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The Equal Rights Amendment and the Courts

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INTRODUCTION

In our constitutional system, law is not retrievable from a series of stone tablets containing unambiguous formulae by which every dispute is to be resolved, and all conduct governed. Nevertheless, this misconception about the nature of law pulses throughout many

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* Editor's note: The Director of the Equal Rights Amendment Project, California Commission on the Status of Women has provided the following policy statement:

The California Commission on the Status of Women has been funded by the Rockefeller Foundation to make a national study of the societal impact of conformance of laws to the Equal Rights Amendment, with the goal of promoting public understanding of the issues involved. Several assumptions underlie the formulation of this project: (1) That widespread discrimination on the basis of sex exists in all aspects of our national life and is reinforced by a network of legal protections; (2) That the ERA will set forth with unequivocal clarity the principle that equality of rights under the law shall not be denied or abridged on account of sex and mandate legal change at every governmental level; (3) That the resultant legal changes will have broad societal impact, with the major institutions such as marriage, family, government, education, and commerce undergoing substantial change as a direct result of requirements to bring federal, state, and local laws into conformance with the ERA; and, (4) That the process of social change may be facilitated by a wide public knowledge of the issues involved and the alternatives which exist. Assuming, then, the existence of legal backing

angry disputes concerning the Equal Rights Amendment; numerous arguments about the Amendment assume that, once written upon the Constitution, the principle of "equality of rights" without regard

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for sex discrimination, the approaching ratification of the ERA, the far-reaching effects of its implementation, and the possibility of orderly social change, the Commission has developed a project which will assist in the process of change.

The project has a dual dimension. It includes code reviews and the development of guidelines for model codes in the areas of family, employment, education, and criminal justice to be used as models for conformance in all states. But pinpointing areas of necessary legal change is in itself a preface to the examination of the impact of such change on selected key societal institutions. This second dimension of the project is meant to generate an understanding of the interaction of social and legal change in order to develop models for legal change which will simultaneously provide required conformance to the ERA, make adequate provision for orderly institutional change, and give due recognition to human needs.

Fundamental change of the proportion implied here need not be accompanied by chaos if systematic and well-thought-out approaches are used rather than hasty and simplistic ones. The Commission's project seeks to move beyond the inadequacies of a piecemeal approach by addressing the totality of the problem. For example, property law, whether community or common, is inextricably involved with law in the field of probate, divorce or dissolution, pensions, retirement, credit, domicile, child support, welfare, and taxes. Of equal complexity is the matter of societal impact of revisions in property law. The impact upon the institution of the family is significant, involving not only law but human reactions. Changes in the center of family power, psychological implications of power shifts, changes in self-image for males and females, and changes in attitudes need to be considered, along with changes for the judiciary in handing down decisions within a different framework.

It is the Commission's belief that multi-disciplinary attention to the effect of change on major societal institutions can keep the issues of conformance clearly laid out before the public while the process of meeting human need is studied, refined, and genuinely reflected in the law. To further the development of thought in some crucial legal and social areas, the Commission asked national leaders from a variety of disciplines to contribute articles to a book soon to be published, Impact ERA: Limitations and Possibilities. Mary C. Dunlap's "The Equal Rights Amendment and the Courts" and Anne K. Bingaman's "The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights", [Editor's note: See supra at p. 26] are a part of this work. The legal dimension of the Project has resulted in the publication of two other books: ERA Conformance: An Analysis of the California State Codes and A Commentary on the Effect of the Equal Rights Amendment on State Law. At the present time the Project is moving toward the publication of an exhaustive ERA bibliography. Hopefully, these studies identify important issues in the entire process of legal and social revision of which we should all be aware.

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to sex will have a fixed, certain and virtually immutable definition, to be applied to the variegated forms of our future.

Oppositely, interpretation of the principle of equality of rights promises to be a process at least as complex and difficult as any other process by which other fundamental constitutional changes in the interaction between law and society have been wrought. How long any stage of this particular process may take cannot be readily gauged. The processes of change accompanying other significant constitutional amendments (e.g., First Amendment freedoms of speech, press and religion, Fourteenth Amendment due process and equal protection) remain unfinished today. Also, the idea of "competing" a guarantee of basic rights, for all time, cannot be reconciled with the essence of human life—invention, creativity and struggle (or, put simply, motion).

Close to the erroneous proposition that the Equal Rights Amendment will soon acquire a clear, concrete meaning in our legal system is the deeply naïve assumption that "equality" is a status which can be successfully and justly bestowed upon persons, or upon rights of persons. Yet this notion of "magic wand equality" poses great dangers; those who wish for rapid, easy eradication of sex-based discrimination share, with those who do not care about the problem, a susceptibility to the facile view that the Equal Rights Amendment will operate automatically.

Along with the attributions of certainty and automatic effectiveness to the principle of equality of rights of men and women goes the attribution of uniform judicial treatment of the Amendment. When it is considered that our judicial system has never been and is not today in agreement about the meaning of "equality," and when we recognize that the system affords a continuous tug-of-war among courts, within courts, and overtime it becomes obvious that the Equal Rights Amendment will yield tentative, experimental and sometimes self-contradictory results long before it can yield hard-and-fast solutions. This is not to say that some cases will not be rather promptly decided concerning the Amendment's meaning; neither is this to say that a large measure of seeming certainty will not be contributed to the meaning of the Amendment by initial Supreme Court decisions. Rather, it is only necessary to remain aware, in any analysis of the Amendment in relation to the courts, that conflicts within the judicial system about "equality" must necessarily lead to setbacks and stalemates in the processes of giving life to the Equal Rights Amendment.

At the center of the relationship between our courts and the Equal Rights Amendment lies a paradox: American judges and

lawyers, having been a major cause of sex-based discrimination under law, will hold a major share in the power to decide whether, and by what means, the Equal Rights Amendment will guide us through the eradication of a sex-discriminatory legal system and through the creation of a non-discriminatory one. The proposition that American judges and lawyers have been primary in the development of a dual arrangement of law regarding male and female is not meant to recriminate, but to describe: court decisions, postures of advocacy and applications of law that have drawn or accepted arbitrary, ignorant and non-individualized distinctions between male and female which have contributed directly to the growth and perpetuation of a sex-differential legal process. It is these self-same steps of advocacy and judicial decision making that will serve, in the interpretation of the Equal Rights Amendment, either to preserve or to overturn the basic duality through which women and men are viewed and treated under law.

This article is premised upon the idea that attempts to predict and to affect judicial handling of the Equal Rights Amendment will become more effective and reliable once a working understanding is gained of the stimuli toward and inhibitions against equality of the sexes that currently (and historically) shape our judicial system. This article seeks to contribute to that working understanding.

I. THE U.S. SUPREME COURT AND THE EQUAL RIGHTS AMENDMENT

A. Overview: Supreme Court Decision Making as the Law of the Land

> *This constitution* and the laws of the United States which shall be made in pursuance thereof; and all treaties . . . *shall be the supreme law of the land;* and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. (emphasis added)
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> U.S. Const. Art. VI.

The Equal Rights Amendment places the principle that "equality of rights under law shall not be denied or abridged . . . on account of sex" in the highest and most powerful form available in our system of laws. As an amendment to the Constitution, that principle is proposed to be located at the top of the hierarchy, in the company of other principles which, in theory, guide or control the entire operation of law in the United States.

At the top of the human hiearchy that corresponds with the supremacy doctrine sit the nine decision-makers of the United States Supreme Court: these are the final arbiters of federal constitutional controversies.[1] In this *theoretical* sense it can be fairly asserted that the Supreme Court will constitute the single most important interpreter of the Equal Rights Amendment.

However, awareness of the primacy of the Supreme Court's interpreter role in relation to the Equal Rights Amendment must be tempered by realization of the procedural, political and psychological limitations upon that role. The Supreme Court hears and decides only a fraction of the cases in which its complete review is sought. The length, contents, and emphases of the Court's docket are mightily affected by these procedural, political and psychological limitations upon Supreme Court review.

To illustrate the significance of this operational truth in predicting the course of the Equal Rights Amendment, let us imagine that cases involving the Amendment, in which the Supreme Court's review is sought, are darts thrown at a target. The target is ringed by procedural restrictions (e.g., the Court will not hear most cases), political inhibitions (e.g., the Court will avoid handling certain "hot potatoes") and psychological constraints (e.g., the Court will resist hearing particular matters which frighten, anger or bore it). Of course, the metaphor of a single target with distinct rings is oversimple. Procedural limitations are sometimes infused with political and psychological ones (e.g., the recent case of *DeFunis v. Odegaard*,[2] which raised the question of the constitutionality of affirmative action styled law school admissions policy, was found inappropriate for review because it was deemed "moot"). Also, the Court is frequently divided within itself as to appropriate limitations upon its docket. Finally, the procedural, political and psychological barriers to Supreme Court review are subject to change. In these ways, the Supreme Court's standards for selection of cases are enshrouded in a kind of irresolvable and continuous mystery.

Thus, to try to predict whether a particular case will "activate" the interpretive powers of the Supreme Court is not unlike attempting to decide whether a single dart will hit the center of nine moving targets. In situations where the targets tend to take up positions upon a discoverable straight line, prediction is facilitated; otherwise, the level of guesswork in estimating the polarities and priorities of the Court is extreme.

1. U.S. CONST. art. III, §§ 1, 2, Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803).
2. 416 U.S. 312 (1974).

There are very few senses in which the present Supreme Court is in substantial internal agreement. From the newly flourishing practice of dissenting opinions taken from refusals to hear cases,[3] it is fair to say that the Court is severely divided within itself as to the occasions and issues which should afford its review. At least one of the Justices, namely William H. Rehnquist, has declared openly[4] that he views the need of the Supreme Court to limit its jurisdiction as a pressing priority. Of course, the dispute concerning the volume of the Court's caseload has a lengthy history. Justice William O. Douglas has written upon the question several times over the years, and historians will quickly recollect that the ostensible basis of Franklin D. Roosevelt's "court-packing" strategy lay in the declared need to increase Supreme Court personnel to meet the growing caseload of the 30's.

The future outcomes of this dispute concerning the availability of Supreme Court review in constitutional cases may have a critical bearing upon the course of the Equal Rights Amendment. To the extent that the Supreme Court resolves to impose further limitations upon the cases that it will hear, it is possible that Equal Rights Amendment cases will receive short shrift in the process of priority setting.

It has been widely observed that, in the 1970's, and under the influence of former President Nixon's Supreme Court nominees in particular, a period of conservatism and retrenchment in the Court has begun. Some observers go further, describing the Burger Court as being actively engaged in the dismantling of personal rights and governmental and institutional responsibilities which were established or illuminated in Warren Court decisions. Under either view, the probability is greatly diminished that the Burger Court will engage in vigorous, demanding articulation of the principle embodied in the Equal Rights Amendment, at least to the degree that such articulation requires so-called judicial activism.

On the other hand, the Supreme Court since 1971 has heard and decided a considerable number of constitutional challenges to sex-differential laws and actions;[5] the proportion of Supreme Court

3. *See* the 1973-75 U.S. Reports, *passim*.
4. Article in American Bar Association Journal (1974).
5. *See* The Equal Rights Amendment within the Constitution as a Whole, *infra*, at 52.

time spent upon these questions in the 1970's appears substantially greater than the proportion of such time spent by, or prior to, the Warren Court. While this change is probably better explained by reference to factors other than that of judicial activism focused upon sex discrimination (i.e., legal strategies of the Women's Movement, increasing numbers of women in the legal profession, elevated and simultaneously reactionary social consciousness about the wrongfulness of a dual system of laws), the indication that the Supreme Court today is far readier to hear and decide certain sex discrimination cases cannot be ignored.

Needless to say, this quantitative and structural perspective upon the Supreme Court misses much. Without examination of the reasoning and the results of Supreme Court decisions, the possible directions of the Court concerning the Equal Rights Amendment cannot be sketched. At the same time, in the process of examining the contents of relevant decisions for trends and leanings, an eye must be left open to the bearing of the operational politics of the Supreme Court, as a bureaucracy, upon the demands of the Equal Rights Amendment. Matters such as the number of cases the Court can and will hear, and the degree of accessibility of the Court generally, will influence the contents and consequences of Supreme Court decisionmaking about the Equal Rights Amendment over time.

B. An Historical Perspective: The Equal Rights Amendment in Constitutional Context. Felix Frankfurter as an Example.

> Lawyers, with rare exceptions, have failed to lay bare that the law of the Supreme Court is enmeshed in the country's history; historians no less have seemed to miss the fact that the country's history is enmeshed in the law of the Supreme Court.
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> The history of the Supreme Court is not the history of an abstraction, but the analysis of individuals acting as a Court who make decisions and lay down doctrines, and of other individuals, their successors, who refine, modify and sometimes even overrule the decisions of their predecessors, reinterpreting and transmuting their doctrines.
>
> Felix Frankfurter,
> *Law and Politics*

It is nothing but profoundly ironic that the words of the late and eminent jurist Felix Frankfurter should open this section. Perhaps, of all men who ever served on the U.S. Supreme Court, Justice Frankfurter worked hardest to demystify and to give popular, progressive consciousness to and about the Supreme Court;

and, of all of the men who have ever served on the U.S. Supreme Court, Justice Frankfurter wrote and acted in the most reactionary and philosophically incongruous way concerning the legal status of women.

A brief analysis of Frankfurter's views is offered here, as a demonstrative example of the falsity of the common notion that liberalism necessarily correlates positively with respect for the ideal of equality of rights. Exposure of the untruth of this notion is crucial to an understanding of the possible lack of relevance of the patent non-liberalism of the Burger Court's majority to the initial fate of the Equal Rights Amendment.

Throughout the hardest fought battles of Mr. Justice Frankfurter's career runs a strong theme—dedication to the ideals of economic fairness and active governmental regulation of the greedy, the landed gentry, and the corrupt. Within this theme come many subthemes, including zealous safeguarding and articulation of the need for labor unions, dedicated spokesmanship for social welfare activism and a continuing insistence upon making law comprehensible to the People.

At the same time that Felix Frankfurter gave incomparable zeal and energy to writing about the plight of such victims as Sacco and Vanzetti, and the Scottsboro Boys, and to vindicating social welfare interests of the People, Felix Frankfurter called himself "a parochial Harvard man."[6] That description denies too much and too little. The parochial influence of Harvard upon Frankfurter barely shows in many domains of his life and action; on the question of women's rights, the influence is obtrusive. Like Harvard itself, a pinnacle of American elitism and a center of American genius and creativity, Frankfurter himself sat, in 1948, and declared that "[the States may] draw . . . a sharp line between the sexes,"[7] and, further that:

> The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards[8]

thus deciding that Michigan could constitutionally prohibit women from being bartenders.

6. F. Frankfurter, Law and Politics, at 289 (1962).
7. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).
8. *Id.*

The opinion of Justice Frankfurter in *Goesaert v. Cleary*[9] has frequently been cited and discussed as a point upon the linear tradition of a separate legal and constitutional place for women.[10] Yet, for purposes of assessing the potential relationships of the Constitution as a whole to the Equal Rights Amendment, this decision is perhaps far more significant than a mere point on the line.

At stake in virtually every constitutional case are a multitude of conflicting political interests. Judicial decisions vary with regard to the quantum of candor with which judges call these conflicting interests by their proper, or at least recognizable, names. In *Goesaert v. Cleary*[11] a record had been made below the Supreme Court, showing the motive beneath the anti-female-bartender legislation; an all male labor union, seeking to get and to keep jobs for its members, had lobbied for the legislation. Mr. Justice Frankfurter took note of this aspect of the record, saying:

> [W]e cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

Unchivalrous for whom, indeed? Surely the Court itself was being "unchivalrous" to the women in Michigan seeking bartending jobs in a postwar labor market swamped by returning veterans. But let us not pick nits.

What is most strikingly germane to the present discourse was Mr. Frankfurter's willingness to discard evidence of economic greed and high-handedness in deciding the case of *Goesaert*. This action, or affirmative inaction, in *Goesaert* runs firmly contrary to the position of a man who had often criticized Taft[12] and Coolidge[13] for their blindness and praised Brandeis[14] and Holmes[15] for their vision, in bringing facts, underlying socioeconomic *realities* and pure, frank sensitivity to *life* into judicial processes.

To go deeper, the crux of Mr. Justice Frankfurter's resolution of competing interests in *Goesaert* lay in his lack of dedication to the ideal of equality of rights, insofar as women were concerned. As a result, the power of unions and state government to squeeze women out of jobs was (tacitly) strengthened by law, and the right of women to equal employment opportunity was left constitutionally defenseless. It should be remembered at this point that it was

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9. *Id.*
10. *See, e.g.*, L. Kanowitz, Woman and the Law: The Unfinished Revolution, at 33, 172 (1969).
11. *See supra* note 7.
12. F. Frankfurter, *supra* note 6, at 37-40.
13. *Id.* at 10-15.
14. *Id.* at 39, 110, 116.
15. *Id.* at 72-77.

Mr. Justice Frankfurter who had actively rebuked the Supreme Court for its decision of 1936 in refusing to uphold a state minimum wage law "for women workers obviously incapable of economic self-protection."[16]

In light of Frankfurter's own conduct in the *Goesaert*[17] decision, the conclusion is justified that his concern, in criticizing the 1936 decision of the Supreme Court, did not spring from a mighty dedication to the cause of equalizing the economic power of women. Indeed, Mr. Justice Frankfurter had either never believed that such an end was possible or worthwhile, or he had *lost* this spirit at some point. When Frankfurter wrote of the philosophical, political and ethical world, he spoke in terms of "men"; when he wrote of workers, he often used the words "men and women." Perhaps one might find an explanation for Frankfurter's *Goesaert* decision in his long-standing preoccupation with the need for unions. But where, as of *Goesaert*, did Mr. Justice Frankfurter's priorities lead? The *Goesaert* opinion should be read as a whole; its tone of mocking women, whose interests Mr. Frankfurter professed to deserve "special" protection, rings loud inside the mind.

As mentioned at the outset, Felix Frankfurter's views have been used here to illuminate the grave distortion involved in attributing a connection between liberalism and concern for human equality. The Aesop's moral of this story, no part of which should be read as an attack upon the person or greatness of Frankfurter himself (for that would be both silly and useless), is this: The Equal Rights Amendment cannot be assumed to have a safer, happier fate in the hands of liberals than it may be assumed to have in the hands of any other politically identifiable group.

As long as the fundamental priorities of the Supreme Court—whether led by conservatives, liberals or otherwise—do not change to include a strong and self-critical attempt to overcome the basic ambivalence with which women are viewed in the law ("we must protect women; we must protect ourselves from women; but women deserve equality")—the fate of the principle of equal rights will be shallow and, possibly, tragic.

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16. *Id.* at 73.
17. *See supra* note 7.

C. *The Equal Rights Amendment inside the Constitution as a Whole*

At a given time, some parts of the Constitution are substantially more ambiguous, controversial, lucid or insignificant than others. At that same time, a clause may be read to mean something quite different by the interpretation of the Supreme Court than it meant earlier, or will mean later on. The late Chief Justice Earl Warren was asked, in 1971, why the Court decided *Brown v. Board of Education of Topeka* as it did; he looked up, almost alarmed at the simplicity of the question as he saw it, and answered, "Why, because of the Fourteenth Amendment—because of equal protection of the laws." The equal protection clause, whose meaning in the present century has seen dramatic shifts and counter-shifts in and through the interpretative processes of the Supreme Court, hardly seems so self-explanatory; at the same time, there was a look of pure inspiration and confidence on the Chief Justice's face when he gave his answer.

In reference to individual or personal rights, the term "equal" occurs only once[18] in the Constitution. The Fourteenth Amendment (section 1) reads in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the *equal* protection of the laws. (emphasis added)

It would be an understatement to observe that current Supreme Court definitions of what constitutes a denial of equal protection are confusing and internally contradictory. The business of projecting the course of today's Supreme Court as to equal protection appears to be a logical never-never land. Chaotic or not, the past, present and future scope and limits of equal protection will have profound effects upon interpretation of the Equal Rights Amendment. This is because the equal protection experiences of America represent an ultimate and central struggle in our system, between person and government, between subgroup and government, and between individual and legal category. Also, political and judicial clashes concerning equal protection have formed precedents, have shaped approaches, and have revealed biases and beliefs about equality, that ratification of the Equal Rights Amendment, by itself, can neither dissolve nor reconcile.

The pulsebeat of equal protection history pounds audibly in the debate that has accompanied the Equal Rights Amendment across

18. The term "equal" is used elsewhere in various quantitative references to the Senate, House and electoral college. U.S. Const. art. I, § 3, art. II, § 1, art. V, U.S. Const. amend. XXIII.

the states. One person's call to freedom is another's cry of fear; the threat of endangered family, womanhood and manhood here is the promise of human renascence over there. At the same time, the Equal Rights Amendment represents a frontal assault upon equal protection history and its consequences. The women of all colors who organized in and before 1868 to pass the Fourteenth Amendment, walked away voteless, and until 1971, the U.S. Supreme Court found no force in the claims of equal protection denied on behalf of women. Thus, support for the Equal Rights Amendment on the basis that equal protection will not otherwise be afforded to all persons regardless of sex has become a common theme of legalist proponents.

Yet the provocative realization that the historic and continuing anomalies, promises and dangers of equal protection are bound to affect judicial interpretation of "equality of rights" pursuant to the Twenty-seventh Amendment should not overshadow other sources of constitutional insight upon the principle.

The Nineteenth Amendment reads:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Whether the Supreme Court will draw guidance in its task from the Nineteenth Amendment, the working clauses of which are identical to the Equal Rights Amendment, remains to be discovered. In a logical world, the conclusion that the Nineteenth Amendment should bear strongly upon interpretation of the Twenty-seventh would be irresistible: the principle is logically inescapable that the parts of the Constitution must be read to work as an harmonious whole. But, like equal protection, if the Nineteenth Amendment serves as a legal touchstone to the Supreme Court, it too may serve as a political one. Early hyperliteral readings of female suffrage kept women out of office and out of the courts.[19] If one does not believe that "equality of rights under law" leaves room for such politically inspired tunnel-vision as that by which the Nineteenth Amendment was first read, one needs please look again.

D. A Psychological View: The Supreme Court and "Women"

When one examines U.S. Supreme Court decisions concerning

19. Babcock, Freedman, Norton and Ross, Sex Discrimination and the Law: Causes and Remedies, at 58-70 (1975).

"women", one frequently sees the Court in its most societally reflective position. To at least the extent that American culture is ambivalent toward the "female", the U.S. Supreme Court has often behaved likewise. But perhaps the Court has gone further. The conflicting state of constitutional law concerning women has now reached a stage of virtual irresolvability, which will continue until and unless the Equal Rights Amendment is ratified and is interpreted by the Court to guide impartial and rigorous re-examination of the current legal images of "male" and "female".

In 1971, for the first time since 1868 when the Fourteenth Amendment was ratified, the Court found within the equal protection clause a limited prohibition of discrimination by state government against women, in *Reed v. Reed.*[20] *Reed* held that a state's law, preferring males over females as administrators of estates, was inconsistent with the guarantee of equal protection. The *Reed* decision was widely heralded as a step upon the long road toward legal equality of persons regardless of sex.

Yet the seeds of the current jungle, now grown up in the form of Supreme Court decisions made since *Reed* that concern the constitutional rights of men and women, were beginning to sprout in the reasoning of the Reed Court. In another view the jungle predated *Reed*, and the Supreme Court's few scythe-like strokes in *Reed* could not cut back the confusion in any lasting way.

After the *Reed* decision, the standard for measuring a deprivation of equal protection based upon sex remained ambiguous: the test requiring only that government should show an *acceptable reason* for its sex-based line-drawing was left standing, alongside the "new" test that government should show a *substantial connection* between sex-based line-drawing in a law and the end to be accomplished by that law. Needless to say, this confusion as to the proper standard for equal protection of the sexes has permitted havoc in the "harder" cases decided by the Court since *Reed.*

Tacit in the Supreme Court's decision of *Reed v. Reed* was an awareness within the Court that the standard used to measure equal protection vis a vis women was potentially neither a strong standard nor a new one. In the decision of *Frontiero v. Richardson,*[21] this tacit awareness became an overt dispute. The majority in *Frontiero* held that the armed services' presumption of the economic dependency of wives, for purposes of greater allowances to married service*men*, denied equal protection to service*women*, whose spouses were not presumed dependent. But there was no

20. 404 U.S. 71 (1971).
21. 411 U.S. 677 (1973).

majority of the Court in *Frontiero* as to the proper standard for measuring denials of equal protection to persons on account of sex.

Justices Brennan, Douglas, White and Marshall took the position that sex, like race, alienage and national origin, amounts to a suspect category, which, when used in legal line-drawing, gives rise to classifications that the courts must scrutinize strictly; or, put a bit more simply, that legal lines based upon sex are justifiable by government only if it can show that a *compelling* governmental interest is served, and can only, or best, be served by the drawing of a sex-based line.

In *Frontiero*, Justice Stewart simply did not agree to this standard, but he agreed that the result was necessitated by the logic of *Reed*. Justice Rehnquist alone disagreed with the result, determining that the military benefits scheme did not deny equal protection.

The concurring opinion of Chief Justice Burger, and Justices Powell and Blackmun took the position that: (1) the decision in *Reed* "abundantly supports"[22] the decision that the military benefits scheme denied equal protection, and (2) the position of Douglas, Marshall, Brennan and White, declaring "sex" a legally suspect category, improperly pre-empted the state legislatures' political consideration of the Equal Rights Amendment. The latter suggestion of this concurring opinion is informative indeed, for it indicates that three members of the Court view the issue of the Equal Rights Amendment as follows: in considering the Equal Rights Amendment, the states will be deciding whether sex, like race, alienage and national origin, *must* be viewed as a suspect category when used in the law to draw a line. For Chief Justice Burger and Justices Powell and Blackmun, there is no escape from the proposition that "hard" cases questioning sex discrimination by law cannot be decided without "political interference" by the Court until 1979.[23]

Several cases raising or containing questions about the constitutionality of sex-based line-drawing have been decided by the Court since *Frontiero*.[24] It is unnecessary to discuss them all in order

22. *Id.* at 692.

23. 1979 is the year by which the Equal Rights Amendment will either be ratified or die, temporarily or otherwise.

24. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (declaring Texas' and Georgia's anti-abortion statutes unconstitutionally denied due process of law); Cleveland Board of Education v. LaFleur, 414

to grasp the tangled mess in which issues of assuring equal protection to the sexes now are located. One decision since *Frontiero* deserves particular attention, in the search for psychological clues as to the current leanings of the Supreme Court where "women" are concerned.

In the case of *Kahn v. Shevin*,[25] a Florida law granting an annual $500 tax exemption to widows was upheld by the Court against the challenge that it denied equal protection to men, who, when widowed, received no such exemption. Justice Douglas' opinion in *Kahn* shows the vitality of the theme, running throughout Supreme Court decisions of this century, that women must be specially protected in economic terms because of their relative economic weakness *as a class*. The decision in *Kahn* cites the 1908 decision of *Muller v. Oregon*,[26] in support of the proposition that "[g]ender has never been rejected as an impermissible classification in all instances".[27] The decision of *Muller* was greeted by many in its time as a highly progressive, sensitive decision, which took cognizance of physical and social data depicting the economic weakness of women (through a famous Brandeis brief), in order to uphold protective laws limiting the work hours of females.

By its decision in *Kahn*,[28] the majority of the Court indicated its continuing disposition to afford women *special* protection suited to their class-wide, generalized need for legally created economic "cushions". The trade-off for these "cushions" has tended to be the inability (and the expectation of inability) of masses of women to provide for themselves in economic terms—or, put simply, economic dependency of women upon men and economic vulnerability to sex-based discrimination. In psychological terms, *Kahn* reinforces a notion that "women" can properly and justly be viewed as a separate, special class under law, provided that the law in question can somehow be interpreted to "benefit" women. The resulting standard of "equal protection" as to women is age-old in

U.S. 632 (1974) (determining that mandatory maternity leave policies denied due process of law); Geduldig v. Aiello, 417 U.S. 484 (1974) (deciding that employee-paid scheme of disability insurance run by California that excluded "normal" pregnancy from sources of paid disabilities did not deny equal protection to women); Kahn v. Shevin, 416 U.S. 351 (1974); Taylor v. Louisiana, 419 U.S. 522 (1975) (determining that state scheme which resulted in a general exclusion of women from juries violated sixth amendment); Ballard v. Schlesinger, 419 U.S. 498 (1975) (determining that armed forces' policy of retaining non-promoted female officers did not deny equal protection to men).

25. 42 U.S.L.W. 4591 (1974).

26. 208 U.S. 412 (1908).

27. 42 U.S.L.W. 4591 (1974).

28. Justices Brennan, Marshall and White dissented in Kahn, citing both Reed and Frontiero.

Supreme Court terms: if government can convince at least five Supreme Court Justices that its sex-based lines "benefit" women, as the government did in *Bradwell*,[29] *Muller*,[30] *Goesaert*,[31] *Hoyt*,[32] *Kahn*,[33] and *Ballard*,[34] the sex-based lines in question will be held valid for equal protection purposes.

The recency and authorship of *Kahn*, written in 1974 by William O. Douglas, a Justice who has been particularly vigilant in some cases involving sex-based discrimination,[35] indicate the depth of the Supreme Court's psychological ambivalence concerning "women", and, in particular, concerning the struggle between advocates of full equality and advocates of the natural or immutable specialness of women. What the Court's opinion in *Kahn* says, in the face of this struggle, is that equal protection of the laws may or may not be found to be denied in a given situation involving differential rights of men and women, depending upon whether the purpose and/or effect of a particular sex-based line is considered by the judicial majority to be "good" for women.

The dangers of this standard are as dual as the legal system that it has perpetuated. First, what may be considered "good" for women as a weaker class may actually operate to condone and perpetuate that class-wide proneness to weakness, with judicial sanction. Second, what may be considered "good" for women as a class may, like the Florida tax exemption scheme, give actual benefits only to women who are wealthy enough to acquire them, while having no actual benefits for poor women, and having detrimental effects upon the positions and attitudes of men, rich and poor alike.

Kahn cannot safely be viewed as a residual, insignificant glance backward at the Supreme Court's fading tintype of the "little woman". *Kahn*, and other decisions of the Court from *Bradwell*[36] on, must be exhaustively analyzed for their political, psycho-

29. Bradwell v. Illinois, 83 U.S. (16 Wall.) 132 (1873), held that the state could constitutionally prohibit women from becoming lawyers.
30. *See supra* note 26.
31. *See supra* note 7.
32. Hoyt v. Florida, 368 U.S. 57 (1961), disapproved in Taylor v. Louisiana. *See supra* note 24.
33. *See supra* note 25.
34. *See supra* note 24.
35. For examples, Mr. Justice Douglas dissented in both Goesaert v. Cleary, *supra* note 7, and Geduldig v. Aiello, *supra* note 24.
36. *See supra* note 29.

logical and legal portents concerning Supreme Court readings of the Equal Rights Amendment. If the process of interpreting the Amendment is affected whatsoever by the psychology of the Court concerning "women", then these ancient, current pictures of wives, widows, pregnant women and soldiers must be regarded just as cautiously as the images of equality hypothetically traced on the brains of the Court by the abstract pen of a constitutional amendment.

II. Federal-State Judicial Relationships
"States' Rights" Controversies Affecting the Equal Rights Amendment

One considerable source of ideological resistance to the Equal Rights Amendment, in ratification debates particularly, has gathered within the circle of opposition to the federalization of power. As one opponent put the matter, "I don't want to see the federal government enforcing a view that I may be adamantly opposed to."[37]

At present, the Equal Rights Amendment has been attacked with a vehemence bordering upon panicky hatred by a number of reactionary[38] and radical[39] organizations alike, in terms of its purported potential for federal invasions of privacy, freedom of religion, states' rights to control marriage, divorce, homosexuality, recreation and other subjects of state police power. Howsoever lightly these attributions of threatened federal power-grabbing are taken by the cool observer, the repetition of this theme in state-level Equal Rights Amendment debates foretells certain problems that await lawsuits based upon the Amendment, once these reach the federal judicial system.

As with the Supreme Court, the question of what federal trial and appellate courts will do in the interpretation of the Equal Rights Amendment must be preceded by the question, *what suits based upon the Equal Rights Amendment will federal district courts elect to hear*? It is quite possible that some federal district courts will await specific Congressional action concerning their jurisdiction (translate: power) to hear Equal Rights Amendment-based suits before they take on the managerial, political and legal rigors of these actions. It is also quite possible that, by reference

37. Quotation from ERA and the American Way (film produced by Mollie Gregory for the Nevada League of Women Voters (1974)).

38. The best example is probably the Hotdogs of the John Birch Society, who have accused ERA supporting governors' commissions of a communist influence. Babcock, *et al.*, *supra* note 19 at 184.

39. The best example is probably the American Communist Party, whose opposition to the ERA is based on an inference of federalized tyranny beneath the Amendment.

to doctrines such as abstention, federal district courts will elect to duck "hard" cases, whether or not Congress sets up orderly procedures for the federal judicial disposition of Equal Rights Amendment-based disputes.

In front of federal judges who find the "abstention" position persuasive, believing that the state courts should rule first upon the constitutionality of state laws called into question under the Amendment, the process of federal judicial decisionmaking upon the Amendment may be surprisingly slow. In this manner, it is predictable that some quite significant litigation will be swallowed up by the time-consuming, expensive process of state-level litigation.

The point of all these predictions is simple: to the extent that there is resistance in the federal courts to making room for the hearing of Equal Rights Amendment cases, and whether such resistance arises from political biases, financial and managerial considerations of the federal courts, or other sources, the business of getting federal courts to hear and decide Equal Rights Amendment-related cases promises to be an uphill battle.

An unavoidable political observation must accompany this prediction about bureaucratic resistance of the federal courts, as institutions, to the increased workload promised by ratification of the Equal Rights Amendment. The amendment states, in section 2:

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Congress' action will be prerequisite to the realization of federal judicial enforcement and elaboration of the Equal Rights Amendment's principle. If Congressional legislation providing money, resources and explicit declarations of judicial power to the federal courts is not forthcoming from Congress, upon ratification of the Amendment, it is highly probable that the role of the federal courts in giving meaning to the Equal Rights Amendment will fall very short of its potential, to the apparent glee of the John Birch Society and the Communist Party alike.[40]

B. Pinpointing Regional Resistance to Equal Rights Amendment Implementation: The Patchwork Quilt of the Sexist Tradition

In the phenomenally controversial ratification process, a kind of

40. *See supra* notes 38, 39.

patchwork quilt of anti-Amendment regions has emerged. These regions hardly compose a geographic "North and South" of sexism, but their emergence nonetheless suggests areas in which resistance to the Equal Rights Amendment will prove resilient upon, and after, its ratification. Once the Amendment is ratified, every state as well as the federal government has been given a two-year period in which to clean sexism out of its legal house, front yard and back yard alike.

In terms of the depth and pervasiveness of various legal forms of denial and abridgement of equal rights to men and women, even if the measure of these forms is Congress' limited accounts,[41] it is indisputable that two years will prove too short a time for thoughtful, deep-reaching implementation of the Amendment. More broadly, because legally created and protected forms of sex discrimination are not all to be caught in the "he" and "she" of the codes, and because the denial and abridgement of equal rights occurs as readily at the levels of official discretion, written regulations, county ordinances, and individual conduct by government officials as it does at the level of black-and-white state law, the two year period subsequent to ratification cannot sanely be viewed as the main stage of Equal Rights Amendment implementation. For states now refusing to ratify the Amendment, the two year period may be spent in continuing tactics of opposition.

Ideally, the federal courts are free of the regionalism that defines states; in practice, the degree to which federal courts avoid regionalism turns powerfully upon the political and personal independence of the federal judiciary, and the people that work with it—lawyers, court reporters, clerks, marshals and others. However, the fact remains that there are whole states in this country where competent federal civil rights lawyers are virtually impossible to find, and where the judiciary, howsoever independent, sometimes suffers accordingly.

If the U. S. Department of Justice, state attorney general's offices and public interest attorneys consider Equal Rights Amendment litigation as anything less than a necessity on the path to human freedom, it is hardly arguable that judges—with rare exceptions will tend to do likewise. In regions where the cause of the Equal Rights Amendment has proved particularly unpopular, the need will be extreme for informed lawyers and open-minded judges to

41. The record of Senate debates, containing reference to some forms of legal inequaltiy of the sexes, is contained in 118 Cong. Rec. S 4247-4272 (March 20, 1972); 118 Cong. Rec. S 4372-4430 (March 21, 1972); 118 Cong. Rec. S 4531-4613 (March 22, 1972).

give their efforts to the process of making the Amendment meaningful.

III. PREDICTIVE SKETCHES: JUDICIAL INTERPRETATION OF THE EQUAL RIGHTS AMENDMENT

A. The Courts as Refined Political Animals

What should "equality of rights" mean? Equality has been a prime subject for major philosophical works throughout the centuries, and the matter of equality of the sexes has often been an articulate part of this theme.[42]

At the outset, it is worth noting that the focus of the Amendment is upon equality of rights under law, and *not* upon equality of persons nor upon the equality of men and women. This feature of the Amendment makes the "vive la difference" school of opponents, with its emphasis upon the biological identifiability of the sexes as a form of "proof" that equality is impracticable, seem ridiculously illogical. For if it is legal rights that are to be afforded equally, and *not* "different" persons who are to be made unexceptionally equal in the law, then opposition to the Amendment founded in "la difference" is non-responsive, unless "la difference" explains why *rights* should not be afforded equally. Thus, it becomes plain that the "vive la difference" perspective carries some hidden meanings, which should be unraveled before one decides to join them.

One of the subtle implications of the "la difference" position appears to be that every person can and must be defined, or at least identified, sexually; the flip-side of this implication is that whenever the rules for sexual identification do not find clear-cut "males" and "females", society is endangered. Listening to the undercurrent of the argument that the Equal Rights Amendment threatens the American family, one hears this: the American family is dependent upon the inequality of the rights afforded by law to men and women.

While this entire exploration of the "biological anti-equality" school might at first perusal appear to be off the subject of the courts and the Amendment, it is assuredly not so. Some courts have already shown strong reactionary potentials relative to the

42. *See e.g.*, Plato, The Republic, Book XVI.

Women's Movement, and it is predictable that readings of the Equal Rights Amendment may draw from those potentials. The "biological" school is itself founded upon this adversity, which has sprung from the notion that the Women's Movement and Equal Rights Amendment proponents are inseparable co-conspirators in a vast plan to castrate men, dump on housewives, steal babies to fill government day centers, draft teenage girls, outlaw heterosexual marriage and make everyone wear the same kind of underwear.[43] The most serious problem posed by this wild collection of reactions is that it distracts energy and attention from the work of discovering what the real hazards of the Equal Rights Amendment process may be, and reducing these risks as fully as possible. To the degree that courts are vulnerable to distraction by political extremism, whether centered upon the Women's Movement or the Amendment itself, the loss of judicial resources in the resolution of false controversies about the equality of "male" and "female" may be considerable.

As mentioned in the Introduction, perhaps the most palpable hazard of Equal Rights Amendment implementation lies in the theory of "magic wand equality" that can be mistakenly read into the Amendment. This theory erroneously focuses upon equality as a *status* conferrable by law upon persons, instead of viewing equality as a positive *value* in the distribution and exercise of rights. By this theory, once the Amendment is ratified, the magic wand of equality will be waved over women and men once and for all. Then a hypothetical judge will be free to say, and indeed will be required to say, "Okay, you're equal now. So go out and get a job, take over the world, since it is yours now, too."

Under this misreading of "equality", courts must resign their powers to ascertain the conditions of *individuals*, relying instead upon the assumption that the status of equality has been conferred by law upon everyone who comes before them. The "magic wand" theory of equality obviously holds an enormous potential for political backlash-style decisions. Whether it is adopted by courts that have shown a dispositional capacity for political backlash will depend upon many factors, including the initial readings of the Amendment by the Supreme Court, and the style and operating definitions of equality adopted in legislation passed to implement the Amendment. The main factor, however, in the day-to-day operations of trial courts, will probably be the attitudes of judges toward equality of rights, the Women's Movement, civil rights activities generally, and toward their own powers to do justice.

43. *See e.g.*, P. Schlafly, Phyllis Schlafly Reports (1972-).

Flexibility is the living membrane of judicial interpretation; it is at once the source of fair results, arbitrary ones and all that come between. To draft a law upon any subject and expect it to have only a single, reasonable meaning in all cases ignores the necessity of courts, as well as their humanness.

If it is correct that the "inequality of rights" upon which the Amendment is focused has resulted from judicial processes as well as legislative ones, then to place the onus of Equal Rights Amendment implementation solely upon the legislative branch will prove markedly ineffective in the disassembling of a sex-divided legal system. The removal of inequality-producing assumptions about women and men from the legal process simply cannot be accomplished by legislative red pencils in codified law, working alone.

The courts are basic to the achievement of a legal system that does not deny or abridge rights on account of sex, not only in terms of the technical definitions of the Equal Rights Amendment that will evolve through case precedents, but in terms of the operating politics of the judiciary insofar as questions of sex-based discrimination are concerned. Legislatures can act to implement the fullest and soundest theory of the Amendment in the living law; however, judges, and only judges, can breathe the spirit of equality into the law in the daily operation of our courts.

B. The Present as Prologue: Treatment of Sex Discrimination Under Title VII of the Civil Rights Act of 1964

Certainly the most recent and widespread experience of federal courts in defining "sex discrimination" has arisen in the hearing of cases charging sex-based discrimination in employment under Title VII. Through these cases, the federal judiciary has begun to develop standards, tests and measures for the phenomenon of unequal employment opportunities, as it affects female workers in particular. The experience of federal courts handling Title VII sex discrimination cases is likely to bear in several ways upon federal judicial interpretation of the Equal Rights Amendment.

As amended in 1972,[44] Title VII prohibits employers, including private employers of 25 or more persons,[45] labor organizations and

44. Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1964).
45. Civil Rights Act, 42 U.S.C. § 2000e(b) (1964).

government at all[46] levels, from following employment policies or practices which, by design or by effect,[47] discriminate against one or more employees on account of race, national origin, color, religion or sex. Literally hundreds of cases involving allegations of sex discrimination in employment have been decided by the courts between 1965 and the present. The most important question that this litigation raises in relation to the process of Equal Rights Amendment interpretation is this: What will be the effects of the Title VII experience of the judiciary upon interpretation of the Equal Rights Amendment? A related question of great significance raised by the Title VII experience is this: Have courts deciding sex/ discrimination cases under Title VII developed standards and predispositions about the meaning of "equality of rights" as applied to women and men? This article cannot answer these questions in a full way; instead a brief discussion of a few facets of these questions is attempted.

For purposes of this discussion, a relatively limited sample of published opinions[48] concerning cases of discrimination under Title VII has been reviewed. This sample of opinions by no means represents the "State of Title VII Law" insofar as sex discrimination in employment is concerned, for the following reasons: (1) many opinions and decisions on the subject are unpublished; (2) cases that are settled in early stages of litigation do not usually engender judicial opinions; (3) an exhaustive look at the "State of Title VII Law" in sex discrimination cases would require thorough-going study of the actual conduct of employers and unions, including patterns of adaptation and defensiveness, in relation to Title VII.

Also, judicial opinions range widely in the degree to which the underlying facts of a case may be gleaned from them. Thus, any discussion of the themes of case law on a given subject requires a certain amount of reading between the lines. This mode of analysis is necessarily risky because the political and psychological motivations of a case, and its results, may be buried far beneath the level of articulation required in judicial opinion writing.

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46. Civil Rights Act, 42 U.S.C. § 2000e(f)-(h) (1964).
47. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
48. For this analysis, the decision contained in Volume 7 of CCH's Employment Practices Decisions were surveyed. This analysis does not purport to represent that Volume 7 is special, but only that it is fairly representative of the diverse patterns and problems of judicial decision-making under Title VII.

1. Judicial Attitudes Toward Agressive Women Under Title VII

In the case of *Newman v. Avco Corp.*,[49] the trial court determined that Defendant maintained racially discriminatory promotion and seniority systems discriminated against Blacks in relying upon subjective supervisorial evaluations and by not rehiring Blacks after a plant closure, and determined that prior to 1965 the only Blacks employed by Defendant were janitors and char-women. The court also found that the company's firing of one Black employee named Mr. Dennis was retaliatory, due to the employer's anger with Dennis because of his "agressive but proper representation of black employees".[50]

Not a single case in Volume 7[51] shows a court finding that the firing of a female was improperly due to her "aggressive but proper representation of female employees". Indeed, several cases suggest that a quite different standard has been applied to defensive showings, in Title VII cases, of activism, militancy and aggressive civil rights-oriented conduct on the part of women.

In *East v. Romine, Inc.*,[52] the trier upheld the defenses of the Defendant employer, who was charged by Plaintiff, a female, with refusing to hire her as a welder because of her sex. The court's opinion took notice of Plaintiff's other Title VII complaints and/or charges against Defendant *as a proper reason* for the refusal to hire her. Of course, that conclusion is precisely contrary to Title VII, which prohibits the refusal to afford equal employment opportunity to a person in retaliation for his/her participation in or filing of charges.[53] But, more important to the issue at hand, the standard for an employee's conduct in *East v. Romine, Inc.* is completely opposite to the standard of *Newman v. Avco Corp.*; in *East*, the court expressly concludes that the female Plaintiff's *legally protected* steps to challenge discrimination are a proper reason for the refusal to hire her.

Juxtaposing *East* and *Newman*, one might suspect that the difference in standards arises from the fact that *East* is a sex discrimination case while *Newman* concerns race discrimination. Or

49. 7 E.P.D. § 9117 (D.C., N.D. Tenn.; 1973).
50. *Id.*
51. *See supra* note 48.
52. 7 E.P.D. § 9356 (D.C., S.D. Ga.; 1974).
53. Civil Rights Act, 42 U.S.C. § 2000e (1964).

one might simply dismiss the significance of the difference of reference to the fact that two different courts and two different judges were involved.

Assuredly the characteristics of courts and judges have demonstrable effects upon results, in discrimination cases as in all other kinds. But the difference between standards in *Newman* and *East* cannot be adequately explained solely by reference to the differences between types of cases or courts. The sex of the Plaintiffs seems relevant when other cases utilizing *East* type reasoning are collected.

Plaintiff, a Black female, in *Goodloe v. Martin-Marietta Corp.*[54] charged Defendant employer with using racially discriminatory college degree requirement for computer jobs. The court in *Goodloe* failed to require the Defendant to show that the college degree was job-related. It disavowed the testimony of Plaintiff's witnesses on the ground that these witnesses themselves had filed complaints of discrimination against the company, and must therefore be biased. Finally, the Court took notice of Plaintiff female's "litigious nature",[55] based upon her filing of a discrimination case at the state level and thus decided that the company's purported reason for discharging the Plaintiff (i.e., that she had used provocative obscenity in argument with another employee) was a valid non-discriminatory reason for firing her. In *Goodloe*, as in *East*, the Plaintiff was sanctioned because of her "litigiousness", that is, the Plaintiff's case of discrimination was decided to be without merit because she had filed suit(s) or charge(s) concerning discrimination. Again, in contrast, the court in *Newman* looked beneath the employer's defense that Mr. Dennis had misbehaved in the course of his civil rights activism, and the court concluded that this "reason" for firing Dennis was a *pretext* for unlawful retaliation against Mr. Dennis. It must be recalled that Title VII expressly prohibits the actions of an employer taken against an employee because of his/her filing of charges, complaints or testimony in opposition to discrimination.

Under the standard of *Goodloe* and *East*, a female Plaintiff regardless of race, is "damned if she does, and damned if she doesn't" oppose discrimination. The strong implication of *Goodloe*, *East* and decisions of this ilk is that if women intend to sustain cases of discrimination, they would be best advised to be quiet, self-concerned and—above all—"lady-like", mannerly and non-aggres-

54. 7 E.P.D. § 9197 (D.C., Colo.; 1972).
55. *Id.*

sive. The standard is circular to the extent that a modicum of aggressiveness is a prerequisite to survival in the context of filing discrimination charges and of litigation.

Lying a level deeper in these cases is the implication that, whereas activism and even militance on the part of ethnic minority males are least permitted if not rewarded by *some* courts, activism and militance on the part of women, of whatever race, are sometimes viewed as proper reasons for employers to discharge such employees, the law to the contrary notwithstanding. The relevance of this emergent double standard, for the process of judicial interpretation of the Equal Rights Amendment, is clear: courts that have already shown the propensity to develop or apply a double standard for proper conduct of men and women in employment discrimination cases will be particularly susceptible to spreading that double standard into Equal Rights Amendment cases, because of backlash motives or simply because of unconsciousness or disbelief that discrimination against women of every color is as great an evil in our system as is discrimination against ethnic minority men.

2. Quota Hiring and Promotion Policies: Sex-Differential Availability of Court Ordered Affirmative Action in Employment

Among the decisions reported in Volume 7 of the C.C.H.'s *Employment Practices Decisions*[56] are numerous opinions in which courts have ordered Defendants to employ, hire, promote, and/or train particular percentages of the discriminated-against group(s) bringing suit. A perusal of these decisions indicates that court-ordered hiring and promotion of certain percentages of ethnic minorities to remedy racial discrimination is far more common than court-ordered hiring and promotion of females to remedy sex discrimination. Less than ten decisions in Volume 7 contain orders or indications of judicial intent to order goal-based hiring of ethnic minorities. Furthermore, while hiring proportionate to the numbers of a minority group in the relevant local work force is a common formula for minority hiring goals, rarely have Defendants been ordered to hire women—of all races—proportionate to their local work force ratios.

Employer seniority systems have been successfully challenged on

56. *See supra* note 48.

many occasions under Title VII for their racially discriminatory effects.[57] Yet very few cases can be found where a court has ordered a Defendant to redefine seniority to eliminate past practices of sex discrimination.[58] Indeed, courts have sometimes found that the greater seniority of men, in employment to which women have been refused access in the past, justifies a higher rate of compensation to those men.

The apparent timidity of some courts to order quota hiring and promotion of females, and to overturn sex discriminatory seniority systems, in cases where the wrongs of sex discrimination can be best remedied by such means, indicates an unwillingness on the part of those courts to implement the sex discrimination prohibitions of Title VII with the same measure of vigor and seriousness shown in cases of race-based employment discrimination. This judicial resistance against using thorough-going means to eradicate sex discrimination in the domain of employment will be likely to penetrate judicial behavior in other areas addressed by the Equal Rights Amendment.

3. An Afterword: On the Bright Side of Title VII

The perspectives upon Title VII given so far have emphasized the negative side of case precedents concerning sex discrimination in employment in order to illustrate existing judicial inhibitions to the implementation of full equality of rights without regard to sex. However, this vein of pessimism, or realism, should be read in context. On the bright side, some courts have begun to gain an exposure to the phenomenon of sex discrimination in employment, and some courts have answered the challenge of applying consistent Title VII principles to *all* prohibited forms of discrimination with energetic, relentless examination of evidence and theory, whether Plaintiffs are males or females, activists or not, and whether the case involves racial or sex discrimination. If these courts take the lead in Equal Rights Amendment cases, drawing from their experience in locating and uprooting the very subtlest forms of sex-based inequality in employment, then interpretation of the Amendment along the no-nonsense lines of the most careful and best reasoned Title VII cases is still possible.

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57. *See e.g.*, U.S. v. Georgia Power Co., 7 E.P.D. § 9167 (D.C., N.D. Ga.; 1974); Pettway v. American Cast Iron Pipe Co., 7 E.P.D. § 9291 (CA-5; 1974).

58. *See, e.g.*, Brennan v. Victoria Bank & Trust Co., 7 E.P.D. § 9358 (CA-5; 1974).

Appendix A

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