for state action purposes.<sup>186</sup> It is more likely that ERA could be interpreted as prohibiting governmental programs from providing aid to institutions that discriminate on the basis of sex. A similar result was reached in an earlier racial discrimination case under the equal protection clause.<sup>187</sup> Only recently a lower court concluded that the federal government could not, consistent with equal protection guarantees, provide funding to state agencies which engaged in racially discriminatory practices.<sup>188</sup> By analogy, a similar result could be expected under ERA. As with tax exemption, the result could be the same even where an organization discriminates for religious reasons.

#### E. *Statutory Antidiscrimination Provisions—Exceptions Based on Religious Belief*

Questions have been raised concerning the potential impact of ERA on religiously-based statutory exceptions to anti-discrimination provi-

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<sup>185</sup> *Bob Jones*, 461 U.S. at 586 n.24.

<sup>186</sup> *Rendell-Baker*, 457 U.S. at 838.

<sup>187</sup> See *Norwood*, 413 U.S. at 455.

<sup>188</sup> *National Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 569 (1983).

sions.<sup>189</sup> For example, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs receiving federal financial assistance.<sup>190</sup> However, Title IX does not apply to an institution which is controlled by a religious organization if compliance would contravene its religious tenets.<sup>191</sup> Further, the church amendment<sup>192</sup> allows hospitals participating in certain federal programs not to perform abortions or sterilizations, and Title VII of the Civil Rights Act of 1964,<sup>193</sup> which prohibits sex discrimination in employment, does not require an employer to pay for health insurance benefits for most abortions.<sup>194</sup>

In assessing the impact of ERA on these exceptions, a fundamental

<sup>189</sup> *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (Jan. 24, 1984) (Testimony of John T. Noonan, University of California). *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (Sept. 23, 1983) (Testimony of Jeremy A. Rabkin, Cornell University).

<sup>190</sup> 20 U.S.C. § 1681(a) (1982).

<sup>191</sup> 20 U.S.C. § 1681(a)(3) (1982). This exception provides protection for Catholic educational institutions which, for religious reasons, decline to include abortion coverage in health benefit programs that arguably could fall within the reach of the Title IX regulations. 34 CFR § 300a-7.

<sup>192</sup> Religious organizations are exempted from Title VII only with respect to preferences for individuals of a particular *religion* for the performance of work connected with the carrying on of its activities. 42 U.S.C. § 2000e-1 (1982). Religious organizations are fully subject to Title VII with respect to other types of discrimination criteria (race, color, sex, or national origin). *E.E.O.C. v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982).

<sup>193</sup> 42 U.S.C. § 2000e(k) (1982). The exception in Title VII was adopted to prevent compromise of the religious freedom of employers having religious or moral objections to abortion. H.REP. No. 948, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749. Unfortunately, it is not broad enough. It requires employers to include in their employee health insurance benefits coverage for abortions necessary to prevent endangerment to the mother's life if the fetus were carried to term, and, by implication, coverage for disability stemming from abortions in their disability insurance benefits and sick leave plans. *See National Conference of Catholic Bishops v. Bell*, 490 F. Supp. 734 (D.D.C. 1980), *aff'd*, 653 F.2d 535 (D.C. Cir. 1981).

<sup>194</sup> Congressman Sensenbrenner has sponsored an amendment to ERA which would add: "[n]othing in this article shall be construed to grant or secure any right to abortion or the funding thereof." The Sensenbrenner proposal would, if approved, avoid the undesirable linkage of ERA and abortion. The amendatory process, however, requires this caveat. It is possible that the defeat or rejecting of the Sensenbrenner amendment could be construed by a court as establishing the intent that ERA is to support abortion. Such a construction by a court would not necessarily be on solid ground because Congress and legislators could reject amendments on any number of grounds including convenience. *See* 2A SUTHERLAND, *supra* note 6, at 224. One must consult the legislative record, however, to determine whether rejection of an amendment established definitive legislative intent. *See Automobile Trade Ass'n of Maryland v. Insurance Comm'r*, 292 Md. 15, 437 A.2d 199 (1981); *City of Ingleside v. Johnson*, 537 S.W.2d 145 (Tex. Civ. App. 1976). If so, then that intent would be very helpful to a reviewing court and possibly harmful to the cause to overturn. *See Roe*, 410 U.S. at 113.

principle must be kept in mind, *i.e.* neither Congress nor a state can enact a law that denies a right guaranteed by the Constitution. The Court has recently held that an exception in Title IX for the admissions policies of certain single-sex public undergraduate institutions did not exempt a public nursing school from its obligation, under the equal protection clause of the fourteenth amendment, not to deny males the right to enroll. Thus, for example, if ERA were interpreted as prohibiting government funding of organizations that discriminate on the basis of sex for any reason, an exception such as the religious tenet exception in Title IX would probably be invalidated.

### VIII. CONCLUSION

To be sure, the present state of the law proscribing sex discrimination reflects contemporary enlightenment and growth. Further, there is no indication that there is not more progress to come. On the other hand, there is also no assurance that the necessary progress will be attained with the dispatch it deserves. Essentially an overlay upon the equal protection components of the fifth and fourteenth amendments, ERA would fortify the existing equal protection guarantees vis-a-vis sex-based discrimination.

It cannot be gainsaid, however, that ERA is also burdened by potential collateral effects which are probably unintended by many as undesirable, and even alarming. It is not possible to forecast all its effects with reasonable precision, a reality wrought in part by the dynamics involved in the complex interplay between ERA and other principles of law which will govern the judicial interpretive process. However, for all the reasons discussed in this memorandum, in the present state of the law and ERA's legislative history, there is no reasonable doubt of its uncertain and far-reaching adverse implications. As for the legislative history, it is a particular cause for regret that the debate too often reflects a desire to imbue the ERA with a purposeful ambiguity, and a willingness to abdicate legislative responsibility in favor of the judiciary.

In the absence of clarifying amendments, or the less secure means of clarifying legislative history, it is fair to say that ratification of ERA would set in motion a potent constitutional force, with potentially undesirable as well as desirable results, whose meaning and effect would be as much a product of skillful advocacy and judicial predilections as of the will of the people. This is a matter of profound constitutional concern. A due regard for our national repository of the powers of government and the rights of the people demand precision both of purpose and expression. It is true, of course, that it is not possible to draft an ERA in a way which makes its future application entirely predictable. Every contingency cannot be envisaged. On the other hand, it is possible to draft an

ERA which, illumined by a well-focused legislative history, will avoid major pitfalls which are now readily identifiable. Unlike statutes which are always subject to amendment by the legislature when deficiencies appear, if ERA is ratified its course and effect will be in the hands of the judicial branch.

There is no concern which cannot be resolved, at least substantially, while still preserving the integrity of the economic and kindred goals which women seek to achieve and to which their dignity entitles them. I would counsel constructive endeavors to achieve greater clarity in service to those goals. Because the legal analysis related to these issues is so complex, and often open to honest differences of informed opinion, the effective level of resolution is that of consensus on policy and draftsmanship, not legal disputation. If there is disagreement on the policy to be established, that should be straightforwardly addressed. If there is not, good faith will find a way to express the policy in reasonably clear and effective terms, buttressed by meaningful legislative history.