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THE NEED FOR THE EQUAL RIGHTS AMENDMENT

*Birch Bayh**

I. Introduction

In March of this year, after almost 50 years of trying, the most crucial step in the fight to secure equal rights under law for men and for women was taken: the Congress, by overwhelming majorities, approved the Equal Rights Amendment and sent it to the states.[1] In short order, the requisite number of states will surely ratify the amendment, and the Constitution will have been altered for only the twenty-seventh time in our Nation's history.[2]

There was no shortage of controversial issues for the Congress, and now for the state legislatures, to debate while considering the Equal Rights Amendment. Some persons, though only a few, objected to the principle of equality under the law for men and women.[3] More significant was the dispute, sometimes technical and sometimes tedious, about the effect of the amendment in the form in which it had been presented.[4] But perhaps the most important and thoughtful question raised by those who opposed the Equal Rights Amendment was whether a constitutional amendment was the correct way to strike at the problem of sex discrimination.[5] Our Nation's most fundamental document ought not, it was said, be amended when lesser measures (court decisions, state and federal legislation) could adequately handle the evil sought to be eradicated. However, in the particular circumstances of the Equal Rights Amendment, this argument appears to be inapposite. The long history of adverse court decisions, the practical difficulties in securing corrective legislation from every state and from the Congress, the pervasiveness of sex discrimination in our Nation's laws, and the social, economic and psychological impact of such discrimination, make a constitutional amendment necessary and proper. In fact, a constitutional amendment is the only realistic and responsible way to guarantee equal rights

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1 H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972). The House of Representatives approved the Amendment 354 to 23 on October 12, 1971. The Senate approved it on March 22, 1972, by a vote of 84 to 8.

2 As of July 10, 1972, twenty states have ratified the Equal Rights Amendment: Alaska, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, Rhode Island, Tennessee, Texas, West Virginia, Wisconsin. Eighteen more states must approve the proposed amendment for it to become part of the Constitution.

3 *See, e.g.*, letter from Mrs. J. T. Grace to Congressman Don Edwards, March 3, 1971, in *Hearings on H. R. Res. 35 and 208 Before Subcomm. No. 4 of the House Comm. on the Judiciary,* 92nd Cong., 1st Sess. at 602 (1971); Reitzer, *What the Bible Reveals About Women's Role and Rights, id.* at 572.

4 *See, e.g.*, 118 CONG. RECORD S. 4543-4551 (daily ed. March 22, 1972) (debate between Senator Bayh and Senator Ervin concerning the effect of the Equal Rights Amendment on privacy and sexual offenses); Kurland, *The Equal Rights Amendments: Some Problems of Construction,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 243 (1971).

5 *See, e.g.*, S. REP. No. 689, 92nd Cong. 2d Sess. 29-30 (1972) (Minority Views of Mr. Ervin); Freund, *The Equal Rights Amendment Is Not the Way,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234 (1971); Kurland, *The Equal Rights Amendment, supra* note 4, at 243.

for men and women. The purpose of this article is to explain the reasons for this conclusion in greater detail.

II. Some General Principles

It seems useful first to lay out some of the general principles on which the Equal Rights Amendment is based. The operative part of the amendment is straightforward: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Basic principles about the meaning of this section have been repeatedly explored in and out of Congress and are fairly well known.[6]

First, the amendment recognizes the fundamental dignity and individuality of each human being by declaring that sex should not be a factor in determining the legal rights of men or of women. Put another way, the amendment will require that the federal government, and all state and local governments and branches thereof treat each person, man or woman, on the basis of relevant individual characteristics, such as mental or physical ability, and not on the basis of the legally irrelevant characteristic of sex. From this it follows that the amendment does not require any level of government to establish quotas for men and women in any of its activities; rather, the amendment will simply require equal treatment of equal individuals, regardless of sex.

Second, and really a corollary of the first point, the amendment does not require identical treatment of men and women when, because of unique physical characteristics, such treatment is impossible. Thus, a law which bases legal consequences on a physical characteristic unique to only one sex (*e.g.*, the ability to bear children) would be fully constitutional. On the other hand, if a particular characteristic is found among members of both sexes, then the individual factor, not the sex factor, would have to be determinative.

Third, the proscription the amendment contains applies only against governmental action, or, in legal parlance, "state action." Private actions and private or social relationships between men and women will not be affected by the amendment. In determining the limits of the Equal Rights Amendment's scope, the courts will draw on the fourteenth amendment as interpreted in, for example, the *Civil Rights Cases*.[7] The Supreme Court in *Shelley v. Kraemer*[8] stated the rule as follows:

> [T]he action inhibited by the [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private action or conduct, however discriminatory or wrongful.

6 Perhaps most authoritative are the recent *Reports of the House and Senate Judiciary Committees on the Equal Rights Amendment:* H. R. REP. No. 359, 92nd Cong., 1st Sess. (1971) (The separate views of Congressman Edwards and 13 other members on pp. 5-8 reflect the understanding of the proponents of the Equal Rights Amendment); S. REP. No. 689, 92nd Cong., 2d Sess. (1972).

7 109 U.S. 3 (1883).

8 334 U.S. 1, 13 (1948).

The parameters of state action are neither fixed nor crystal clear,[9] but the Supreme Court in *Moose Lodge No. 107 v. Irvis*[10] recently reaffirmed that there are substantial limits on the scope of the fourteenth amendment. Similar principles will apply under the Equal Rights Amendment.

Fourth, and finally, under established doctrine, the amendment will have to be interpreted as part of the entire Constitution, and apparent conflicts, if any, with other parts of the document will be harmonized by the courts.[11] This is particularly important with respect to the rights to privacy established in *Griswold v. Connecticut*.[12] As the House and Senate Committee Reports on the Amendment both stated, "[T]his right [to privacy] would . . . permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions."[13]

III. The Legal Situation

The *American Bar Association Journal* summarized quite well the two sides of the argument over whether a constitutional amendment banning sex discrimination was needed:

> The legal debate on the equal rights amendment has revolved around the question of whether the amendment is necessary. Opponents have insisted that there is ample constitutional authority without the amendment to secure equal rights for women. . . .
>
> But proponents of the amendment have pointed out that judicially condoned classifications based on sex still stand in many fields.[14]

It was primarily, though not entirely, the failure of the courts to apply the fourteenth amendment to sex discrimination with the same vigor they had applied it to racial discrimination that prompted Congress to approve the Equal Rights Amendment.[15]

A. *The Legal History Before 1971*

The first significant case involving sex discrimination was *Bradwell v. The State*,[16] in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. Although the Court relied on the privileges and immunities clause of the fourteenth amendment and not the equal protection or due process clauses, the presumptions and attitudes which were to govern later decisions sanctioning sex discrimination were already apparent:

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9 *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1071 (1969).

10 40 U.S.L.W. 4715 (June 13, 1972).

11 *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900-02 (1971).

12 381 U.S. 479 (1965).

13 S. REP. No. 689, 92nd Cong., 2d Sess. 12 (1972), *quoting* H.R. REP. No. 359, 92nd Cong., 1st Sess. 7 (1971) (separate views).

14 58 A.B.A.J. 604-05 (June, 1972).

15 Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* 84 HARV. L. REV. 1499, 1502 (1971).

16 83 U.S. (16 Wall.) 130 (1873). *See also In re* Lockwood, 154 U.S. 116 (1884).

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .
>
> . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[17]

Two years later, in *Minor v. Happersett*,[18] the Court held that the fourteenth amendment did not confer on women citizens the right to vote, a position which stood until ratification of the suffrage amendment in 1920.

The test of "reasonableness" for determining the validity of sex discrimination under the fourteenth amendment was first expressly stated in the landmark case of *Muller v. Oregon*[19] which upheld an Oregon maximum hour law for women. It is ironic that *Muller*, which represented the most progressive thinking of its time, has become the cornerstone of a judicial philosophy which upheld almost all forms of discrimination against women as "reasonable," and therefore, not in violation of the equal protection clause.

In *Muller* the Court was responding to the demonstrated need for legislative protection of working conditions, a protection which has been subsequently upheld for both men and women.[20] Yet the assumptions about women on which the Court based its decision in *Muller* have become firmly entrenched in judicial doctrine. Finding that the apparent difference in physical endurance and strength between men and women justified the state's restriction on the right of women to work, the Court stated:

> That woman's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[21]

Using similar reasoning, the Court sustained other labor laws for women in subsequent years as "reasonable" under the fourteenth amendment. In *West Coast Hotel Co. v. Parrish*[22] a minimum wage law for women was upheld as a reasonable exercise of the state's police power; in *Radice v. New York*,[23] a law prohibiting nighttime employment of women in restaurants was held not an unreasonable or arbitrary classification; in *Miller v. Wilson*,[24] a women's eight-hour labor law was held to be neither an arbitrary invasion of freedom of contract nor unreasonably discriminatory.

Applying the standard of "reasonableness," the Court failed to find constitutional fault with later labor laws which appeared to have little if any rational

17 Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).
18 88 U.S. (21 Wall.) 162 (1875).
19 208 U.S. 412 (1908).
20 Bunting v. Oregon, 243 U.S. 426 (1917).
21 Muller v. Oregon, 208 U.S. 412, 421 (1908).
22 300 U.S. 379 (1937).
23 264 U.S. 292 (1924).
24 236 U.S. 373 (1915).

justification. For example, in *Goesaert v. Cleary*,[25] the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court reasoned that:

> Bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures. . . . Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.[26]

The Court in *Goesaert* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the state's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied. It specifically refused to consider whether the statute might reflect an "unchivalrous desire" of males to monopolize the bartending trade. Moreover, the Court's concern for protecting women from the noxious "moral and social" influences of the barroom was plainly misplaced; Michigan permitted women to work in bars, prohibiting them only from employment as bartenders. Furthermore, the statute itself exempted the wives and daughters of bartenders from its supposed protection.

More recently, in *Hoyt v. Florida*,[27] the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the fourteenth amendment, since it was reasonable

> . . . for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[28]

It is this predetermined, generalized conception of the nature and role of women that underlies the Court's past decisions finding sex discrimination a "reasonable" exercise of the state's police power. Women as a group have been judicially viewed as being primarily limited to the home and family. Further, they have been regarded as weaker in strength and endurance than men and as less able to protect themselves against moral corruption and economic exploitation. While this view may be accurate for some women, it might also be accurate for some men. As a generalization, it is clearly inapplicable to the vast majority of women in our society today.

B. *The 1971 Supreme Court Term*

When the Supreme Court decided to hear *Reed v. Reed*[29] and *Alexander v.*

25 335 U.S. 464 (1948).
26 *Id.* at 466-67.
27 368 U.S. 57 (1961).
28 *Id.* at 62.
29 *Cert. granted*, 400 U.S. 816 (1970) (No. 430).

Louisiana,[30] there was great hope that a new view toward women's rights was being ushered in. *Reed* involved a challenge to an Idaho statute which automatically preferred males to females as between persons equally entitled to administer an estate.[31] *Alexander* was a challenge to a criminal conviction on the ground, among others, that women were systematically excluded from the grand jury list and venire and from the grand jury which returned the indictment.[32] It was, in short, an invitation to the Court to reverse *Hoyt v. Florida*.[33]

Those concerned about equal rights argued to the Court that it should abandon the approach it had previously taken in sex discrimination cases and, instead, subject such discrimination to the most rigid scrutiny under the equal protection clause.[34] The Court has long recognized that when "fundamental" and "individual and personal" rights are involved, "strict scrutiny" must be exercised by the courts lest such important rights be abridged or infringed. This standard of review has been used by the Court to overturn discrimination in voting power, discrimination against aliens, discrimination against the poor[35] and, most importantly, racial discrimination.

Women clearly are entitled to equal protection of the laws under the fourteenth amendment. Sex discrimination has as substantial an adverse impact on our society as the other forms of discrimination which the Court has struck down. Women have as great a claim to the benefits of the equal protection clause as do aliens, indigents, and members of racial minorities. The same premises of human dignity and fundamental equality that gave rise to the fourteenth amendment require that its full protection be extended to strike down discrimination on account of sex.

Unfortunately, the Supreme Court declined to accept these arguments. *Alexander* was disposed of on traditional race discrimination grounds, and the sex discrimination point was not reached.[36] *Reed* was, in some ways, even more disappointing. The Court dealt specifically with the sex discrimination complaint and did reverse the lower court's approval of the Idaho procedure.[37] But the Court did not overrule such cases as *Goesaert* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the fourteenth amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable." And that is a different burden to carry, thus making it too difficult to expect any real assistance from the courts in eliminating sex discrimination.

Reed was especially disappointing because so many (though by no means all) lower courts had accepted the argument that state action which perpetuates

30 *Cert. granted*, 401 U.S. 936 (1971) (No. 5944).
31 *See* Idaho Laws, ch. 127 § 1 (1937) (repealed 1972).
32 *See La. Crim. Pro. Code Ann.*, art. 402 (1967) '(selection of woman for jury duty prohibited unless she files a written declaration of her desire to serve).
33 368 U.S. 57 (1961).
34 I had the privilege in this instance of representing the National Federation of Business & Professional Women's Clubs, Inc., which filed an *amicus curiae* brief in *Reed* and *Alexander*.
35 *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Education, 347 U.S. 483 (1954); Douglas v. California, 372 U.S. 353 (1963); Takahashi v. Fish Comm'n, 334 U.S. 410 (1948).
36 40 U.S.L.W. 4365 (April 3, 1972).
37 404 U.S. 71 (1971).

sex discrimination is unconstitutional. Many of these decisions were based squarely on the ground that sex discrimination must be reviewed under the strictest fourteenth amendment standard and that seldom, if ever, can such discrimination withstand careful judicial scrutiny.

Perhaps the most striking progress in eradicating sex discrimination had been made in the area of occupational restrictions. In effect, the Court's decision in *Goesaert v. Cleary*,[38] was rejected by the Supreme Courts of New Jersey[39] and California,[40] and by the Federal District Court for the Northern District of Illinois.[41] Each of these cases involved challenges to laws prohibiting women from employment as bartenders—laws which were similar to the Michigan statute sustained by the Court in *Goesaert*—and each held that the sex discrimination embodied in such occupational restrictions could not be sustained under the fourteenth amendment.

There were numerous other examples of similar judicial decisions before the Court when it decided *Reed*. For example, longer prison terms for women than for men convicted of the same crime had been declared unconstitutional under the fourteenth amendment in *United States v. York*.[42] The court in *York* had held that different sentencing laws for men and women constituted "invidious discrimination" against women in violation of equal protection of the laws guaranteed by the fourteenth amendment. In *Commonwealth v. Daniel*,[43] the court had declared that a statutory scheme fixing the maximum term of imprisonment for women but not for men convicted of the same crime created an arbitrary and invidious discrimination in violation of the fourteenth amendment. Exclusion of women from liquor-licensed public taverns had also been held to violate the fourteenth amendment.[44] In *Mollere v. Southeastern Louisiana College*[45] a federal court had held unconstitutional a requirement that unmarried women under twenty-one live in the state college dormitory when no such requirement was imposed on men. Further, the exclusion of women students from state-supported "prestige" institutions had been held to violate the fourteenth amendment equal protection guarantee.[46] And a regulation requiring a female teacher to leave her job in the fifth month of pregnancy had been held to violate her right to equal protection.[47] Likewise, the exclusion of policewomen from the examination required for promotion to sergeant solely because of sex had been struck down as an impermissible denial of constitutional rights.[48] An inheritance tax imposed on certain property when devised by husband to wife, but not when

38 335 U.S. 464 (1948), discussed *supra* note 25 and accompanying text.
39 Patterson Tavern & G.O.A. v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970).
40 Sail'er Inn, Inc. v. Kirby, 3 CCH EMPLOY. PRAC. DEC. ¶ 8222 (Cal. Sup. Ct. 1971).
41 McCrimmon v. Daley, 2 FEP Cases 971 (N.D. Ill. 1970).
42 281 F. Supp. 8 (D. Conn. 1968).
43 430 Pa. 642, 243 A.2d 400 (1968).
44 Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969).
45 304 F. Supp. 826 (E.D. La. 1969).
46 Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).
47 Cohen v. Chesterfield County School Board, Civil No. 678-79-R (E.D. Va., May 17, 1971).
48 *In re* Shpritzer v. Lang, 234 N.Y.S.2d 285 (1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y. S.2d 869, 191 N.E.2d 919 (1963).

devised by wife to husband, had been held to violate the equal protection guarantee.[49] Finally, the statutory exclusion of women from jury service had been held to violate the fourteenth amendment's equal protection clause.[50]

The judicial trend apparent from even this small sample of cases was clear. Courts across the country were beginning to recognize that laws or practices which subject women to differential or inferior treatment because of their sex are no more constitutionally permissible than other forms of invidious discrimination, particularly racial discrimination. But the Supreme Court chose not to follow these lower courts. Its decision in *Reed* made it clear that the fourteenth amendment would not be used to strike down sex discrimination as it had been utilized to strike down racial discrimination despite the large body of scholarly opinion that the equal protection clause should so apply. As the Association of the Bar of New York City pointed out in a recent report endorsing the Equal Right Amendment, "[t]he 1971 *Reed* case indicated no substantial change in judicial attitude." Far from obviating the need for the Equal Rights Amendment, *Reed* emphasized it.

C. *Legislative Action*

The fact that the Supreme Court has refused to apply the fourteenth amendment with full vigor to sex discrimination is not necessarily conclusive evidence that a constitutional amendment is needed. For it is theoretically possible for Congress and each state to revise their laws and to eliminate those which discriminate on the basis of sex. But that has *always* been true, and as this article will indicate, there are still a vast number of state and federal laws which discriminate on the basis of sex.[51] Thus reliance on ordinary legislative remedies is misplaced in this situation.[52]

To be sure, some legislative progress has been made toward equal rights for men and women. But it has, unfortunately, been sporadic and, on occasion, inadequate. Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment unless sex is a "bona fide occupational qualification."[53] Congress approved the Equal Pay Act which assures that many persons who do equal work receive equal pay regardless of sex.[54] Just recently Congress passed the Higher Education Bill which prohibits sex discrimination in colleges and universities which receive federal funds.[55] But too many of these and other federal laws and regulations fail to reach a number of areas of sex discrimination, allow for substantial exemptions, and have been implemented slowly or enforced lackadaisically. And, of course, Congress by mere legislation cannot reach sex dis-

49 *In re* Estate of Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1967).
50 White v. Crook, 251 F. Supp. 401 (N.D. Ala. 1966).
51 *See* Kurland, *The Equal Rights Amendment, supra* note 4; Freund, *The Equal Rights Amendment Is Not the Way, supra* note 5.
52 *See generally* Dorsen & Ross, *The Necessity of a Constitutional Amendment,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216 (1971); Brown, *et al., supra* note 11, at 883-84.
53 42 U.S.C. § 2000(e) *et seq.* (1970).
54 29 U.S.C. § 206(d) (1970).
55 P.L. 92-318, §§ 901-907 (June 23, 1972).

crimination in state laws in areas traditionally and constitutionally committed to the states.[56]

In the states, progress has been mixed. Some states have made diligent efforts to revise outmoded and discriminatory laws. At least three states—Illinois, Pennsylvania, and Virginia—have recently approved state constitutional provisions banning sex discrimination. However, in other states there has been no progress at all.

Without the impetus of the Equal Rights Amendment, the real and rapid progress we need against sex discrimination cannot be achieved. After ratification of the Equal Rights Amendment, the states and the federal government will have two years to revise any of their laws which are in conflict with the Equal Rights Amendment.[57] This is adequate time for the necessary changes to be made. After the two-year period has elapsed, state and federal laws which violate the amendment will be subject to challenge in court, as will other forms of "state action."[58] Thus the amendment guarantees the elimination of sex discrimination. Ordinary legislative action, on the other hand, offers, at best, the hope of equal rights in the far distant future.

IV. Sex Discrimination

The legal status of women is only one reason the Equal Rights Amendment is needed. The other reason is that there is overwhelming evidence that persistent patterns of sex discrimination actually do permeate our social, cultural and economic life. Congresswoman Shirley Chisholm eloquently demonstrated the magnitude of sex discrimination in our country when at hearings on the Equal Rights Amendment she said: "I have been far oftener discriminated against because I am a woman than because I am black."[59]

The evidence of sex discrimination is massive. Difficult as it is to believe, women are sometimes denied even the basic rights and responsibilities of citizenship in the United States. Although no state any longer excludes women from juries altogether, there is still at least one state which requires women, but not men, to register specially to be eligible to serve on juries.[60] There is also invidious discrimination against women in the criminal laws of some states. One state has a statute which allows women to be jailed for three years for habitual drunkenness, while a man can receive only thirty days for what amounts to the same offense.[61] In another state, the defense of "passion killing" is allowed to the wronged husband but not to the deceived wife.[62] And in yet another state,

56 Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, *supra* note 15 at 1516-19; *see* Oregon v. Mitchell, 400 U.S. 112 (1970); *cf.* Northern Securities Co. v. United States, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting).

57 Section 3 of the Equal Rights Amendment provides: "This amendment shall take effect two years after the date of ratification."

58 *See* discussion *supra* in notes 9-12 and accompanying text.

59 *The "Equal Rights" Amendment, Hearings on S.J. Res. 61 Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Comm.*, 91st Cong., 2d Sess., at 35 (1970).

60 The state is Louisiana; *see* Alexander v. Louisiana, 40 U.S.L.W. 4365 (April 3, 1972).

61 ARK. STAT. ANN. §§ 46-804, 48-943 (1964); *see also* State v. Costello, 59 N.J. 334, 282 A.2d 748 (1971); Wark v. State, 266 A.2d 62, *cert. denied*, 400 U.S. 952 (1970).

62 TEX. PENAL CODE § 1220 (1961).

female juvenile offenders can be declared "persons in need of supervision" for noncriminal acts until they are eighteen, while males are covered by the statute only until age sixteen.[63]

Governmental action also contributes significantly to sex discrimination in education. Approximately seventy-five per cent of the college students in the country attend publicly supported institutions. These colleges and universities have a crucial role in determining employment opportunities for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country. As an independent report prepared for the Department of Health, Education, and Welfare stated, "Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."[64]

Discrimination in admission to college is widespread. A much lower percentage of women between the ages of eighteen and twenty-one are enrolled in college than of men of the same ages.[65] While some of this difference results from sex-role expectations, there are, as noted, solid indications of sex discrimination. In 1969, for example, one state university published an admissions brochure which stated, "Admission of women on the freshman level will be restricted to those who are especially qualified."[66] Another state university admitted women only for summer school sessions, and never to the regular academic curriculum, unless they were related to employees or students and wished to pursue a course of study otherwise unavailable.[67] In 1970, the thirty-five schools which were considered most selective by one college handbook admitted approximately only twenty-nine per cent women to their freshman class as compared to the national admissions rate of forty-one per cent.[68]

Discrimination against women does not end with admission; it pervades every level of the teaching profession. While more than two thirds of the teachers in public, elementary and secondary schools are women, only twenty-two per cent of the elementary school principals and only four per cent of the high school principals are women.[69] At the college level, statistics show that almost half of the male teachers become full professors while only ten per cent of the female teachers are granted that status.[70]

The business and labor laws of some states discriminate invidiously against women. Some states place special restrictions on the right of married women, but not married men, to contract or to establish independent businesses or to

63 New York Family Court Act § 712 (b) (McKinney, 1954).
64 NEWMAN, REPORT ON HIGHER EDUCATION, 80 (1971).
65 *See* 118 CONG. REC. 2746 (daily ed. Feb. 28, 1972) (statement of Senator Bayh).
66 UNIVERSITY OF NORTH CAROLINA, PROFILE OF THE FRESHMAN CLASS (1969).
67 Texas A&M; *see* Brief for National Federation of Business & Professional Women's Clubs, Inc., as *amicus curiae*, Reed v. Reed, 404 U.S. 71 (1971); Alexander v. Louisiana, 40 U.S.L.W. 4365 (April 3, 1972).
68 *See* 118 CONG. REC. S. 2747 (daily ed. Feb. 28, 1972) (statement of Senator Bayh) (ratings of colleges taken from CASS & BIRNBARUM, COMPARATIVE GUIDE TO AMERICAN COLLEGES 1971).
69 *Id.* (*quoting* Dr. Peter Muirhead, Associate Commissioner of Education).
70 *Id.* at 49 (citing SIMON & GRANT, DIGEST OF EDUCATIONAL STATISTICS (1969)).

become a guarantor or a surety.[71] Perhaps even more astounding, in 1970, twenty-six states had laws or regulations which prohibited the employment of adult women in specified occupations or industries which were open to adult men.[72]

Most states have enacted so-called protective labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for qualified women to obtain work they desire. It also inhibits the ability of qualified women to become supervisors. State laws which limit the amount of weight a woman can lift or carry, arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. Speaking of such restrictive laws as a whole, the Equal Employment Opportunities Commission states in its guidelines on sex discrimination:

> The Commission believes that [state laws which restrict or limit the employment or conditions of employment of females] 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. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect.[73]

Partially because of these laws, as well as other sorts of sex discrimination, working women are at a great disadvantage in the private sector. The median salary income for women is only fifty-nine and one-half per cent of that earned by men and in recent years the gap between male and female median incomes has been widening.[74]

Sex discrimination is clearly present even in government employment, which in total accounts for more than twenty per cent of the labor force. For example, although women constituted thirty-four per cent of all full-time white-collar federal civil service employees in 1967, they filled more than sixty-two per cent of the four lowest grades and only two and one-half per cent or less of the four highest grades.[75] In addition, sex discrimination in government has a subtle effect upon employment of women in the private sector, for private employers often look to government as a model for employment practices.

V. Conclusion

For these reasons — the failure of the courts to apply the fourteenth amend-

71 *See* Freeman, *The Legal Basis of the Sexual Caste System,* VALPARAISO L. REV. 203, 212 (1971).

72 *Hearings on S.J. Res. 61 Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess., at 306 (1970) (statement of Professor Emerson).

73 29 C.F.R. § 1604.1(b)(2) (1972).

74 S. REP. No. 689, 92nd Cong., 2d Sess. 9 (1972).

75 U.S. CIVIL SERVICE COMM'N, BUREAU OF MGT. SERVICES, STUDY OF EMPLOYMENT OF WOMEN IN THE FEDERAL GOVERNMENT, 1967 17 (1968).

ment vigorously to sex discrimination, the practical difficulties in relying on ordinary legislation to achieve equal rights quickly and uniformly, and the pervasiveness of sex discrimination in our country—the Equal Rights Amendment is necessary. There is another point too: the symbolic effect of the Equal Rights Amendment. The Constitution is our most fundamental document. We do not and should not tamper with it for insignificant reasons.[76] Therefore, an amendment has great moral and persuasive value, and influences conduct beyond its own legal reach. By declaring in the Constitution that men and women are equal before the law, we will be giving the women of our country tangible evidence of our commitment as a Nation to true equality. As was recently stated by the *American Bar Association Journal:*

> [W]e have confidence that our system will be able to prevent "legal chaos" if the amendment is ratified. To act fifty years after an amendment was required to give women the vote hardly seems to be rushing something that should have been accomplished without another amendment but wasn't.[77]

The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second-class citizenship is a fundamental affront to personal human liberty. I am confident that the states will respond as did Congress to the justified demands for constitutional equality for men and women.

76 *See* C. PRITCHETT, THE AMERICAN CONSTITUTION 32 (1959)
77 58 A.B.A.J. 604, 605 (June, 1972).