

Spring 1971

Equal Rights for Women: The Need for a National Policy

Julia C. Lamber

Indiana University Maurer School of Law, lamber@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Lamber, Julia C. (1971) "Equal Rights for Women: The Need for a National Policy," *Indiana Law Journal*: Vol. 46 : Iss. 3 , Article 5.
Available at: <http://www.repository.law.indiana.edu/ilj/vol46/iss3/5>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

EQUAL RIGHTS FOR WOMEN: THE NEED FOR A NATIONAL POLICY

In 1971, the theoretical proposition that women should enjoy equal rights and opportunities has been accepted. There is evidence of this acceptance from past legislation, resulting from social pressure in the 1960's, such as the Fair Labor Standards Act as amended by the Equal Pay Act,¹ the equal opportunity provisions of the Civil Rights Act of 1964,² two executive orders³ relating to discrimination in federal contracts and federal employment, and numerous state fair employment practices laws.⁴ Unanswered, however, is whether the above state and federal response is sufficient to in fact enable women to enjoy equal rights and opportunities, or whether the proposed Equal Rights Amendment, in any of its suggested forms, is also needed to resolve the disparity between theory and reality.

The problems of equal rights and opportunity for women are pervasive. Of special concern is the field of employment. In 1969 there were 30.5 million women workers constituting 38% of all workers.⁵ Approximately 17.9 million wives worked outside the home.⁶ Moreover, 5.4 million families were headed by women.⁷ The median income of full-time working women was substantially below that of men.⁸ Because

1. 29 U.S.C. § 206(d) (1963).

2. 42 U.S.C. § 2000e (1964) [sex provision]. See note 11 *infra*.

3. Exec. Order No. 11246 (as amended), 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1965-69); Exec. Order No. 11478, 3 C.F.R. 446 (1970), 42 U.S.C. § 2000e (Supp. V, 1965, 1965-69).

4. See, e.g., WIS. STAT. §§ 111.31-111.37 (West 1957), MICH. COMP. LAWS ANN. §§ 423.301-423.311 (1967). See also IND. ANN. STAT. §§ 40-2307-40-2317 (Burns Supp. 1970), ILL. ANN. STAT. Ch. 48, § 851-67, 881-87 (Smith-Hurd Supp. 1970).

5. WOMEN'S BUREAU, DEPT. OF LABOR, BACKGROUND FACTS ON WOMEN WORKERS IN UNITED STATES 1 (1970). "Nearly one-half (49%) of all women 18 to 64 years of age were workers in 1969." *Id.* at 2.

6. *Id.* at 2.

7. "Many of these families were poor despite the fact that the women family heads were in the labor force. Among the 3.2 million families whose head had some work experience in 1968, about 772,000 or 24% had incomes below the poverty level." *Id.*

8. The median earnings of year-around, full-time working women fourteen years of age and over in 1968 were \$4,457. This was only 58% of the \$7,664 median earnings of fully employed male workers. Twenty percent of the women but only eight percent of the men earned less than \$3,000. At the upper end of the scale only 3% of working women but 28% of the men earned \$10,000 or more in 1968. *Id.* at 4.

Comparison of Median Wages for 1968

	Year-around, full-time workers		All workers	
	<i>Women</i>	<i>Men</i>	<i>Women</i>	<i>Men</i>
Professional, technical, and kindred workers	\$6,691	\$10,151	\$5,564	\$9,368

of the significant societal group involved, the problem of wage disparity demands a solution.

Federal Legislation

The Equal Pay Act of 1963,⁹ an amendment to the Fair Labor Standards Act, prohibits employers from paying wages to employees:

at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility¹⁰

There are provisions for pay differentiation based upon seniority, the merit system, and quantity of production.

In 1964 another step toward eliminating the barrier to equal opportunities was the passage of Title VII of the Civil Rights Act. Directed toward unlawful employment practices, the Act prohibited employers, labor unions, and employment agencies from discriminating on the basis of sex, as well as race, color, religion, or national origin.¹¹ The Act also

Managers, officials, and proprietors (except farm)	5,635	10,340	4,840	9,904
Clerical and kindred workers	4,789	7,351	3,882	6,755
Sales workers	3,461	8,549	2,073	7,245

Id. at 20.

9. 29 U.S.C. § 206(d) (1963). Congressional Finding and Declaration of Policy:

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act . . . through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

Id.

10. *Id.*

11. 42 U.S.C. § 2000e-2 (1964) [hereinafter referred to as Title VII].

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against 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; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

created the Equal Employment Opportunity Commission,¹² charged with the responsibility of administering the Act, and a complex procedural provision for the prevention of unlawful employment practices.¹³ The United States Attorney General is authorized to bring suit when he has "reasonable cause to believe there is a pattern or practice of resistance to the full employment of any of the rights secured by this title"¹⁴ or to intervene in a suit if he feels the case is of "general public importance."¹⁵ Another provision of particular importance is the bona fide occupational exception.¹⁶ The Equal Pay Act and Title VII of the Civil Rights Act

individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

12. 42 U.S.C. § 2000e-4 [hereinafter referred to as the EEOC].

13. 42 U.S.C. § 2000e-5. After a charge has been filed, the Commission furnishes the respondent with a copy and makes an investigation of such charge. If the Commission determines there is reasonable cause to believe the charge to be true, it notifies the respondent and seeks to eliminate the unlawful employment practice by "informal method of conference, conciliation, and persuasion." The Commission has 60 days to secure voluntary compliance; if it is not achieved, it so notifies the parties. The aggrieved party can then file a complaint within 30 days in a District Court, since the Commission has no enforcement power of its own. For extensive study of the procedural requirements see Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964*, 31 U. PITT. L. REV. 407 (1970); Rawalt, *Litigating Sex Discrimination Cases*, 4 FAM. L.Q. 44 (1970).

14. 42 U.S.C. § 2000e-6.

15. 42 U.S.C. § 2000e-5(e). However, the Attorney General has brought only one suit alleging sex discrimination, *United States v. Libbey—Owens—Ford Co.*, 3 CCH-EPD 8052 (N.D. Ohio Dec. 7, 1970).

16. 42 U.S.C. § 2000e-2 (1964):

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion [hereinafter referred to as a BFOQ].

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training

appear to correct inequities in employment and provide remedies for sex-based discrimination.¹⁷

Cases Under Title VII

The legal disputes involving these statutes have been significant in number, yet only one case has reached the Supreme Court.¹⁸ Several lower federal courts have declared various employment practices as in violation of Title VII. In *Bowe v. Colgate Palmolive Co.*¹⁹ female

or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of each school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. [Emphasis added.]

Given a narrow interpretation, the exception applies only "in those certain circumstances" when "reasonably necessary to the normal operation of that particular business," which should not include presumptions of women's life patterns, certain attributes of a sex, or the prejudices on the part of customers, the public, or other employees. The exception is meant to apply in very limited cases such as a woman for an actress, or a washroom attendant, or a model. See 29 C.F.R. § 1604.1(a) (1970).

It should be noted that the BFOQ cannot apply to race because this factor could never be a reasonable necessity in the normal operation of a business.

17. For extensive analytical treatment of Title VII see Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967); Rawalt, *supra* note 13; Comment, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221 (1970) [hereinafter cited as *Mandate*]; Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778 (1965) [hereinafter cited as *Classification*]; Comment, *supra* note 13; Comment, *A Woman's Place: Diminishing Justification for Sex Discrimination in Employment*, 42 S. CAL. L. REV. 183 (1968).

18. 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971), *vacated and remanded*. For discussion of the case see text accompanying notes 29-33, 39 *infra*.

In four years of EEOC operation, 1965-69, complaining parties have filed about 41,000 charges of discrimination, approximately 24,000 of which were assigned for investigation, and of those investigated 27% (over 6,700) involved allegations of discrimination based on sex. Pressman, *The Quiet Revolution*, 4 FAM. L.Q. 31, 32 (1970).

However, discrimination still exists: "Over 75% of all working women are confined, by legal discriminations, union contracts, stereotyped concepts, and lack of opportunity for training, to the lower-level routine clerical, sales, factory jobs, or as household workers." Rawalt, *supra* note 13, at 44, citing WOMEN'S BUREAU, DEPT. OF LABOR, WB 68-161, Apr. 1968. "The largest major occupation group of employed women in 1969 was clerical workers. Of the nearly 10 million in clerical jobs, 3.4 million were working as stenographers, typists, and secretaries. The next two largest major occupation groups were service workers (except private household and operatives—about 4.7 million and 4.5 million respectively)." BACKGROUND FACTS ON WOMEN WORKERS IN UNITED STATES, *supra* note 5, at 3.

19. 416 F.2d 711 (7th Cir. 1969), *rev'g.* in part 272 F. Supp. 332 (S.D. Ind. 1967).

employees brought suit against their employer and the union. The Seventh Circuit Court of Appeals upheld the lower court dismissal as to the union because it was not charged with violations before the EEOC. However, the court found employer violations of Title VII, as the seniority system permitted men to bid for jobs plant-wide while women were restricted to jobs which did not require lifting in excess of 35 pounds. The court stated that 35 pounds could continue as a general guideline for both men and women; however, each employee must be afforded an opportunity to demonstrate his ability to perform more strenuous jobs and those who could must be allowed to bid on and fill such positions. The weight restriction was not imposed by statute but rather by the employer and the union. Thus, the former practice had been pursued under the guise of protecting women when in reality it limited job openings, job choices, and pay levels. In three other cases there were state statutes imposing weight restrictions enforced by the employers which were successfully challenged by female employees because the restrictions denied them job opportunities.²⁰

In *Cheatwood v. South Central Bell Telephone and Telegraph Co.*²¹ a similar weight lifting restriction was linked to the type of job. Because of the necessary rural canvassing and the requirement to lift a case weighing about 60 pounds, the employer refused to hire women as commercial representatives. Although the evidence presented showed that males could work more efficiently and more safely, it failed to indicate that all, or substantially all, women would be unable to perform the duties. Consequently, the court struck down the restriction as violative of Title VII and imposed a duty upon the employer "to determine on an individual basis whether a person is qualified for the position of commercial representative."²²

20. *Weeks v. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), was the first appellate court decision to follow the EEOC weight restriction guideline, 29 C.F.R. § 1604.1 (1968). For text see notes 49 and 52 *infra*. The court held that the state law to be in violation of Title VII. Although the employer claimed such restriction was a bona fide occupational qualification (BFOQ), he failed to sustain the burden of proof and the court did not allow a presumption in his favor because of the state law. For an explanation of the case see 4 GA. L. REV. 417 (1970).

The same result was reached in *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969), with the rationale resting on the fact that Title VII has superceded conflicting state laws by virtue of the supremacy clause.

In California the same question was avoided in *Mengelkock v. Industrial Welfare Comm'n*, 284 F. Supp. 950 (C.D. Cal. 1968), 284 F. Supp. 956 (C.D. Cal. 1968), but answered in *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968). The district court held that California's hours and weight laws, CAL. LABOR CODE, §§ 1171-1256, 1350-57 (West Supp. 1970), violated the Civil Rights Act; the female plaintiff had been denied a job as "agent-telegrapher" because she was subject to these laws.

21. 303 F. Supp. 754 (M.D. Ala. 1969).

22. *Id.* at 760.

Title VII, however, is not providing an adequate remedy for all instances of job discrimination. For example, the federal court in *Mengelkock v. Industrial Welfare Commission*²³ employed the abstention doctrine²⁴ to avoid the issue of an alleged state-federal law conflict. Because determination of the controversy turned on the validity of the state law, it was deemed inappropriate for a federal court to be the first to resolve the dispute. Judge Stephens stated that while the federal statute was clear on its face, the purpose of the California restrictions was "not by any means apparent."²⁵ His rationale indicates that if the state had a legitimate health and welfare interest in women's hours and weight lifting restrictions, the statute would withstand attack. However, one of the primary goals of Title VII is to supercede legislation which differentiates female from male as a class unless the burdens of a BFOQ are met.²⁶

An additional problem precluding courts from adjudicating equal opportunity violations is the complex procedure established by the Civil Rights Act.²⁷ In *Union Bank v. Equal Employment Opportunity Commission*²⁸ the court held that the Commission did not have jurisdiction over a dispute involving a female employee who alleged a Title VII violation because she had not first exhausted all available state remedies.

Finally, there is the problem of interpretation of the Act. In *Phillips*

23. 284 F. Supp. 956 (C.D. Cal. 1968). The abstention doctrine was also invoked in *Ward v. Luttrell*, 292 F. Supp. 162 (E.D. La. 1968).

24. The doctrine of abstention is most adequately discussed in D. CURRIE, *FEDERAL COURTS* 500-29 (1968). This discretionary device forces the litigation to return to the state courts and is a useful tool in avoiding a constitutional question.

There appears to be two poles in the application of abstention. One is the state regulatory scheme where the state courts' expertise and the localism of the problem make it rational for the federal court to not disturb the state sovereign. The other pole is the civil rights area which could not be finalized by a single litigation involving only a single set of circumstances. The cases which illustrate the transition between the regulatory scheme and the civil rights situation are: *Alabama Public Service Comm'n v. Southern Ry.*, 341 U.S. 341 (1951) when the regulatory scheme was sufficient to invoke abstention; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), where abstention was applied to an eminent domain proceeding to essentially defeat diversity jurisdiction, but the court retained jurisdiction to protect federal fact finding capabilities; and *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), involving another eminent domain situation. The opinion is similar to the dissenting opinion of *Thibodaux*, where abstention was improper because the "state law . . . is clear and certain."

It appears that abstention may not be proper in the area of employment opportunities, especially with the current federal laws and the lack of any special expertise in the local courts.

25. *Mengelkock* at 959.

26. See e.g. *Weeks* discussed in part at note 20 *supra*, at 232-35.

27. For extensive treatment of the procedural problems see Rawalt, *supra* note 13; Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846 (1966); Comment, *supra* note 13.

28. 408 F.2d 867, 869 (9th Cir. 1968).

*v. Martin Marietta Corp.*²⁹ the trial court found no violation of Title VII, where the employer hired men with pre-school age children for a certain position but refused to hire women with pre-school age children. On appeal, the employer's primary contention was that he did not rely on the BFOQ but rather on the premise that his criterion was not discrimination based on sex. Affirming, the Fifth Circuit Court of Appeals reasoned that Title VII prohibited only discrimination based on sex and that in this case it was a "two-pronged" test for disqualification: being a woman and having pre-school age children. Acceptance of the employer's non-reliance on a BFOQ consideration was vigorously attacked in the dissenting opinion. The dissenters reasoned that since the distinguishing factor in the employer's hiring practice was motherhood versus fatherhood it was sex-related:³⁰ "It is the fact that the person [is] a mother—i.e., a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man."³¹

The majority opinion interpreted Title VII to the effect that the BFOQ provision was inapplicable in analyzing and resolving the complaint because the defendant had failed to rely on it. Rejecting the "two-pronged" test, the Supreme Court remanded the case, per curiam, to the district court for a decision on whether the hiring practice qualifies as a BFOQ.³² Because the Court did not have adequate evidence to decide the merits of the case, its result was not as determinative as several commentators had hoped.³³

Bona Fide Occupational Qualification

The BFOQ provision³⁴ of Title VII provides a potential loophole for those employers who wish to continue discriminatory practices. The permissibility of subtle employment discrimination under the guise of a BFOQ has received mixed reaction from lower federal courts. In *Weeks*,³⁵ the court relied upon the EEOC guideline that "[t]he principle of non-discrimination requires that individuals be considered on the basis

29. 411 F.2d 1 (5th Cir. 1969), *vacated and remanded*, 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971). This case is also significant for it deals with discrimination in hiring, one of the few cases which does. See Pressman, *Legal Revolution in Women's Employment Rights*, 44 FLA. B.J. 332, 333 (1970), for discussion of the significance of the case, especially as it relates to the EEOC.

30. 416 F.2d 1257, 1259 (5th Cir. 1969).

31. *Id.* "A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done." *Id.* at 1262.

32. 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971).

33. *E.G.*, Pressman, *supra* note 29, at 333; see *Mandate*, *supra* note 17, at 235-39.

34. See *Mandate*, *supra* note 17, at 224-27.

35. 408 F.2d 228 (5th Cir. 1969).

of individual characteristics and not on the basis of any characteristic generally attributed to the group."³⁶ Consequently, the court ruled that the defendant employer had failed to sustain his burden of proof in establishing the switchman job as a BFOQ because:

they [defendant] introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can . . . [T]echnique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies positions to a great many women perfectly capable of performing duties involved.³⁷

Courts have indicated that sex would be a BFOQ for a job only where the employer proved that all or substantially all members of one sex are unable to perform it.³⁸ For example, the Supreme Court decided in *Phillips* that the "unlawful employment practice" provision does not permit one hiring policy for women and another for men, each having pre-school age children; the consideration on remand is whether the "existence of such conflicting family obligations" is the basis of a BFOQ.³⁹

Cases which have permitted BFOQ exceptions were decided, for the most part, prior to the 1969 amendments of the EEOC guidelines. Today, the *Gudbrandson*⁴⁰ decision should not be followed. A complaint seeking to compel the employer to hire women as "warehousemen" was denied because the court found the exclusion to be a valid BFOQ. While concluding that the employer could exclude women on the basis of a 40 pound weight lifting limit established by the employer, the court did acknowledge that some women could do the work without harm. However, it was stated that the process of selection would involve a high degree of risk and danger. This decision conflicts with the Fifth Circuit Court of Appeal's opinion in *Weeks*.

One of the earliest group of litigants to challenge the validity of BFOQ's were airline stewardesses who questioned the employer tradition

36. 29 C.F.R. § 1604.1(a)(1)(ii) (1969). This same burden was imposed and not met in *Cheatwood* involving the same defendant employer. See text accompanying note 21 *supra*.

37. 408 F.2d at 235-36.

38. Pressman, *supra* note 29, at 332. Pressman is the senior attorney for the office of the General Counsel of the EEOC.

39. 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971).

40. 297 F. Supp. 134 (D. Minn. 1968).

of requiring "single" status. The court in *Cooper v. Delta Airlines*⁴¹ permitted the airline to discharge a stewardess who was married, because the regulation was regarded as a BFOQ. Since a BFOQ is allowed only when sex classification is reasonably necessary to the normal operation of the particular business or enterprise,⁴² does the inability of a married woman to obtain a job as an airline stewardess rest on the rationale that the married stewardess must be away from her husband on a regular basis, or because the married stewardess is no longer a dating fantasy for the male customers.

In *Lansdale v. United Air Lines, Inc.*⁴³ the employer relied upon the Phillips "two-pronged" tests, rather than the BFOQ to discharge a female employee, not because she was female but because she was female and married. The court conclude that Title VII did not prohibit discrimination in employment based upon marital status. This distinction is unwarranted since the no-marriage condition for employment was not applicable to anyone other than stewardesses, indicating that sex, rather than marital status, was the controlling factor. Moreover, the EEOC guidelines state that an employer who forbids or restricts the employment of married women but does not do likewise for married men is discriminating on the basis of sex.⁴⁴ In 1970, the District Court for the Northern District of Illinois, in *Sprogis v. United Air Lines, Inc.*,⁴⁵ found practices similar to those in *Lansdale* violative of Title VII.

State Laws

State protective laws were passed during the first part of the twentieth century when labor conditions were generally deplorable.⁴⁶ Those covering women only were generally held constitutional, whereas those covering both men and women were deemed unconstitutional.⁴⁷

41. 274 F. Supp. 781 (E.D. La. 1967).

42. 42 U.S.C. § 2000e-2(e).

43. 62 CCH Lab. Cas.; ¶ 9416-17 (S.D. Fla. 1969), *appeal docketed*, No. 29254, 5th Cir., Feb. 16, 1970.

44. 29 C.F.R. § 1604.3 (1970). This provision was also in effect under the old guidelines, *see* 29 C.F.R. § 1604.3 (1966-69). *Compare Lansdale with Colvin v. Piedmont Aviation, Inc.*, E.E.O.C. Dec., Case No. 6-8-6975, June 20, 1968.

45. 308 F. Supp. 959 (N.D. Ill. 1970), *appeal docketed*, No. 18481, 7th Cir., May 15, 1970; and *Neal v. American Airlines, Inc.*, E.E.O.C. Dec., Case No. 6-6-5759, June 20, 1968.

46. *See Frankfurter, Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916); Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495 (1908).

47. *See* text accompanying note 76 *infra*. *Lochner v. New York*, 198 U.S. 45 (1905), holding unconstitutional a state statute prohibiting employment in a bakery for more than 60 hours in one week or 10 hours in one day because it interfered with employer-employee freedom of contract applicable to the states as part of "liberty" in the fourteenth amendment; *contra, Holden v. Hardy*, 169 U.S. 366 (1898), sustaining a state-

However, with the passage of Title VII the question of the effect of the former on equal opportunity, as well as the necessity to "protect" only one class of laborers, has now come into prominence. In the EEOC's 1966 guidelines⁴⁸ two classifications for state protection laws were established:⁴⁹ It would be an unlawful employment practice not to, *e.g.*, hire and promote, because the state law required certain benefits, *i.e.*, minimum wage, rest periods, to be extended to women;⁵⁰ it would not, however, be an unlawful employment practice to refuse to, *e.g.*, hire and promote if state statutes prohibited types of employment, *i.e.*, lifting heavy weights, working more than certain hours each day or number of days per week.⁵¹ Thus, the guidelines apparently upheld the validity of both types of state laws. In 1969, the Commission changed its position with respect to state laws prohibiting several types of employment for women. The new guidelines narrowed the exemption and provided that state protective laws would no longer "be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the BFOQ exemption."⁵²

imposed eight hour day for employees of underground mines. *Bunting v. Oregon*, 243 U.S. 426 (1917), sustaining regulation of hours for men in manufacturing, overruled *Lochner*.

See *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), holding unconstitutional the regulation of wages for women as violative of due process which was overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *United States v. Darby*, 312 U.S. 100 (1940), sustained the constitutionality of the federal minimum wage law.

48. The guidelines are promulgated under the authority of 42 U.S.C. § 2000e-12(a) :

The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

49. 29 C.F.R. § 1604.3 (1966).

The Commission believes that some state laws and regulations with respect to the employment of women, although originally promulgated for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment. 29 C.F.R. § 1604.1(b) (1966).

The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. 29 C.F.R. 1604.1(c) (1966).

50. *Id.* § 1604.1(a) (3) (i).

51. *Id.* § 1604.1(a) (3) (ii).

52. 29 C.F.R. § 1604.1(b) (1)-(2) (1970) :

(b) (1) Many states have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females in certain occupations

The state protective laws⁵³ presently under scrutiny are of several types. One such type is the weight lifting limitations imposed only upon women; Utah prohibits carrying more than 15 pounds or lifting more than thirty,⁵⁴ while California permits lifting of up to 50 pounds but restricts amounts carried on stairways to 10 pounds.⁵⁵ California's stairway limitation appears irrational in light of every mother who must carry a baby around the house, often up and down stairs. Another restriction is the "no work" statute which prohibits the employment of women in particular industries. Indiana is typical in that it prohibits women working in mines.⁵⁶ A third example is the limitation on the maximum hours each day or per week that women may work. California is not unusual in limiting the amount to eight hours each day, forty-eight hours per week.⁵⁷ The fourth type of protective law is minimum wage legislation. Indiana's statute⁵⁸ applies to both men and women as do the laws in several other states. California's statute,⁵⁹ however, applies only to women. Other types of "protective laws" require rest periods,⁶⁰ seats for women,⁶¹ and provisions for physical facilities.⁶²

in jobs requiring the lifting or carrying of weights, excluding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

(b) (2) The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. . . . Such laws do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the BFOQ exception.

One case reflecting the new guidelines is *Lansdale*, *supra* notes 43, 44.

53. For a comprehensive study written before the 1969 amendment to the guidelines of the relationship between the Civil Rights Act of 1964 and state protective laws see Oldham, *Sex Discrimination and State Protective Laws*, 44 DEN. L.J. 344 (1967). The author's thesis is "any state statute which, on its face, retains an underlying protective policy pertinent to the modern labor force, would be within the state's police power to enact, and would not be pre-empted by Title VII." *Id.* at 371, 375.

54. 2 CCH LAB. L. REP. STATE LAWS ¶ 45,525 (1969). (See same paragraph under each state for other states' laws, *i.e.*, Alaska, Ohio, Oregon.)

55. CAL. LABOR CODE, §§ 1251-52 (West 1955).

56. IND. ANN. STAT. § 46-2704 (Burns Repl. 1956). Also, Michigan had a ruling in its liquor licensing statute which prohibited women from working as bartenders in the absence of a husband or father as the owner, MICH. COMP. LAWS ANN. § 436.19a (repealed 1955).

57. CAL. LABOR CODE § 1350 (West 1955); 2 CCH LAB. L. REP. STATE LAWS (Utah) ¶ 44,501 (1969).

58. IND. ANN. STAT. § 40-135 (Burns Repl. 1970).

59. CAL. LABOR CODE §§ 1171, 1182 (West 1955).

60. *E.g.*, *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). The rest period provision was in the union contract.

61. *E.g.*, IND. ANN. STAT. § 40-1006 (Burns Repl. 1965).

62. *Id.*

Whether the dissimilar treatment of employees on the basis of sex violates Title VII becomes the crucial issue. Those who favor protective state laws maintain that Congress intended to proscribe only those laws which deny equal opportunity to women. Opponents claim that protective legislation is inherently discriminatory.⁶³ The EEOC guidelines indicate that these state laws conflict with Title VII. However, protective legislation persists, denying women equal opportunities.⁶⁴

Fourteenth Amendment: Equal Protection

The equal protection clause of the fourteenth amendment can also be used to support or attack employment equality. One authority in this field, Leo Kanowitz,⁶⁵ suggests an "extension" doctrine as a means to achieve equal opportunity for women.⁶⁶

Kanowitz separates the types of protective laws in a fashion similar

63. WOMEN'S BUREAU, DEPT. OF LABOR, LAWS ON SEX DISCRIMINATION IN EMPLOYMENT 10 (1970).

64. Because of these extremes, it is fruitful to investigate the various states attorneys general interpretation of the problem and practical application of the laws.

Prior to the August 1969 guidelines, the attorneys general from South Dakota, North Dakota, and Kentucky issued opinions. On February 27, 1969, the attorney general from South Dakota said the hours statute yielded to Title VII; on April 18, 1969, the attorney general from North Dakota stated recent developments might prevent prosecution for violation of state clauses regulating employment of women; but Kentucky's attorney general ruled the state hours law would remain in effect until the Supreme Court ruled otherwise. *Id.*

Subsequent to these August guidelines other states issued policy statements. Ohio's Department of Industrial Relations announced on September 4, 1969, that it would not prosecute violations of state protective labor legislation in conflict with the revised guidelines. Oklahoma's attorney general stated that because of the supremacy clause the state's hour law would yield to Title VII. Michigan's and Pennsylvania's attorneys general, on December 30, 1969, and November 4, 1969, respectively, stated that Title VII would control. In North Carolina, however, the Commissioner of the Department of Labor stated on November 25, 1969, that until a federal court held otherwise the Commissioner would continue to enforce the state hours law. *Id.* at 10-11.

65. Professor Kanowitz has compiled several law journal articles in this area into a book, *WOMEN AND THE LAW* (1969) [hereinafter cited as *KANOWITZ, WOMEN*]. In a recent article he responded to various criticisms of his methodology and assumptions, Kanowitz, *Woman and the Law: A Reply to Some Commentators*, 4 *FAM. L.Q.* 19 (1970) [hereinafter cited as *Kanowitz, Reply*]. In this article he states several premises of his book in order to show his underlying philosophy:

One [reason for the book] was the rather widespread assumption among members of the American community and public that the problem of sex-based inequality in legal norms no longer existed. Another was the clear need to explode that myth if meaningful reform was to occur in this area. And finally, there was my own perception of the law-society relationship in this field. *Id.* at 19.

. . . throughout the book there is an implicit assumption that sex-based unevenness of treatment under law is as destructive of human personality and happiness as the United States Supreme Court found to be true in the area of race relations as a result of the previous doctrine "separate but equal." *Id.* at 21.

66. *KANOWITZ, WOMEN* at 117-31, 182-92.

to the classification used by the old EEOC guidelines,⁶⁷ namely those which provide benefits and those which prevent "hazardous" work. The former should be "extended" to men if the true purpose of the state legislation is a valid interest in the protection of workers. By construing the statute as conferring the same benefits upon men, it would be applied equally as required by the equal protection clause of the fourteenth amendment. Hence, courts could avoid the undesirability of declaring a statute unconstitutional, yet administer equal protection under the law.⁶⁸ Extending the benefits of protective legislation is a logical method to test the real purpose of the law. If the statute does in fact provide a benefit, male employees should also enjoy it. If the protection is unwanted, unnecessary, or too restrictive, men would reject it just as women have attempted to do.⁶⁹

In the category of hazardous work, the statutes typically prohibit women from lifting or carrying items of a certain weight or deny women the opportunity to work in certain industries. Under the logic of the extension doctrine, to the effect that a state statute is constitutional only if men and women receive the same treatment, the theoretical result is that the state statute under consideration would be held constitutional by reading into it an equal status for men. Therefore, the stoppage of large segments of industry would ensue since no one would lift the required weight or work in any restricted occupation. Consequently, Kanowitz would not apply the extension doctrine to state statutes prohibiting hazardous work. Rather, he suggests that under the fifth and fourteenth amendments these statutes should be held invalid by rejecting the "any rational basis" test, used historically to uphold these state statutes as a legitimate exercise of the police power, and instead regard the subject matter as a fundamental, basic right.⁷⁰

Once the subject matter is characterized as a fundamental right, then

67. See note 49 *supra*.

68. Several Supreme Court cases have extended a benefit in order to find statutes constitutional, especially in the area of basic human rights; see e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968). In *Levy* the Court held that five illegitimate children could bring an action for wrongful death of their mother, although the state court traditionally had held that the statute applied only to legitimate children. The equal protection clause was violated by denying the right to a cause of action; illegitimate children are not "non persons"; they are human and alive, thus entitled to equal protection under the law. *Id.* at 70.

69. See *Classification*, *supra* note 17. "Legislation that irrationally confers a 'benefit' on one sex is by definition a detriment to the other sex and represents the clearest case of equal protection violation." *Id.* at 734.

70. *Loving v. Virginia*, 388 U.S. 1 (1967), found the freedom to marry to be a "basic right," "fundamental to our very existence and survival." *Id.* at 12. The Court stated that to deny fundamental freedom on unsupported information violated both the equal protection and the due process clauses of the fourteenth amendment.

in order to sustain the validity of a statute which categorically prohibits women from certain employment, "the state will be required to sustain a much greater burden of justification to support the classification."⁷¹ Since this burden will rarely be fulfilled, the practical result is to declare that laws may no longer bar women from a certain occupation or duty, rather they must permit individuals, men or women, to establish their ability or inability of performance. A presumption that women should be excluded might be permissible as long as individuals could rebut the presumption with a showing of ability.

In the area of "hazardous work" legislation, where the "extension theory" is inappropriate,⁷² some basis is needed to determine who should or should not perform the given task. Authors Murray and Eastwood⁷³ recognize a socio-legal interest in the protection of women's maternal and familial functions. For this reason they recommend that laws should be classified according to function which, if performed, would not be based upon sex. With this functional analysis, the intrinsic value of the homemaker or mother is recognized,⁷⁴ and workers are not restricted to certain jobs because of a mere label.

Cases Under the Equal Protection Clause

Although commentators suggest modes of analysis for the application of the equal protection clause to alleged sex discrimination practices, the judiciary continues to follow the precedent of the late nineteenth and early twentieth centuries. The cases illustrate the facility with which the courts have found classification based on sex to be rational, often neglecting the principle that the classification must be rational for the purpose of the particular statute.⁷⁵ For example, the 1907 decision of *Muller v. Oregon*⁷⁶ has been followed as recently as 1968.⁷⁷ In *Muller* the Supreme Court upheld an Oregon state law restricting the maximum hours a woman could work each day and per week, although it had only recently declared a similar statute which applied to men as unconstitutional.⁷⁸ While the decision to protect workers, if only one group of

71. KANOWITZ, *WOMEN* at 157-58.

72. For critical examination of Kanowitz' approach see Indritz, *Commentary*, 4 *FAM. L.Q.* 6 (1970); Pressman, *supra* note 29; Rawalt, *supra* note 13; and for a response see Kanowitz, *Reply*.

73. Murray and Eastwood, *Jane Crow and the Law*, 34 *GEO. WASH. L. REV.* 232, 239 (1965), cited with approval in KANOWITZ, *WOMEN* at 155-57.

74. Murray and Eastwood, *supra* note 73, at 241.

75. See *Classification*, *supra* note 17, at 784.

76. 208 U.S. 412 (1907).

77. *Mengelkock v. Industrial Welfare Comm'n*, 284 F. Supp. 950, 954-55 (C.D. Cal. 1968).

78. *Lochner v. New York*, 198 U.S. 45 (1905), held state law restricting hours not

them, may have been a reasonable response to the sweat shop employment conditions of the time, the premise that sex serves as a rational basis for classification continues to haunt decisions today⁷⁹ when the need for the distinction is no longer warranted.⁸⁰

In cases subsequent to the enactment of the Civil Rights Act of 1964, female plaintiffs have alleged violation of the Act itself as well as the fourteenth amendment's equal protection clause. The response of the courts, in employment cases brought under the Constitution, has been to either abstain in order that the state may decide or to dismiss any three-judge panel, for lack of substantiality of a constitutional issue.⁸¹ In areas other than employment involving fourteenth amendment actions, judicial developments are uneven. On the one hand, laws have been invalidated which exclude women from jury duty and which impose longer prison terms on women than men for the same crime.⁸² On the other hand, there have been judicial rulings upholding laws which permit the statute of limitations in negligence actions to expire earlier for a woman than for a man⁸³ and which deny a wife a cause of action for loss of consortium for negligent injury to her husband.⁸⁴

Another area of divergent judicial decisions involves state-supported schools. In Texas the state university system is composed of sixteen coeducational schools, one male school and one female school. *Allred v. Heaton*⁸⁵ involved an action against the Board of Trustees which had refused the female plaintiff admission to Texas A & M, the male school.

a legitimate exercise of the police power as to men; it was unreasonable, unnecessary, and arbitrary. See note 47 *supra*.

79. See cases set forth in notes 83, 84 *infra*; *Mengelcock v. Industrial Welfare Comm'n*, *supra* notes 23-25 and accompanying text.

80. For cases expressing a similar philosophy as *Muller*, see *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Bradwell v. Illinois*, 83 U.S. 130 (Wall. 1872).

81. *Coon v. Tingle*, 277 F. Supp. 304 (N.D. Ga. 1967); *Mengelcock v. Industrial Welfare Comm'n*, 284 F. Supp. 950 (C.D. Cal. 1968); *Ward v. Luttrell*, 292 F. Supp. 162 (E.D. La. 1968); See note 24 *supra* for a discussion of the abstention doctrine.

82. *Indritz*, *supra* note 72, at 11; see also, *Murray and Eastwood*, *supra* note 73, at 241; Comment, *Constitutional Law: Exclusion of Women From Jury Does Not Deny Equal Protection*, 51 MINN. L. REV. 552 (1967).

83. *Jacobson v. Lenhart*, 30 Ill.2d 225, 195 N.E.2d 638 (1964).

84. *Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969). See also *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968) permitting computation of pension benefits under the Social Security Act which discriminates against men having age and earnings credits equal to that of a woman.

85. 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960); *accord*, *Heaton v. Bristol*, 317 S.W.2d 86 (Tex. Civ. App.), *cert. denied*, 359 U.S. 230 (1958). For discussion and criticism of the cases' rationale see Comment, *Sex Discrimination in College Admissions: The Quest for Equal Educational Opportunity*, 56 IOWA L. REV. 209, 220-21 (1970) [hereinafter cited as *Quest*].

The court held that this refusal did not violate the plaintiff's constitutional rights although she wanted to study floraculture, which was offered at no other school in Texas. A three-judge panel in Virginia reached the opposite result in *Kirstein v. University of Virginia*.⁸⁶ The court stated that these female plaintiffs had a constitutional right to an education equal with that offered men at Charlottesville; thus, the discrimination on the basis of sex violates the equal protection clause of the fourteenth amendment.⁸⁷

The Equal Rights Amendment

The foregoing analysis reveals that although Title VII of the 1964 Civil Rights Act and the equal protection clause of the fourteenth amendment provide the means by which to end discrimination against women, they have not been so utilized. Failure lies not in some inherent defect, but rather it is the lack of a concerted national policy advocating equal rights for women. Hence, the consideration of equal opportunity turns to an analysis of the Equal Rights Amendment and its possible effectiveness if enacted. The Amendment states:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.⁸⁸

An examination of the debates in Congress⁸⁹ reveals the many misconceived notions and misunderstanding as to the objectives sought to

86. 309 F. Supp. 184 (E.D. Va. 1970). For examination and criticism of the case see *Quest*, *supra* note 85.

87. 309 F. Supp. at 187. The court found that the other state schools, some only for women, others only for men, did not offer equal facilities with respect to these plaintiffs. The case was dismissed as moot, for a district court judge had issued a preliminary order to the University of Virginia to consider without regard to sex plaintiffs' application for admission. However, the court provided that upon motion and for good cause shown the action could be reinstated within one year, because the university had implemented a three stage plan by which in 1972 women would be admitted on precisely the same basis as men.

Compare Murray and Eastwood, *supra* note 73, at 240 and 2 B. SCHWARTZ, COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES pt. 3 § 475 (Rights of the Person) at 535 (1968) (who states that there is no inference of discrimination when "separate but equal" education opportunities for sexes exist) with *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Quest*, *supra* note 85, at 217 that "separate but equal" is inherently unequal.

88. H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

89. These debates occurred in the second session of the 91st Congress, lasting one day in the House but unfinished in the Senate.

The House first had to discharge the Amendment out of committee where it had been for 22 years without a hearing. Introduced into Congress for 47 consecutive years, the Amendment has been endorsed by both political party conventions for 26 years. 116 CONG. REC. 7948 (daily ed. Aug. 10, 1970).

The Amendment, as Senate Joint Resolution 9, has been introduced in the 92d Congress. See 117 CONG. REC. 141-44 (daily ed. Jan. 25, 1971).

be promoted. In the House, the advocates expressed the general sentiment that approval of the Amendment was imperative in light of the fact that women are not accorded equal treatment.⁹⁰ The House sponsor, Martha Griffiths (D-Mich.), who favored passage noted that although the fifth and fourteenth amendments could be authority for ending sex discrimination, the Court has failed to so find.⁹¹ Opponents, however, feared passage would cause the downgrading of women.⁹² Representative McCullough (R-Ohio), an opponent, stated there was a need to have factual evidence to show that discrimination based on sex in fact existed.⁹³ Another opponent, Representative Celler (D-N.Y.), was against the Amendment because no one knew the consequences it would have.⁹⁴ In summary, proponents attempted to distinguish between those sex characteristics which should continue to be recognized and those which should not, whereas opponents ignored any effort to classify characteristics in voicing their opposition.⁹⁵

Most of the Senate debate was directed toward proposed riders and collateral matters.⁹⁶ However, Senator Eagleton (D-Mo.) expressed concern as to whether the right of privacy would continue to be viable so as to insure that various facilities, such as restrooms, remained separate.⁹⁷

If the Civil Rights Act of 1964 and the Constitution are sufficient tools with which to eliminate discrimination against women but have failed thus far because of judicial reluctance to utilize them, one may well ask what is the utility of passing the Equal Rights Amendment. Since it has been iterated that judicial inaction may be the result of a lack of national policy in the area of women's rights, the debates and passage

90. 116 CONG. REC. at 7952, 7963-70 (daily ed. Aug. 10, 1970).

91. *Id.* at 7948.

92. *Id.* at 7971.

93. *Id.* at 7948.

94. *Id.* at 7949.

95. *Id.* at 7952, 7963. The House passed the Amendment 350 to 15. *Id.* at 7984-85. It went to the Senate, not to committee, and was placed on the calendar for consideration by the entire body.

96. On Oct. 9, 1970, Senator Allen (D-Ala.) proposed his "busing amendment" which was defeated 17 to 57, 116 CONG. REC. 17758 (daily ed. Oct. 12, 1970). On Oct. 12, 1970, Senator Ervin (D-N.C.) proposed his amendment to exempt women from compulsory military service which was passed 36 to 33, 116 CONG. REC. 17895 (daily ed. Oct. 13, 1970). Also on Oct. 13, 1970, Senator Baker (R-Tenn.) proposed his prayer amendment to overrule the Supreme Court cases against prayer in schools which was passed 50 to 20, 116 CONG. REC. 17923 (daily ed. Oct. 13, 1970). On Oct. 14, 1970, Senator Bayh (D-Ind.) proposed a different equal rights amendment in an attempt to reconcile the different forces and compromise with the opponents, 116 CONG. REC. 18076 (daily ed. Oct. 14, 1970).

97. 116 CONG. REC. 17631, 17638 (daily ed. Oct. 9, 1970). Sen. Bayh responded that the right of privacy would continue but Sen. Ervin maintained that this right would be superceded.

may serve to "help educate the American public about many aspects of sex discrimination and the need to eliminate them."⁹⁸

If the Amendment is enacted and if courts are willing to give it full force and effect, then the implications are several. One consequence of the Equal Rights Amendment would be the alteration in domestic relation principles. For example, the husband's common law duty of support could evolve into each spouse's duty of contribution; thus, failure to support would no longer be an effective ground for divorce. Instead, the ground for divorce would be failure to contribute to a reasonable extent.⁹⁹ Another change would be the husband's automatic role as "head of the household," with its corresponding privileges and obligations such as the right to determine domicile.¹⁰⁰ State laws which presently prohibit the granting of alimony to ex-husbands would become vulnerable to constitutional attack.¹⁰¹ Since the area of domestic relations is in itself complex and has some unique considerations, these changes are only illustrative of the Amendment's probable effect.¹⁰²

Another implication of passing the House version of the Amendment is the subjection of women to the draft.¹⁰³ Several Congressmen believe that this would lead to the abolition of the draft altogether because of the adverse public opinion likely to ensue if women are drafted.¹⁰⁴ Others believe that women are psychologically and physiologically unfit to endure military hardships.¹⁰⁵ If one accepts the premise of the Amendment that distinctions will be based on factors other than sex, then logical consistency requires that women should indeed be subject to the draft.

The Amendment would also effect the validity of present state protective laws.¹⁰⁶ Those that categorically bar women from certain types

98. Indritz, *supra* note 72, at 12.

99. 116 CONG. REC. 7962 (daily ed. Aug. 10, 1970).

100. *Id.*

101. *See generally* Annot., 66 A.L.R.2d 880 (1959).

102. For treatment in detail of the changes in domestic relations see "Selected State Laws Relating to Domestic Relations," prepared by American Law Division, Library of Congress, cited in 116 CONG. REC. 7949-52 (daily ed. Aug. 10, 1970); Gorecki, *Women and the Law: From a Different Viewpoint*, 4 FAM. L.Q. 13 (1970); Lay, *Role of Matrimonial Domicile in Marital Property Rights*, 4 FAM. L.Q. 61 (1970); Murray and Eastwood, *supra* note 73, at 240-41.

103. *But see* 116 CONG. REC. 17792 (daily ed. Oct. 12, 1970). The problem would be solved by passage of the Senate version, *see* note 96 *supra*.

104. *E.g.*, 116 CONG. REC. 7953 (daily ed. Aug. 10, 1970).

105. 116 CONG. REC. 17781 (daily ed. Oct. 12, 1970).

106. A list of state protective laws for women is found in WOMEN'S BUREAU, DEPT. OF LABOR, STATE PROTECTIVE LAWS (1969) cited in 116 CONG. REC. 7955-59 (daily ed. Aug. 10, 1970).

of employment would be unconstitutional.¹⁰⁷ In answer to the charge that the Amendment will take away the benefits now afforded women, the "extension" approach for its application is advocated.¹⁰⁸ As one Congress-women stated:

Some state laws—those which deny rights or restrict freedoms of one sex—would be violative of the equal rights amendment and rendered unconstitutional. Laws which confer benefits and privileges on one sex would have to apply to both sexes equally, but would not be rendered unconstitutional by this amendment.¹⁰⁹

Conclusion

It is submitted that the present discrimination against women must end. To judicially accomplish this goal within the present constitutional framework is feasible. Yet the educational process, in terms of establishing a national policy, implicit in passing the Equal Rights Amendment is important. Although equal rights for women would mean the loss of some of the special treatment they are now accorded, this should be deemed insignificant in a society whose basic premises are individual freedom and equality.

JULIA C. LAMBER

107. See text accompanying note 71 *supra*.

108. See text accompanying note 68 *supra*.

109. 116 CONG. REC. 7968 (daily ed. Aug. 10, 1970) (Remarks by Rep. May (R-Wash.)). For examination of these and other areas of change effected by the Amendment see KANOWITZ, *WOMEN* at 160-78; Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970).