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The Enigma of the ERA

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INTRODUCTION

The failure of the Equal Rights Amendment to secure ratification calls attention to a political enigma. The language of the proposed amendment appears to be simple, straightforward, and well within established law and public policy favoring equality. The amendment reads, in pertinent part:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.[1]

After approval by Congress in 1972, the amendment won swift ratification in many states and appeared to be certain of final adoption with thirty-five of the thirty-eight required states giving their assent.[2] However, the momentum for ratification slowed. The remaining states resisted internal and external pressures in favor of the ERA.[3] Some states, including South Dakota, attempted to rescind their ratification.[4] The proposed amendment eventually did not pass the required number of states within the designated period, notwithstanding the extension of time granted by Congress.[5] Undaunted, supporters of the amendment reintroduced it in Congress in July of 1982. This time, however, there was significant resistance to the measure in Congress. After further hearings and debate, the House of Representatives, in November of 1983, failed to approve the amendment by the requisite two-thirds majority.[6] Passage by the Senate, at this point, looks even less likely.

Why did this amendment, which appeared to be a simple statement of a basic political and moral truth, engender so much controversy? Why has the concept of equal rights become so problematic? It should be noted that this

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1. S.J. Res. 8, 92d Cong., 2d Sess. (1972); H.R.J. Res. 208, 92d Cong., 1st Sess. (1971), 86 Stat. 1523.

2. *See* Kanowitz, *The ERA: The Task Ahead*, 6 HASTINGS CONST. L.Q. 637 (1979).

3. *See* J. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS (1979).

4. Dow, *Sexual Equality, the ERA and The Court—A Tale of Two Failures*, 13 N.M. L. REV. 53, 66 n.58 (1983); Kanowitz, *The ERA: The Task Ahead*, 6 HASTINGS CONST. L.Q. 637 n.3 (1979). On the issue of rescission of the vote to ratify, see Kanowitz & Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979 (1977); Fasteau & Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?*, 1 HARV. WOMEN'S L.J. 27 (1978); Rhodes & Mabile, *Ratification of Proposed Federal Constitutional Amendments—The States May Rescind*, 45 TENN. L. REV. 703 (1978); Note, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 LA. L. REV. 896 (1977).

5. On the issue of the extension of time granted by the Congress, see Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979).

6. 129 CONG. REC. H9865 (daily ed. Nov. 15, 1983).

country's commitment to equality, although quite genuine in aspiration, has been sporadic and uneven in practice. An examination of the commitment to equality embodied in the Declaration of Independence illustrates this point:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[7]

All *men* are created equal. Did Jefferson mean "men" in the specific sense or did he mean the word to be understood in the broader sense of "people"? It was, of course, the style of the time to use the word "men" in both senses.[8] Jefferson followed the statement concerning equality and unalienable rights with the conclusion that whenever government becomes destructive of its intended purpose of securing rights, there is a right of the *people* to revolt. It would be anomalous if Jefferson meant to posit a right of the people to revolt on account of the denial of the rights of white adult males.[9] It appears, therefore, that the statement of equality in the Declaration is a statement about the natural equality of all people.

Equality is not the only concept set forth in this famous paragraph. Jefferson speaks of "unalienable Rights." People are created equal and endowed by their Creator with certain unalienable rights. Equality is a condition; certain rights are a manifestation of this condition. These rights are not political rights but instead are natural rights. To secure natural rights as political rights is the task of a government which derives its just powers from the consent of the governed. The justice of this consent is grounded on the principle that all people are created equal. The basis for democratic rule, as opposed to a monarchy or an oligarchy, is the natural equality of people, but its operations are shaped by the opinions of the governed. The irony is that the collective opinion of the governed does not always favor full political recognition of the equal rights of others. The will of the majority sometimes denies the fundamental equality of a minority. Thus, there is a tension within the Declaration between equality and consent.[10] This may account for the apparent

7. H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 100 (9th ed. 1973).

8. *See* THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1710 (1971).

9. In his *Notes on Virginia*, Jefferson contrasted the treatment of women under primitive conditions with their treatment in civilized society and concluded: "It is civilization alone which replaces women in the enjoyment of their natural equality." THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 211 (A. Koch & W. Peden eds. 1944). For discussion of the scope of Jefferson's language in the Declaration, see, *e.g.*, C. BECKER, THE DECLARATION OF INDEPENDENCE 240-55 (1922); H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION, 144-45 (1978); M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 72-76 (1978).

10. *See* H. JAFFA, CRISIS OF THE HOUSE DIVIDED 373-74 (Phoenix ed. 1982) [hereinafter cited as CRISIS OF THE HOUSE DIVIDED].

paradox that although there is an equality of all persons with respect to natural rights, the Declaration did not demand the equality of all with respect to political and civil rights.[11] This was left to the judgment of men, in the specific sense, to determine how best to secure these rights.

It is useful to start with the Declaration because this tension between equality and consent has continually shaped American politics and history. The statement of equality was very influential in the pre-Civil War period as it pricked the conscience of those who saw the gap between the aspiration and the reality.[12] One can imagine a very different history if the Founders had not stressed the concept of equality or, as the Confederacy did in its Constitution, had expressly disavowed the essential equality of people.[13] The statement concerning equality and the emphasis on personal liberty at the Founding probably had a beneficial effect during this period for women as well. An astute

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11. *See infra* note 16. The disparity between the statement of fundamental principles in the Declaration and their actualization in revolutionary America has prompted some to conclude that the Founders never intended to include others besides white adult males within the description in the Declaration. This, for example, was the view of Chief Justice Taney in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407-10 (1857) where he attributed to the Founders the view that "all men are created equal" did not include Negroes. This view was disputed by Abraham Lincoln who believed that the Founders meant what they said. THE LINCOLN-DOUGLAS DEBATES 304-05 (R. Johannsen ed. 1965) (Seventh Joint Debate, Alton, October 15, 1858). Taney's view that the framers of the Declaration did not mean to include blacks is shared by many today. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 388-89 (Marshall, J., dissenting in part, concurring in part); R. KLUGER, SIMPLE JUSTICE 29-31 (1975). Consider,however, the late Herbert Storing's response to the Taney view:

> This whole argument—and I repeat, it is identical to the common view today—is a gross calumny on the Founders. The truth is almost the exact opposite of Taney's account. The Founders understood quite clearly that Negroes, like men everywhere, were created equal and were endowed with unalienable rights. They did not say that all men were actually secured in the *exercise* of their rights or that they had the power to provide such security; but there was no doubt about the *rights*. Far from it being true that "negroes were never thought of except as property," not only Negroes but slaves were frequently spoken of and treated as persons. All of the Constitutional provisions relating to slaves, for example, refer to them as persons. And while slaves were typically deprived of *civil* rights, they were regarded as persons under criminal law. As rational and, to some degree, morally responsible human beings, they were held capable of committing crimes, and they were protected by the law—in principle and surprisingly often in practice—against crimes committed against them. In the first three or four decades of our history, the injustice of slavery was very generally acknowledged, not merely in the North but in the South and particularly in Southern courts.

Storing, *Slavery and the Moral Foundations of the American Republic*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 217 (R. Horwitz 2d ed. 1979) (emphasis in original).

12. CRISIS OF THE HOUSE DIVIDED, *supra* note 10; R. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 49-55 (1975).

13. *See* Bellah, *The Revolution and the Civil Religion*, in RELIGION AND THE AMERICAN REVOLUTION 64-65 (J. Brauer ed. 1976). The Constitution of the Confederacy contained an explicit affirmation of the proposition that slaves were not persons, but instead were considered to be property. *See* E. THOMAS, THE CONFEDERATE NATION: 1861-1865 at 313 (1979): "No . . . law denying or impairing the right of property in negro slaves shall be passed." Moreover, as might be expected, the principle of inequality was vigorously hailed as a basic principle of the new regime. The following excerpt from a speech by Confederate Vice-President Alexander Stephens is illustrative:

> Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth that the negro is not the equal to the white man. That slavery—the subordination to the superior race, is his natural and normal condition.
>
> This our new Government [the Confederate States of America] is the first in the history of the world, based upon this great physical and moral truth.

Quoted in H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 157 (1978).

observer of American democracy, Alexis de Tocqueville, wrote near the end of his great book on America:

> [I]f anyone asks me what I think the chief cause of the extraordinary prosperity and growing power of this nation, I should answer that it is due to the superiority of their women.[14]

The beneficial effects of a democratic system shaped by the ideals of equality and liberty were becoming noticeable, particularly when compared with the older regimes of Europe.

The commitment to equality often faltered because of the problem of consent. This, in fact, was the main point of contention in the Lincoln-Douglas debates. Stephen Douglas favored consent over equality, arguing that the people in each new state had the right to decide for themselves whether or not they would have slavery.[15] Abraham Lincoln favored equality because he believed slavery was antithetical to the founding principles, but also sought to win popular support for equality.[16] He preferred not to impose equality by force if it was possible to achieve it through consent. Lincoln was only partially successful in this effort. Although the popular commitment to equality was not without reservations, its strength was manifested in the effort of the North to preserve the Union.[17]

The commitment to equality, manifested by deeds on the battlefield and expressed eloquently by words in Lincoln's Gettysburg Address, was followed shortly by a commitment to equality in the law. The fourteenth amendment to the Constitution provided, *inter alia*, that no state should "deny to any person within its jurisdiction the equal protection of the laws." The United States, however, shortly went into default on this promise and was spared the

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14. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 603 (J.P. Mayer ed. 1969).

15. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 490-91 (1978); E. FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 45-48 (1980); CRISIS OF THE HOUSE DIVIDED, *supra* note 10, at 347-62.

16. Lincoln was equally dedicated to the principle of equality and the principle of consent. Statesmanship, for him, consisted in finding that common denominator in existing circumstances which was the highest degree of equality for which general consent could be obtained. To insist upon more equality than men would consent to would require turning to force or to the arbitrary rule of the few. But to turn to oligarchy, as a means of enforcing equality, would itself involve a repudiation of equality in the sense of the Declaration. Precisely because all men are created equal, we have an equal duty to work for equality and to seek consent. . . . Lincoln never ceased to summon the people to fidelity to the principle of equality, considered as the principle of abstract justice. He would not abandon equality, as Douglas had done, when equality proved unpopular or inconvenient. But neither would he abandon equality's other face, reflected in the opinion of the governed who made up the political community of the United States. Because of the requirement of consent, Lincoln felt a duty to adjust public policy to the moral sense of the community. In the tension between equality and consent, in the necessity to cling to both and abandon neither, but to find the zone between which advances the public good, is the creative task of the statesman. For this task there is no formula; for the wise statesman there is no substitute.

CRISIS OF THE HOUSE DIVIDED, *supra* note 10, at 377.

17. If one believes that the outcome of the Civil War showed only the superior strength of the Union Army, then consider the difficulties of raising an army with superior numbers of soldiers and material, sending those soldiers away from their families to fight on enemy soil, and doing this in a regime that teaches that all people are *not* created equal. America, in significant part because it has a democratic regime, has had great difficulty winning wars in which its citizens were not fundamentally committed.

embarrassment of bankruptcy for failure to honor the promise only by a declaration from the Supreme Court that the words of the fourteenth amendment did not mean what they had appeared to state with such simple clarity.[18]

As a result, the fourteenth amendment did not initially provide relief to blacks against discriminatory laws, nor to women for that matter. There was the infamous case of *Bradwell v. Illinois*,[19] where a woman was denied admission to the practice of law solely on account of her sex. The equal protection clause of the fourteenth amendment continued to languish for many years and, as late as 1927, was described by Justice Oliver Wendell Holmes, with the disdain often reserved for scoundrels, as "the usual last resort of constitutional arguments."[20]

The civil rights movement brought new life to the promise of equal protection of the laws. This time the Supreme Court concluded that the fourteenth amendment indeed meant what it said and began ordering back payments on this debt, now long overdue. From *Brown v. Board of Education*[21] through litigation today, there has been an elevation of equal protection from its once discredited status to a doctrine of primary importance in the courts. Congress has also played an important role with the passage of several civil rights acts.[22] With judicial and legislative victories for blacks came a greater sensitivity to the problem of affording equal protection of the laws to women. The Equal Rights Amendment (albeit in a slightly different version) had been introduced in Congress in 1923 and reintroduced many times thereafter.[23] In 1972, this political hurdle was overcome with adoption by Congress.

It may well be, in light of this brief account, that the political setback for the Equal Rights Amendment is only temporary. The struggle for equality has never been symbolized by a straight line of progress and enlightenment, but more often has resembled a wavy line with the alternation of commitment and repudiation, success and setback. There are reasons to believe, however, that the current difficulties of the Equal Rights Amendment may be due to deeper and more complex problems. It is instructive, for example, to take a look at the ERA in 1972 and consider the effect of two other approaches to

18. The promise metaphor may be found in an extended and eloquent version in C.V. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 84-86 (1960). The cases start with the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) and continue through Plessy v. Ferguson, 163 U.S. 537 (1896) and Gong Lum v. Rice, 275 U.S. 78 (1927).

19. 83 U.S. (16 Wall.) 130 (1872).

20. Buck v. Bell, 274 U.S. 200, 208 (1927).

21. 347 U.S. 483 (1954).

22. *See, e.g.*, The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. §§ 1975a through 1975e (1982)); The Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. §§ 1974 through 1974e (1982); The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a through 2000h-6 (1982)); The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 through 1973bb-1(1982)).

23. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 981-85 (1971) [hereinafter cited as *Equal Rights for Women*]; Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 172 [hereinafter cited as *Sexual Equality*]; Dow, *supra* note 4, at 54-56.

securing equality for women. The first was to let the Supreme Court achieve the desired result through interpretation of the equal protection clause of the fourteenth amendment. The other approach was to work through Congress and achieve the virtual equivalent of the ERA through legislation. The current political failure of the ERA may be due, in part, to the success in the meantime of these two other approaches to the problem of achieving equality. These more moderate reforms appear to have acted as a "check dam" which prevented political pressure for a more radical reform from uniting.

In addition, these moderate approaches may, in fact, be more clearly within the mainstream of sentiment concerning equality which emphasizes equality of opportunity in contrast to equality of results in all phases of political, social, and economic life. The Supreme Court has had little trouble in dealing with the "easy" cases where the laws deny opportunities to women or otherwise expressly discriminate, but it has hesitated to overturn laws which are neutral on their face although having a disproportionate impact upon women. Because the Supreme Court has dealt with the "easy" cases and promises to continue to do so, the answer to the question of what the ERA will accomplish has accordingly shifted over time from the simple ground of equal protection of the laws to the more problematic ground of equal results or entitlements. It is with respect to this latter ground that the consent of the governed has not been given, hence the reluctance of a Congress to approve in 1983 what it so enthusiastically had endorsed in 1972.

This Article will examine the two substitutes for ratification of the Equal Rights Amendment: judicial interpretation of the equal protection clause and congressional enactment of civil rights legislation prohibiting sex discrimination. These measures, although not unequivocally successful, have contributed significantly toward the amelioration of sex discrimination, both *de jure* and *de facto*. The Article will first examine the Supreme Court's equal protection analysis of sex discrimination claims. The main focus will be on the standard of review and how the standard developed by the Court differs from the standard which would likely prevail under the ERA.[24] The Article will also examine the matter of special treatment of groups and the problems associated with class analysis and affirmative action.[25] Consideration of the Supreme Court's role will conclude with discussion of why the Court's moderate approach may be better suited to deal with the remaining difficult questions of sex discrimination, particularly those which pose serious conflicts with other constitutional values.[26] The Article will also review the principal congressional enactments in the area of sex discrimination.[27] Particular emphasis will be given to the question of wage discrimination and the theory of comparable worth.[28] Congress has not yet definitively addressed this issue and the courts

24. *See infra* notes 31-77 and accompanying text.
25. *See infra* notes 78-118 and accompanying text.
26. *See infra* notes 119-61 and accompanying text.
27. *See infra* notes 162-275 and accompanying text.
28. *See infra* notes 186-246 and accompanying text.

are now being asked to intervene and perform the task of assessing what jobs are inherently worth. Acceptance of this task, with its attendant judicial activism, may prove to undermine popular sentiment in favor of the equal rights movement. The Article concludes with a discussion of how judicial activism generally has weakened the desire to give the judiciary what is commonly viewed as a "blank check" in the form of the Equal Rights Amendment.[29]

JUDICIAL INTERPRETATION OF THE FOURTEENTH AMENDMENT

The desirability of enacting an amendment in addition to the equal protection clause of the fourteenth amendment was questioned by some who were sympathetic to the idea of equal rights.[30] It was not necessary to adopt the Equal Rights Amendment, it was argued, because there already was one contained in the fourteenth amendment. It was uncertain whether the words "equality of rights" would mean anything different than "equal protection of the laws." Moreover, the Supreme Court had begun to show a willingness to apply fourteenth amendment equal protection jurisprudence to sex-based discrimination.

Development of the "Intermediate" Standard of Review

In 1971, the Supreme Court, in the case of *Reed v. Reed*,[31] struck down an Idaho probate statute which had given a preference to males in the selection of an administrator of an estate. The Court, in a unanimous opinion, applied fourteenth amendment analysis to the statute and said the party relying on the statute was required to show that any difference in treatment of classes of persons bore a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[32] This standard is not as stringent as the strict scrutiny standard, which requires a compelling governmental interest in support of the classification, nor is it as deferential as the rational basis standard, which merely requires that there be a rational basis in support of the classification.[33] The intermediate standard of review clearly puts the burden on the party relying on the statute to justify any differential treatment based upon sex. The father of the decedent failed to meet the burden in this case. The *Reed* intermediate standard therefore functions as a rebuttable presumption against sex-based classifications and, as such, places most discriminatory statutes in jeopardy.

In an important case decided after congressional approval of the ERA,

29. *See infra* notes 276-99 and accompanying text.

30. Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 243, 250 (1971); Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RTS.-CIV. LIB. L. REV. 234, 242 (1971): "Moreover, a few significant decisions of the Supreme Court in well-chosen cases under the fourteenth amendment would have a highly salutary effect."

31. 404 U.S. 71 (1971).

32. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

33. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

the Supreme Court, in *Frontiero v. Richardson*,[34] extended the fourteenth amendment equal protection analysis in sex discrimination cases to the federal government. As it had done in earlier cases involving racial discrimination and welfare residency requirements, the Court decided not to apply a lesser or different standard of review for federal legislation than it had applied to state legislation.[35] At issue in the *Frontiero* case was a pay differential between male and female military personnel. The military services gave additional quarters allowances and medical and dental benefits if the service person had a "dependent" spouse. A serviceman could claim his wife as a "dependent" without regard to whether she was in fact dependent. A servicewoman, however, had to show that her husband was in fact dependent upon her for over one-half of his support in order to obtain the additional benefits.[36] The Court reversed the district court judgment sustaining the statutory discrimination, but did not reach a clear consensus on the ground of its decision.[37] Implicit in the holding, however, is the conclusion that the federal government did not meet its burden of justifying the discrimination.

Justice Brennan, writing for four of the Justices, suggested that sex be viewed, like race, as a "suspect classification."[38] This would oblige the party defending the classification to show a "compelling" governmental interest in support of the difference in classification.[39] Brennan argued by analogy to racial discrimination, stating that there was a long history of sex discrimination in this country; that sex had been the basis of stigmatizing women with respect to their ability to engage in the public responsibilities of citizenship; that although conditions had improved markedly, there still was pervasive, though subtle, discrimination in the employment area and in the political arena; and that because sex, like race and national origin, is "an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' "[40] A majority of the Court did not accept this suggestion that sex should be treated as a "suspect classification" with its corresponding higher burden of justification.[41] As such, the higher standard would have struck down almost all sex-based dis-

34. 411 U.S. 677 (1973).

35. *Id.* at 680 n.5. *See* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

36. 411 U.S. at 678.

37. Justices Brennan, Douglas, White and Marshall believed that sex should be treated as a suspect classification and that any statute using a gender classification would be subject to strict scrutiny by the courts. *Id.* at 688. Justice Stewart voted to reverse on the basis of the *Reed* standard. *Id.* at 691. Justices Powell and Blackmun and Chief Justice Burger also agreed that *Reed* was sufficient to warrant reversal, but they expressly rejected the suggestion by Justice Brennan that sex be considered a suspect classification. *Id.* at 691-92. Justice Rehnquist alone dissented from the reversal of the lower court decision. *Id.* at 691.

38. *Id.* at 688.

39. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91, 319-20 (1978).

40. 411 U.S. at 686 (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)).

41. *Id.* at 691-92.

crimination because, as Professor Gerald Gunther has observed, it is " 'strict' in theory and fatal in fact."[42]

Four of the Justices agreed with the result but declined to join the plurality opinion which urged the treatment of sex as a "suspect classification." The narrow ground was that any extension was unnecessary in this case because the statute was invalid under the *Reed* standard.[43] Justice Powell, however, stated an additional reason for not expanding the list of "suspect classifications" to include sex. He noted that the Equal Rights Amendment had been passed by Congress and submitted to the states for ratification and concluded:

> If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.[44]

Powell's statement is puzzling because it is inconsistent with the theory underlying the "suspect classification" doctrine. That doctrine has its origin in the famous footnote number four of the *Carolene Products* case where the Court indicated that the presumption of constitutionality would not necessarily apply where a legislative classification is directed at a "discrete and insular" minority.[45] The reason that the Court would, in such instance, engage in a "more searching judicial inquiry" is that such minorities may be effectively cut off from "those political processes ordinarily to be relied upon to protect minorities."[46] As a result, the Court developed the concept of "suspect classifications" as a means of protecting the rights of those who could not protect themselves in the political process.[47] Thus, Powell's suggestion that the Court should defer to the established political process to determine whether sex should be a suspect classification is inconsistent with the underlying purpose of the doctrine. If anything, the failure of the ERA to win ratification would suggest according to the *Carolene Products* concept that women are still outside of the mainstream of the political process and thus deserving of the

42. Gunther, *supra* note 33, at 8.

43. 411 U.S. at 691-92. This is consistent with the traditional practice of refraining from deciding a constitutional issue on a broader ground if there is a narrower ground available. *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

44. 411 U.S. at 692 (Powell, J., concurring).

45. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

46. *Id.*

47. *See* J. ELY, DEMOCRACY AND DISTRUST 73-104, 135-79 (1980) [hereinafter cited as DEMOCRACY AND DISTRUST]; L. LUSKY, BY WHAT RIGHT? 108-10 (1975). For an excellant discussion of the *Carolene Products* footnote and its impact on the development of constitutional analysis, see Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority,"* 16 GA. L. REV. 407 (1982). Professor Erler argues that the Court has used the concept of "discrete and insular minorities" as a means of recognizing group rights and denigrating individual rights under the Constitution. *Id.* at 423-40.

heightened judicial scrutiny.[48]

The question concerning the intensity of judicial review and the corresponding burden of justification placed on the party defending the differential treatment is an important one because of the particular nature of sex discrimination. The pattern of discrimination against women, although sharing some similarities with the history of discrimination against blacks, is essentially unique.[49] That is, the discrimination suffered by women appears less hostile, at times even well intentioned, less overt, and therefore more subtle.[50] This fact ties in directly to the judicial scrutiny of the governmental interest issue. The statute itself may appear to be benign while the real harm is perpetuated by the premises underlying the statutory classification which in fact rely upon unexamined or unwarranted assumptions about differences between men and women. Under a less intensive review by the judiciary, there may be a greater willingness to accept the ostensible justification advanced by the state, especially if such justification does not express any overt hostility against women.

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48. To regard the defeat of the ERA, however, as proof that women constitute a discrete and insular minority proves too much. *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 742-43 (1969): "Every loser in the legislative process is by definition a minority, and at least potentially classifiable as disadvantaged." The legitimacy of judicial intervention to reverse the loss suffered in the legislature "turn[s] on the losers' long-term chances of becoming winners." *Id.* at 725. The distinction, for purposes of heightened judicial scrutiny, would appear to be "between minorities that seem permanently 'voiceless and invisible' and those that do not." *Id.* at 743. *See also* DEMOCRACY AND DISTRUST, *supra* note 47, at 166-67:

> Constitutional suspiciousness should turn on evidence of blocked access, however, not on the fact that elections are coming out 'wrong.' There is an infinity of groups that do not act as such in the political marketplace, but we don't automatically infer that they have a 'slave mentality'. . . . Given such open discussion of the traditional stereotypes, the claim that the numerical majority is being 'dominated,' that women are in effect 'slaves' who have no realistic choice but to assimilate the stereotypes, is one it has become impossible to maintain except at the most inflated rhetorical level. It also renders the broader argument self-contradictory, since to make such a claim in the context of the current debate one must at least implicitly grant the validity of the stereotype, that women are in effect mental infants who will believe anything men tell them to believe.

49. *See, e.g., Equal Rights for Women, supra* note 23, at 885:

> [T]he achievement of equality under the law for women presents its own special problems. These problems differ in many ways from those involved in eliminating discrimination in other spheres where equal protection theory has been applied. They are closest to those which are raised in the area of race discrimination. Yet even here there are significant differences. Women are not residentially segregated from men. The socio-economic connections which link different aspects of sexism are not necessarily the same as those that link the many facets of racism. Women are a majority, not a minority; thus, changes in the status of women may affect most of the population, rather than a small part.

Nevertheless, there has been a conscious effort throughout American history to analogize the plight of women with the experience of slavery. For a description of these efforts, see G. MYRDAL, AN AMERICAN DILEMMA 1073-78 (1944). The analogy is strained, however, beyond all but rhetorical usefulness. DEMOCRACY AND DISTRUST, *supra* note 47, at 166-67. Further, as observed by Professor Mansfield: "But slaves who can gain freedom by raising consciousness were never slaves." Mansfield, *The Underhandedness of Affirmative Action*, NAT'L REV., May 4, 1984, at 26, 29.

50. An example of the subtlety of the problem of sex discrimination may be observed in Betty Friedan's book, *The Feminine Mystique* published in 1963. She begins her description of the phenomenon with a chapter entitled "The Problem That Has No Name." That this book itself helped to call attention to the problem indicates the subtle nature of sex discrimination. By contrast, there was virtually no one in 1963 who was unaware of the problems of racial discrimination in this country. For an account of the history of discrimination against women, see J. BAER, THE CHAINS OF PROTECTION (1978). *See also* UP FROM THE PEDESTAL (A. Kraditor ed. 1968).

This problem is observable in the cases which followed *Frontiero*. In *Kahn v. Shevin*,[51] for example, the Court upheld a Florida property tax exemption which gave widows, but not widowers, an annual tax break. The Court believed that the exemption was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[52] The opinion, by Justice Douglas, noted the established tradition of favorable treatment of women and cited the case of *Muller v. Oregon*,[53] thus recalling the protectionist leanings of the Court. The assumption underlying the tax exemption is, of course, that widows are a special class and require more protection than widowers. This type of justification may be both true and yet harmful in the long run. It has the effect, albeit unwittingly, of perpetuating the stereotype of women as dependent upon men for economic security.[54] It is precisely this kind of stereotyping which may pass muster under the less intensive intermediate standard. Therefore, the issue of the appropriate standard of review remains an important one because of the possibility that the Court will not appreciate the more subtle effects of discrimination when the Court itself believes that the discrimination is merely "benign."[55]

The Supreme Court finally reached a consensus on the appropriate standard of review in the case of *Craig v. Boren*.[56] The statute challenged in this case prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. The asserted justification for the disparate treatment was that males were more prone to drink and drive. The Court reviewed the state's statistical evidence, but concluded that it did not closely support the use of sex discrimination to achieve the

51. 416 U.S. 351 (1974).

52. *Id.* at 355.

53. *Id.* at 356 n.10. *See* Muller v. Oregon, 208 U.S. 412 (1908) (during the era when the Court was quite critical of legislation designed to ameliorate the harsh conditions of the workplace, the Court nevertheless sustained an Oregon law that limited the workday for women in certain industries to ten hours).

54. *See, e.g.*, Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 940-42 (1983) [hereinafter cited as *Sex Equality, Sex Differences*]; Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 20-21 [hereinafter cited as *Gender in the Supreme Court*]; Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 816-17 (1978) [hereinafter cited as *Benign Classification*]. *See also* Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO ST. L.J. 546 (1974).

55. In another example, Schlesinger v. Ballard, 419 U.S. 498 (1975), the Court refused to overturn the discharge of a male navy officer who had argued that the mandatory discharge for nonpromotion discriminated against men because it allowed women a longer time in which to gain a promotion. The Court responded that "Congress [may] quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" *Id.* at 508. What is curious about this reasoning is that the Court justified the difference in treatment on the basis of other sex-based differences within the Navy. *Id.* at 511 n.1 (Brennan, J., dissenting). They said, in effect, this classification is okay because women need the additional time to gain promotion in light of limited opportunities which the Navy provides. This may have been a realistic assessment of the circumstances, but it may also serve to reinforce notions about women as being less able and in need of special treatment.

56. 429 U.S. 190 (1976).

undisputed beneficial goal of traffic safety.[57] There must be more than a simple statistical relationship between the problem and the proposed solution when the means chosen involve sex discrimination. The Court reaffirmed the *Reed* analysis and stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[58] Thus, the "intermediate" standard, somewhere between rational basis and strict scrutiny, became the accepted measure in sex discrimination cases. Application of this intermediate standard, however, did not mean that the Court would invariably accept the assertion that a statute furthered significant governmental interests. The cases demonstrate, in fact, some sensitivity to the problem of unwarranted assumptions underlying sex-based classifications.

In *Stanton v. Stanton*,[59] for example, the Utah Supreme Court had upheld a statute establishing the age of majority for males at twenty-one and the age of majority for females at eighteen. The issue of unconstitutional discrimination was raised in a support action by a daughter whose father stopped paying support when she became eighteen years old. She claimed that the statute denied her support from her father solely on account of her sex. The Utah court justified the difference in treatment on the ground that young men needed the greater support because they had the greater responsibilities to face.[60] The United States Supreme Court rejected this argument:

> Notwithstanding the 'old notions' to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statute]. . . . A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary antecedent, is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl.[61]

This language indicates that although the Supreme Court is willing to listen to the state justification, it will not accept all explanations at face value and will not sustain the statute if it is grounded on broad generalizations about the asserted proper role of women. The party relying on the statutory discrimination must demonstrate that the two sexes are not similarly situated and may

57. *Id.* at 204.

58. *Id.* at 197.

59. 421 U.S. 7 (1975).

60. The Utah court believed that the difference could be justified on the following basis: "[T]hat it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males." *Id.* at 14.

61. *Id.* at 14-15 (citation omitted).

not in the course of this demonstration rely on unstated assumptions about the role of women in society.[62]

One measure of the impact of the intermediate standard may be seen in the increasing willingness of the lower courts to strike down federal statutes and practices which perpetuated sex discrimination. For example, the lower federal courts have invalidated a bankruptcy provision which discriminated between ex-spouses with regard to the discharge of alimony and support obligations,[63] a Social Security provision which deemed, for coverage purposes, that all income from a family business would be attributed to the husband unless the wife exercised substantially all management and control,[64] and the mandatory discharge of a woman Marine on account of pregnancy.[65]

The federal courts also have struck down many state statutes and discriminatory practices. They have found sex discrimination in school policies and practices concerning promotion of teachers to administrative positions,[66] in the denial to a female public high school student of any opportunity to play soccer,[67] in the conducting of strip searches by City of Chicago police,[68] in the barring of a woman reporter from the locker room of a professional baseball team,[69] in the conduct of jury selections by jury commissioners,[70] in the conveyance of public property to a private organization which restricted membership to boys,[71] and in the operation of the Kentucky correctional institutions with respect to equal facilities, educational, and recreational opportunities.[72] To be sure, the federal courts did not disapprove of sex-based discrimination in all cases,[73] but it is clear that the Supreme Court's shifting of the burden of justification to the party relying on the classification has had a significant im-

62. Similarly, in Orr v. Orr, 440 U.S. 268 (1979), the Court struck down an Alabama alimony statute which provided that husbands, but not wives, could be required to pay alimony upon divorce. The asserted purpose of the statute was to provide help for needy spouses and to compensate women for past discrimination which had "left them unprepared to fend for themselves in the working world following divorce." *Id.* at 280. The Court responded that these purposes could be met by holding a hearing in each divorce case in order to determine the appropriate relief. This would meet the state's objective without using "the baggage of sexual stereotypes" that were implicit in the statute. *Id.* at 283.

63. *In re* Crist, 632 F.2d 1226 (5th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

64. Becker v. Harris, 493 F. Supp. 991 (E.D. Cal. 1980).

65. Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).

66. Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979).

67. Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977).

68. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983).

69. Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978).

70. Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983).

71. Ridgefield Women's Political Caucus, Inc. v. Fossi, 458 F. Supp. 117 (D. Conn. 1978).

72. Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982), *supplemented in* 562 F. Supp. 106 (W.D. Ky. 1983).

73. *See, e.g.*, deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978) (mandatory nine month pregnancy leave policy did not violate the fourteenth amendment); Cape v. Tenn. Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977) (rules for girls' basketball that were different than the rules for boys' basketball were justified on the basis of "distinct differences in physical characteristics and capabilities between the sexes"); Robinson v. Bd. of Regents of Eastern Ky. Univ., 475 F.2d 707 (6th Cir. 1973) (dormitory curfew restrictions applicable to women students only held not violative of the fourteenth amendment); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968) (state statute denying wife's right to sue third party for injuries to husband held not violative of the fourteeth amendment even though the law allowed the husband to recover for the wife's injuries).

pact on sex discrimination litigation in the federal courts.[74]

It would be fair to say that the Court's intermediate standard of review has proven capable of handling the "easy" cases of sex discrimination. In addition, it leaves the courts with flexibility, although some would argue too much flexibility, to deal with the "hard" cases of sex discrimination, such as the problem of affirmative action and "benign" discrimination, the problem of neutral statutes with a disproportionate impact, and the problem of sex-based classifications with deeply entrenched roots, such as the male-only draft and the statutory rape laws. It is with the harder cases that the Court's willingness to defer to legislative classifications becomes more apparent. The deference is usually reflected in the conclusion that the classification is permissible because the two sexes are not "similarly situated" with respect to the matter the legislative branch was attempting to address.

It is also fair to say that adoption of the Equal Rights Amendment would compel the use of the higher, strict scrutiny standard in sex discrimination cases. The chief proponents of the ERA asserted that this would be one of the major changes brought about by adoption. The influential Yale Law Journal article on the ERA, for example, stated:

> The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. . . . In short, sex is a prohibited classification.[75]

The United States Commission on Civil Rights emphasized the change in the standard under the ERA:

> Ratification of the Equal Rights Amendment will set a standard for review of sex discrimination claims that clearly goes beyond current interpretations of the 5th and 14th amendments in such cases. The ERA standard would prohibit sex-based classifications, except where the constitutional right to privacy or physical characteristics unique to one sex are concerned.[76]

As such, the higher standard would eliminate virtually all sex-based classifica-

74. Another measure of the impact of the Supreme Court decisions in the lower federal courts is that the petitioners for certiorari are no longer invariably those who have been victimized by sex discrimination, but instead often the government or the party relying on the discriminatory statute who seek review. For example, in Kirchberg v. Feenstra, 450 U.S. 455 (1981), a lawyer sought reversal of a Circuit Court of Appeals decision invalidating a mortgage in his favor which had been unilaterally executed by the husband on a home owned jointly by the husband and the wife. The wife had successfully challenged Louisiana's "head and master" statute which gave the husband the right to dispose of jointly owned property without the wife's consent. *Id.* at 458-59. This was one of the laws which the United States Civil Rights Commission had cited as a reason for adopting the Equal Rights Amendment. U.S. COMM'M ON CIVIL RIGHTS, STATEMENT ON THE EQUAL RIGHTS AMENDMENT 6 n.8 (1978) [hereinafter cited as STATEMENT ON THE EQUAL RIGHTS AMENDMENT]. The Supreme Court affirmed the Court of Appeals judgment, stating that the statute "clearly embodies the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest." 450 U.S. at 459-60.

75. *Equal Rights for Women, supra* note 23, at 889.

76. STATEMENT ON THE EQUAL RIGHTS AMENDMENT, *supra* note 74, at 18. *See also Sexual Equality, supra* note 23, at 173, 177-78.

tions. The far reaching consequences of this potential change have not been lost on the members of the Court. Justice Powell virtually conceded in his *Frontiero* concurring opinion that adoption of the ERA would change the standard of review to the higher strict scrutiny.[77] His hesitancy, along with a majority of the other Justices, indicates a conscious choice, for the time being, of the more flexible "intermediate" standard.

Equality and the Problem of Special Treatment

The Supreme Court's insistence that persons who are similarly situated be dealt with equally under the law does not necessarily require the law to be neutral with respect to sex. If the law was truly neutral as to one's sex, then it would not matter, for example, if one was tried as a criminal defendant before an all-male jury or an all-female jury. But the Supreme Court has said that this would be wrong, precisely because men and women are different. In *Taylor v. Louisiana*,[78] the Court reviewed a Louisiana law which provided that a woman could not be selected for jury duty unless she filed a written declaration that she wished to be considered. As a practical result, most women were not on the jury lists and the juries selected were overwhelmingly male. In *Taylor*, the defendant challenged his conviction by an all male jury by claiming the state law governing the composition of jury lists was in effect a denial of his right to a jury trial. The Supreme Court agreed with him, stating that the selection of a jury "from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[79] If the law was blind when dealing with people, then it should not matter how many males or females sat on the jury. But the Court concluded this was not the case:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. . . . [A] distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[80]

According to this language, women must be on juries *because* they are women. The two sexes are not fungible. Because women are different, their participation on a jury is an essential aspect of a representative jury and, accordingly, of a fair trial. Equality requires that men and women be equal before the law, but it does not mean that they are the same.

77. 411 U.S. at 692 (Powell, J., concurring).

78. 419 U.S. 522 (1975).

79. *Id.* at 528. The Court overturned its prior holding to the contrary in Hoyt v. Florida, 368 U.S. 57 (1961). In *Hoyt*, the defendant was accused of killing her husband with a baseball bat during an argument in which she claimed he had insulted and humiliated her. The all-male jury rejected her defenses of provocation and temporary insanity. Hoyt challenged her conviction of second degree murder, claiming that the systematic exclusion of women from the jury denied her the right to trial by jury.

80. *Id.* at 531-32 (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)).

As a consequence, the laws need not always be strictly neutral in order to achieve equality. It is possible to have some laws which accommodate some groups without discriminating against others. There are cases where one group's gain is not necessarily at the expense of others; not everything is a "zero-sum" game. For example, many public buildings now have ramps so that those who are handicapped may have easier access to the building. The construction of the ramp is special treatment, but it does not discriminate against others.[81] In fact, it allows those who would otherwise find it very difficult to attend public meetings or to use public facilities to be able to participate in community affairs on an equal basis. Another example arises in the employment area. Congress has decided to require employers to provide benefits for female workers who miss work on account of pregnancy.[82] This legislation deals with an aspect of a woman's life which is unique to women.[83] The law need not be so rigid as to fail to recognize that different treatment may be permissible to deal with problems unique to individuals, as in the handicapped situation, or unique to one sex, as in the case of women who become pregnant.

To the extent that the law does single out certain groups for special treatment, there is a danger that unfair burdens will be placed on others. As Justice Brennan noted in *Frontiero*, there is "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[84] In addition, special treatment is usually premised upon assumptions relating to classes, not individuals. As a result, the classification tends to either include some who do not need the special treatment or exclude some who do.

Perhaps the best illustration of the problems of special treatment is the case of *Personnel Administrator of Massachusetts v. Feeney*.[85] The plaintiff in that case sued to invalidate a veterans' preference statute which had effectively barred her promotion as a state employee. The statute required that all veterans who qualified for state civil service positions be considered ahead of any qualifying non-veterans. The plaintiff had passed a number of civil service examinations for better jobs, but in each instance the job was given to a veteran who had lower test scores than the plaintiff.[86] Her chances of obtaining a

81. It does add an extra tax burden on the general public. However, it allows for a more even-handed use and enjoyment of public facilities by all taxpayers, including the handicapped.

82. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982).

83. An analogous circumstance would be the case where a man misses work due to a medical condition exclusive to males, such as a prostate or testicular problem.

84. 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)).

85. 442 U.S. 256 (1979).

86. In a sense, Ms. Feeney's predicament was similar to Allan Bakke's. The Court described her efforts to obtain a better state job:

> During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male

more desirable job were continually thwarted by a system which accorded special treatment to others on account of prior military service. The theory of the plaintiff's action in the federal district court was that the preference operated "to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denie[d] them the equal protection of the laws."[87] The plaintiff had a good statistical case in that over ninety-eight percent of the veterans in Massachusetts were male and over one-quarter of the Massachusetts population were veterans. The Supreme Court conceded that this had a severe impact on the plaintiff's employment opportunities.[88]

The Court, however, upheld the statute against the plaintiff's fourteenth amendment challenge, saying that proof of disproportionate impact was not enough. When a statute is neutral on its face and does not utilize sex-based classifications, then the plaintiff must show that the legislature intended to discriminate.[89] The district court had found that the enactment of the preference was not for the purpose of discriminating against women and therefore the plaintiff had failed to prove a crucial element of her case.[90] From the plaintiff's standpoint, she believed it was sufficient to infer intent from the results because of the maxim that one is presumed to have intended the natural consequences of one's acts.[91] The Court disagreed and held that this alone would not establish the element of intent. "Discriminatory purpose . . . implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[92] This was not the case, according to the Court, because the preference was offered to all veterans, male and female.[93] The Court thus upheld a law which, though neutral on its face, had a disproportionate impact on women.

Some of the difficulties (and ironies) connected with special treatment of discrete groups are presented in the *Feeney* case. One of the principal difficulties is the use of class analysis to measure equal protection claims. Two Justices, Stevens and White, argued that the disproportionate impact argument was met by the fact that the group of non-veteran males was comparable in size to the group of non-veteran females.[94] Because the group of males discriminated against was very large, the preference was not "intended to benefit males as a class over females as a class."[95] The equal protection claim is turned on its head, however, when the discrimination is considered permissi-

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veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

Id. at 264-65. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 276-77 (1978).

87. 442 U.S. at 259.

88. *Id.* at 271.

89. *Id.* at 272. The Court relied heavily on Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). 442 U.S. at 273-74.

90. 442 U.S. at 274-75.

91. *Id.* at 278.

92. *Id.* at 279.

93. *Id.* at 280.

94. *Id.* at 281 (Stevens, J., concurring).

95. *Id.*

ble because it affects a large group of citizens who have the opportunity to seek redress in the legislature. Such an argument is an application of the *Carolene Products* concept that the courts are primarily concerned with legislation directed at "discrete and insular" minorities.[96] It is akin to saying that Allan Bakke did not have an equal protection claim because he was a member of the white majority.[97] Taken to its logical conclusion, the *Carolene Products* concept undermines the plain language of the equal protection clause: "[N]or shall any State . . . deny to *any person* within its jurisdiction the equal protection of the laws."[98] Protection from discriminatory legislation is a personal right and should not be denied solely because of one's "group" identification.

The principal difficulty presented by special treatment concerns the overbroad generalizations and the inflexibility with which the special treatment is accorded. The Massachusetts statute, for example, gave veterans a *lifetime* preference over non-veterans. There were three interests urged by the state in support of the preference system: "(1) assisting veterans in their readjustment to civilian life; (2) encouraging military enlistment; and (3) rewarding those who have served their country. . . ."[99]

The dissenting opinion of Justice Marshall (joined by Justice Brennan) deftly examined the application of these justifications to the preference statute.[100] First, the interest in facilitating the veteran's readjustment to civilian life was overbroad because the lifetime preference could be invoked repeatedly, without regard to the date of discharge. It also was given without regard to need or special disadvantage, if any, suffered as a result of the military service. Second, the desire to encourage military enlistment was also overbroad in that the preference was given to those who were drafted as well as to those who volunteered. Finally, the interest in rewarding those who had served their country could be met without, in effect, precluding women from upper level civil service positions. Marshall noted the possibility of less restrictive alternatives such as a preferences for a limited time, or as a limited factor in the form of extra points rather than as an absolute preference, or the provision of additional state assistance to veterans for the transition period.[101]

Justice Marshall's analysis also has, in an ironic way, broader implica-

96. *See supra* note 47.

97. *See Bakke*, 438 U.S. at 357 (Brennan, J., concurring in part and dissenting in part), quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973):

> Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Brennan did qualify this statement with the observation that: "the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate." 438 U.S. at 357 n.31. Compare with Justice Powell's view of Bakke's equal protection rights. 430 U.S. at 290-91. For a discussion of the problem of measuring equal protection claims through group or class analysis, see Erler, *supra* note 47, at 423-40.

98. U.S. CONST. amend. XIV (emphasis added). *See* Erler, *supra* note 47.

99. 442 U.S. at 286 (Marshall, J., dissenting).

100. *Id.* at 286-88.

101. *Id.* at 287-88.

tions for equal protection analysis. The state's asserted interest in *Feeney* is actually a form of affirmative action, based on the notion that those who have served in the military have been disadvantaged in the job market and should be compensated on account of this disadvantage in order to allow them to compete with those who did not serve in the military. The implementation of this policy is difficult, however, because the preference overincludes those who are to receive its benefits; it is inflexible with respect to whether one qualifies or does not qualify for its benefits; and, once established, it is not easily amenable to reduction or abolition, even if the conditions which gave rise to its adoption have altered or disappeared. In short, the veteran's preference carries with it many of the problems associated with affirmative action programs. Justice Marshall's dissenting opinion, interestingly, articulates many of these problems.

Another difficulty relating to special legislative treatment of certain groups concerns the characterization of a statute as compensatory or stigmatizing. This presents a dilemma for a legislature that wants to deal with what it perceives as a problem of past discrimination. It must do so, according to the cases, in a manner which does not stigmatize the recipient of the special treatment. This has not been an easy task. Thus, an Alabama alimony statute which was defended as an attempt to offer redress to the wife for "discrimination during marriage" fell, in part, because it carried "the baggage of sexual stereotypes."[102] In *Weinberger v. Wiesenfeld*,[103] a Social Security Act provision which gave death benefits to the widow of a wage earner who left minor children, but not to the widower of a wage earner with minor children, was held to be unconstitutional. The distinction was defended on the same ground as in *Kahn v. Shevin*: the payments are necessary to the support of a family which had lost its principal wage earner. The Court, however, believed that an "archaic and overbroad generalization" underlay the distinction drawn by the statute, "namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support."[104] Moreover, the provision worked to the detriment of women wage earners by implicitly denying the value of their contribution.

Likewise, in *Califano v. Goldfarb*,[105] the Court struck down another Social Security provision which paid benefits to a widow of a wage earner, but not to a husband unless he could show dependency upon the wife-employee. Rejecting the government's argument that the widow was more likely to have been dependent because of past discrimination against women, the Court said that this was like *Frontiero*, with its implicit presumption that wives were usu-

102. Orr v. Orr, 440 U.S. 268, 280, 283 (1979).
103. 420 U.S. 636 (1975).
104. *Id.* at 643. *See also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (where the Court invalidated a Missouri workers' compensation statute that required a widower, but not a widow, to prove dependency or incapacity before receiving benefits for the work-related death of a spouse).
105. 430 U.S. 199 (1977).

ally dependent.[106] Thus, governmental attempts to benefit women as a class may fall because the benefits are seen as relying on assumptions which stigmatize women as being dependent. There is a Catch-22 involved here: the need for special treatment cannot be admitted as such without appearing to rely on "archaic and overbroad generalizations."[107]

The Supreme Court has approved differential treatment favoring women when it is convinced that the government does not thereby stigmatize women while attempting to provide compensation for past discrimination. The *Kahn*[108] case, where the Court upheld the Florida tax exemption for widows, and the *Ballard*[109] case, where the Court approved the more lenient promotion requirements for Navy servicewomen, are two examples. Several commentators, however, have criticized either or both of these cases for relying on unstated "benign assumptions" in sustaining the differential treatment.[110] This criticism points to another problem in that it is difficult for one to refer to the fact of past discrimination without raising suspicions that he or she believes this discrimination has rendered women economically and socially dependent upon men. The reason for allowing the special treatment must therefore remain covert.

The Supreme Court has attempted to clarify the distinction between granting remedies for past discrimination and perpetuating sexual stereotypes in the case of *Califano v. Webster*.[111] In *Califano*, there was a challenge to another Social Security Act provision which offered the possibility of higher old-age benefits to female wage earners than to male wage earners.[112] However, unlike the other Social Security cases, *Goldfarb*[113] and *Wiesenfeld*,[114] the Court, in a per curiam opinion, sustained the differential treatment on the ground that the sole purpose was "the permissible one of redressing our society's longstanding disparate treatment of women."[115] Four of the Justices, however, questioned whether there was a principled distinction between the approved purpose of providing redress and the discredited purpose of recognizing dependency.[116] The majority appeared to admit this point when they noted, with approval, that Congress had in 1972 equalized the treatment of

106. *Id.* at 206-07. The reason why the federal government defended the distinction had little, if anything, to do with the desire to perpetuate an outmoded generalization. HEW Secretary Joseph Califano, Jr., estimated that compliance with the *Goldfarb* decision would cost the government an additional $500 million to $1 billion *each* year. J. CALIFANO, JR., GOVERNING AMERICA 371-72 (1981).

107. For a discussion of the hypocrisy in the affirmative action debate, see Mansfield, *supra* note 49.

108. Kahn v. Shevin, 416 U.S. 351 (1974).

109. Schlesinger v. Ballard, 419 U.S. 498 (1975).

110. *Benign Classification, supra* note 54, at 816-18; Ginsburg, *Gender and the Constitution*; 44 U. CINN. L. REV. 1, 13 (1975) [hereinafter cited as *Gender and the Constitution*]; Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. REV. 235, 243-44 (1975); *Sex Equality, Sex Differences, supra* note 54, at 939-42; Dow, *supra* note 4, at 77-79.

111. 430 U.S. 313 (1977).

112. *Id.* at 314-16.

113. Califano v. Goldfarb, 430 U.S. 199 (1977).

114. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

115. 430 U.S. at 317 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)).

116. *Id.* at 321 (Burger, C.J., concurring).

men and women with respect to old age payments. The majority opinion stated:

> [E]limination of the more favorable benefit computation for women wage earners, even in the remedial context, is wholly consistent with those reforms, which require equal treatment of men and women in preference to the attitudes of 'romantic paternalism' that have contributed to the 'long and unfortunate history of sex discrimination.'[117]

Thus, equal treatment is to be preferred to special treatment because special treatment may in fact contribute to the problem of sex discrimination. The problems posed by "benign" classifications may make affirmative action difficult to sustain on any ground other than a strict insistence on equality of results. The ideal is posited as a fifty-fifty sharing in all endeavors; anything that falls short of equal results is deemed discriminatory.[118] However, insistence on equality of results may be "romantic paternalism" in a new guise because it appears to imply that government is needed to make amends for life's inequities or that women are unable to effectively compete on an equal basis with men unless they have the protection of government.

The Problem of Sex-Based Classifications With Deeply Entrenched Roots

The governmental interest necessary to sustain a statute which expressly draws a distinction on the basis of sex has been the focus in two recent Supreme Court cases. *Michael M. v. Superior Court*[119] involved a challenge to the California statutory rape law which punished men only for sexual intercourse with an under-age female who was not the wife of the "perpetrator." The governmental objective offered by the state in support of the statute was the prevention of teenage pregnancies.[120] The punishment of men only was said to be substantially related to that end because it served to "roughly 'equalize' the deterrents on the sexes."[121] The threat of punishment by the law was seen as a counterpart to the natural sanction imposed upon females.

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117. *Id.* at 320.

118. *See, e.g.*, CALIF. COMM'N ON THE STATUS OF WOMEN, IMPACT ERA: LIMITATIONS AND POSSIBILITIES 71 (1976) [hereinafter cited as IMPACT ERA]:

> ERA economics groans beneath the weight of the statistical disproportion between women and men, both professionals and laborers. The touchstone of ERA commitment is the comfort with which one can envision a totally 50-50 sharing of every occupation and the extent to which one welcomes it. The probability that this is a comfortable expectation to only militant feminists defines the burden of the ERA.

See also Chavetz, *The ERA and Redefinitions of Work*, in IMPACT ERA, *supra*, at 112: "Equal employment opportunity will eventually mean that, in general, males and females will have approximately equal earning capacity and approximately equal access to interesting jobs."

119. 450 U.S. 464 (1981).

120. *Id.* at 470.

121. *Id.* at 473. The argument was more fully stated as follows:

> Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes.

Id.

Justices Brennan, White, Marshall, and Stevens, in dissent, disagreed with the plurality's assessment that the statute was *substantially* related to the state's goal of preventing teenage pregnancies. Justice Brennan felt that the state had failed to sustain its asserted justification that the law would be easier to enforce because one of the parties had, in effect, been granted immunity.[122] Justice Stevens likewise questioned the exclusion, arguing that the greater risk of harm argument cut the other way in favor of inclusion of females within the prohibition.[123] More importantly, it was questioned whether the prevention of teenage pregnancy was in fact the actual purpose of the statute or merely a modern rationalization of a statute originally enacted on the basis that young women, but not young men, needed the special protection of the state.[124] The images of the male as the sexual aggressor and the female as the passive object, lacking in judgment, appear to underlie the statute.[125] Nevertheless, a majority upheld the distinction drawn by the statute, saying that with respect to the problem of preventing teenage pregnancies, males and females were not "similarly situated."[126]

The not "similarly situated" conclusion was also employed by the Court to uphold the constitutionality of the male-only military draft. In *Rostker v. Goldberg*,[127] the Court, in a six to three decision, refused to overturn the decision by Congress to require the registration of males and not females for conscription into the military services. The majority opinion emphasized that decisions regarding the conduct of foreign affairs were delegated by the Constitution to the Congress and to the President, as Commander-in-Chief.[128] The purpose of the registration was said to be the preparation for a draft of combat troops.[129] By contrast, the dissenting Justices said that the issue was not whether the Constitution required women to go into combat, but rather whether the obligation of military service, including the performance of noncombatant functions, could be imposed solely on one sex.[130] Applying equal protection analysis, the majority believed that the decision not to use women in combat supported a strong governmental interest, quoting from the Senate Report: "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our

122. *Id.* at 492-94 (Brennan, J., dissenting).

123. In this case, the fact that a female confronts a greater risk of harm than a male is a reason for applying the prohibition to her—not a reason for granting her a license to use her own judgment on whether or not to assume the risk. . . . Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter?

Id. at 499 (Stevens, J., dissenting).

124. *Id.* at 494-96 (Brennan, J., dissenting).

125. *See* Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. RPTR. 175, 186 (1982).

126. 450 U.S. at 471.

127. 453 U.S. 57 (1981).

128. *Id.* at 64-66.

129. *Id.* at 76.

130. *Id.* at 92-97 (Marshall, J., dissenting). This is a good example of how framing the issue influences the outcome.

[people]."[131]

This language is instructive because it relies expressly on tradition and implicitly on notions about what is "man's work" without examining whether a sex-based approach to the duties of citizenship implies a lesser ability of one sex to perform those duties.[132] This justification also does not answer the broader question framed by the dissent concerning the unequal allocation of the duties of citizenship. A less restrictive alternative which satisfies the governmental interest in a more even handed manner would be to draft women for service in noncombat roles. The majority declined to impose this requirement on the Congress, saying it was largely a political decision which Congress was entitled to make.[133]

The decisions in *Michael M.* and *Rostker* do not necessarily indicate a retreat by the Court in the area of sex discrimination. The performance by the Court in the "hard" cases is instructive, but not always conclusive, because the hard cases are those on which reasonable minds can differ. When the classification is one which is deeply entrenched in our culture, such as male soldiers or men as the perpetrators of rape, analysis and judgment is called for in order to discern between archaic generalizations and genuine distinctions. By its rejection of the suspect classification treatment for sex discrimination, a majority of the Court has indicated its desire to use judgment in the hard cases. The use of the intermediate standard of review, which is demanding yet flexible, is preferable for this purpose to strict scrutiny, which is virtually always "fatal in fact."[134]

The refusal of the Court to adopt the strict scrutiny standard for sex discrimination undoubtedly has affected the outcome of these cases; it permits the justices to use discretion and judgment. It also allows room for consideration of popular consent, which, although mired in tradition, will be vital if a constitutional change is to take permanent root. In addition, the flexible approach does not lock the result into the Constitution. The outcome in either *Michael M.* or *Rostker* may be reversed by a simple majority vote in the legislature. If a mistake in judgment has been made it is easier to change it in the legislature than to amend the Constitution.

The Supreme Court's Middle Course.

The Supreme Court, thus far, has declined to follow the more radical approach to sexual equality, but instead has continued to steer a middle course. Two recent cases demonstrate that the Court's concern about the problem of sex discrimination has not diminished. The first, *Mississippi University for Women v. Hogan*,[135] presented the question of whether a state supported women's educational institution could deny admission to a male

131. *Id.* at 77.
132. Williams, *supra* note 125, at 182-85.
133. 453 U.S. at 64-67.
134. *See* Gunther, *supra* note 33, at 8.
135. 458 U.S. 718 (1982).

applicant who was interested in pursuing a career in nursing. Justice O'Connor, writing for the Court, rejected as unpersuasive the state's justification that the single-sex admissions policy was intended to compensate for discrimination against women.[136] The state made no showing that women lacked opportunities to obtain training in the field of nursing. Indeed, most of the nursing degrees were awarded to women. The Court concluded:

> Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and the assumption that nursing is a field for women a self-fulfilling prophecy. [Citation omitted]. Thus, we conclude that, although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.[137]

Moreover, the state could not show that its sex-based classification was substantially related to its asserted compensatory objective. That is, there appeared to be no reason why the denial of admission to the male student was necessary to compensate women for past discrimination in light of the school policy which allowed men to attend class as auditors.[138] The complete exclusion of men was apparently not necessary to the achievement of the institution's educational goals.

The Supreme Court also upheld, in its most recent term, a Minnesota statute which prohibited sex discrimination in "places of public accommodation." In *Roberts v. United States Jaycees*,[139] the United States Jaycees challenged the order of the Minnesota Department of Human Rights to admit women to its local chapters in Minnesota. Their principal contention was that the statute as applied denied them their first amendment rights of free speech and freedom of association.[140] While noting that the assertion of associational rights might be stronger with a smaller and more selective group, the Court held that the Jaycees' right of association was not absolute and subject to "Minnesota's compelling interest in eradicating discrimination against its female citizens."[141] The state had an interest in ensuring that all citizens were entitled to equal use and enjoyment of public facilities. This interest extended beyond tangible public places to include access to nontangible goods and services.[142] Thus, the Court, in a noteworthy conclusion, affirmed the Department of Human Rights interpretation that the Jaycees' local chapters are "place[s]

136. *Id.* at 727-28.
137. *Id.* at 729-30.
138. *Id.* at 730-31.
139. — U.S. —, 104 S. Ct. 3244 (1984).
140. *Id.* at —, 104 S. Ct. at 3249.
141. *Id.* at —, 104 S. Ct. at 3251-52, 3253.
142. *Id.* at —, 104 S. Ct. at 3254.

of public accommodations" within the meaning of the Act.[143] The Court stated:

> [T]he Minnesota court noted the various commercial programs and benefits offered to members and stated that , '[l]eadership skills are "goods," [and] business contacts and employment promotions are "privileges" and "advantages". . . .' [Citation omitted]. Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.[144]

The Court recognized that the Jaycees have a quasi-public character and it articulated a right of access to this quasi-public group. Approval by the Court of affirmative measures to break down well-entrenched business and social barriers may portend considerable legislative activity in this area. As such, it represents the strength of the Court's commitment to equal rights.

The Court's use of the equal protection clause in sex discrimination cases, while achieving many of the original objectives of the ERA, has not gone as far as the ERA in two principal respects. The Court continues to use the intermediate standard of review rather than the strict scrutiny standard. This leaves the Court subject to the criticism that this standard is not adequate to deal with the remaining "hard" cases of discrimination against women. The "easy" cases have been or will be dealt with,[145] but the more difficult cases involve subtle forms of discrimination which have deep roots in our culture. The Court's middle course appears to take the position that eradication of subtle discrimination, where the appropriate result is less obvious, requires a more precise method of review, a scalpel rather than a hacksaw.

It may not be wise for the Court to have an inflexible standard to deal with such difficult prospective issues as the constitutionality of marital property laws,[146] the constitutionality of restrictions on public funding of abor-

143. *Id.*

144. *Id.*

145. *See supra* notes 31-62 and accompanying text. A list of the remaining "easy" cases would include state voter registration provisions requiring female voters to indicate their marital status (*see* Walker v. Jackson, 391 F. Supp. 1395 (E.D. Ark. 1975) (state requirement that a female voter indicate her marital status with "Miss" or "Mrs." was invalid in the absence of a comparable requirement for male voters)); statutes requiring a married woman to use her husband's surname (*see* Walker v. Jackson, 391 F. Supp. 1395 (E.D. Ark. 1975) (state law requiring a married woman to register to vote under her husband's surname and a divorced woman to register under her former husband's surname was held invalid); *Equal Rights for Women, supra* note 23, at 940); laws requiring the wife to assume the domicile of the husband (*see* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966); *Equal Rights for Women, supra* note 23, at 941); laws and cases giving the husband the right to sue a third party for injuries to his wife, but not allowing the wife to sue for injuries to her husband (*see* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968); Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971); *but see* Benjamin v. Cleburne Truck & Body Sales, Inc., 424 F. Supp. 1294 (D.V.I. 1976) and Sheeler v. Trans-Chem. Inc., 520 F. Supp. 117 (D. Wyo. 1981)); attribution of the earnings of a married woman "accruing from labor performed for her husband, or in his employ" to the husband and thus subject to his control (*see* WIS. STAT. ANN. 766.05 (West 1981) (vacated by repeal, 1983 Act 186 § 47, effective Jan. 1, 1986 (West Supp. 1984)); attribution of the value of the family farm to the efforts of the husband notwithstanding the "non-monetary" contributions of the wife (*see* STATEMENT ON THE EQUAL RIGHTS AMENDMENT, *supra* note 74, at 6).

146. *See, e.g.*, CALIF. COMM'N ON THE STATUS OF WOMEN, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 223-60 (1975) [hereinafter cited as COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT]; Barham, *Community Property: Symposium on Equal Rights*, 48 TUL. L. REV. 560 (1974); Johnston, *Sex and*

tions,[147] the problem of affirmative action in employment, including potential conflicts with other forms of affirmative action,[148] the potential conflicts with the first amendment, such as the matter of single-sex private colleges, religious schools and seminaries[149] and the problem of censorship in school textbooks,[150] and potential conflicts with the constitutionally recognized right of privacy, such as the question of completely integrated dormitories in state colleges and universities.[151] In addition, there are the more exotic issues such as the legality of prostitution laws,[152] the separation of prisoners on the basis of sex,[153] the legality of homosexual marriage[154] and the issue of gay rights in general,[155] and the rights of transsexuals[156] It is ironic that some of these

Property: The Common Law Tradition, the Law School Curriculum and Developments Towards Equality, 47 N.Y.U.L. REV. 1033 (1972); Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505 (1973).

147. *See* Fischer v. Comm'r, Dep't of Public Welfare, 482 A.2d 1137 (Pa. Commw. Ct. 1984) (court held that restrictions on the public funding of abortions violated the equal rights provision of the state constitution), *rev'd*, 482 A.2d 1148 (Pa Commw. Ct. 1984). *See also* Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 ORE. L. REV. 265, 280-81 (1984).

148. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Winkes v. Brown Univ., 747 F.2d 792 (1st Cir. 1984) (conflict between the Equal Pay Act and obligations imposed on a university under a Title VII affirmative action decree). For a discussion of the impact of the ERA on affirmative action programs, see Hillman, *Sex and Employment under the Equal Rights Amendment*, 67 NW. U.L. REV. 789, 834-40 (1973).

149. *See, e.g.*, Gallagher, *Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges*, 18 ST. LOUIS U.L. J. 41 (1973); Miller, *The Future of Private Women's Colleges*, 7 HARV. WOMEN'S L.J. 153 (1984). *See also* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 578 F. Supp. 1004 (S.D. Ohio 1984) (religious school held to be under the jurisdiction of the state civil rights commission). *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (the Supreme Court held that the National Labor Relations Act did not apply to the Catholic church, thus avoiding what the Court believed to be a serious question relating to the free exercise clause of the first amendment).

150. *See* Comment, *Sex Discrimination: The Textbook Case*, 62 CALIF. L. REV. 1312 (1974); Levin, *Feminism and Thought Control*, COMMENTARY 40 (June 1982); Davis, *Many Forces Shape Making and Marketing of a New Schoolbook*, The Wall St. J., Jan. 3, 1985, at 1, col. 1. *Cf.* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. CIV. RTS.-CIV. LIB. L. REV. 133 (1982); Delgado, *et al., Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 U.C.L.A. L. REV. 128 (1983). Delgado suggests in these articles that the individual claims of freedom of expression and academic freedom in research may be legitmately subordinated to the social and political goal of equality.

151. *See* Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975) (holding that the state's equal rights act did not require the state university to rescind its rule against co-ed visitation in the dormitories); A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT, *supra* note 146, at 139-40 (concluding that dormitories would not be required to be fully integrated under the ERA). *But cf.*, Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (holding that the privacy rights of major league baseball players were subordinate to the interest of a female reporter in obtaining equal access to the locker room after a baseball game).

152. *See* U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE 215 (1977); *Equal Rights for Women, supra* note 23, at 905, 954; Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CR. L. REV. 373 (1973).

153. *See* A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT, *supra* note 146, at 66-69; Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229 (1973).

154. *See* Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973). *But see* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

155. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 180 (1975): "The effect that the Equal Rights Amendment will have on discrimination against homosexuals is not clear . . . . [I]t is hard to justify a distinction between discrimination on the basis of the sex of sexual partners and other sex-based discrimination." *Cf.* Gay Student Services v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984) (university refusal to recognize gay students' group constituted a denial of its first amendment rights); DeSantis v. Pacific Tel. & Tel., 608 F.2d 327 (9th

latter cases are not really women's issues. This may be one of the consequences of the delay in ratification of the ERA. As the "easy" cases become resolved by the courts, the prospective answer to what the ERA will accomplish has accordingly shifted. The answer now provided includes consideration of non-women's issues and suggests that the ERA would now support the more radical view that society must be fundamentally restructured.[157]

The Court has also diverged from the anticipated impact of the ERA on the issue of disproportionate impact. The Court in *Feeney*, in affirming the validity of the veterans' preferences, expressly rejected the argument that discrimination could be shown simply on the basis that women were more adversely affected by the preferences than were men.[158] Proponents of the ERA believe that ratification would allow for proof of discrimination on the basis of disproportionate impact without a showing of discriminatory intent.[159] Refer-

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Cir. 1979) (homosexual employees not entitled to Title VII protection); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (homosexual employee not entitled to Title VII protection); Valdes v. Lumbermen's Mut. Cas. Co., 507 F. Supp. 10 (S.D. Fla. 1980) (court held that a lesbian employee stated a cause of action for sex discrimination under Title VII for the denial of promotion and transfer by her employer); Curran v. Mount Diablo Council of Boy Scouts, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (a homosexual stated a cause of action under a California anti-discrimination statute against the Boy Scouts for unlawful expulsion). *See generally* Kovarsky, *Fair Employment for the Homosexual*, 1971 WASHINGTON U.L.Q. 527; Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexuals in the United States*, 30 HASTINGS L.J. 799 (1979).

156. *See* Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1983) (federal district court found the employer in violation of Title VII's prohibition of sex discrimination in employment when it discharged an airline pilot for having had transsexual surgery and adopting the lifestyle of a woman). For cases holding that Title VII's protection does not include transsexuals within its ambit, see Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md. 1977); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd* 570 F.2d 354 (9th Cir. 1978). *See also* Wein & Remmers, *Employment Discrimination and Gender Dysphobia: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075 (1979); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963 (1971).

157. *See, e.g.*, IMPACT ERA, *supra* note 118, at 140-41:

> The choice of the appropriate model is crucial to our social structure, for it defines the relationship between tradition and equality, between the old social order and the new. Merely giving women greater participation in the old society, assuming they will take on male values, male responsibilities, and male privileges, is not the answer to the problem because inequality is structured into our institutions.

Id. at 72:

> The full economic implementation of the ERA would have an enormous impact on society. Full and equal participation of women in the work force at all levels is only the beginning of its ramifications. The future holds possibilities for both a redefinition of work itself and an economic restructuring of society, currently organized around male assumptions and male convenience, which are only relative and which make female participation difficult. Dual-career family needs will entail the reorganization of work role and domestic role relationships as well as environmental change.

See also Chafetz, *The ERA and Redefinition of Work: Toward Utopia*, in IMPACT ERA, *supra* note 118, at 108-15; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

158. 442 U.S. at 272.

159. *See, e.g., Equal Rights for Women, supra* note 23, at 898:

> [C]lassifications, though formulated without explicit sex reference, may in practice fall more heavily on one sex than the other. This opens the possibility that non-sex-based classifications can be use to circumvent the Equal Rights Amendment. . . . The problem of formally neutral laws which may have a discriminatory impact arises under any law which attempts to eradicate discrimination based upon a single prohibited factor in a context where many other factors may legitimately be taken into account. The same issues have consistently appeared in the enforcement of laws prohibiting discrimination because of race, religion, national ori-

ring to the anticipated impact of the ERA, the United States Commission on Civil Rights stated: "Even laws neutral on their face, but that affect one sex more harshly than the other, would have to be reexamined."[160]

The problem with the disproportionate impact approach is that it appears to assume that disparities in results between men and women are wholly the result of discrimination. Facts, however, do not speak for themselves. Analysis and interpretation of the asserted causes of such disparities are required in order to eliminate the noncontributing factors and to focus on the primary causes. Factors which suggest that the disparate results are not the result of discrimination, such as individual choice, education, experience, and merit, should not be ignored.[161]

The disproportionate impact approach, as such, constitutes an irrebutable presumption of discrimination. The Court's more moderate approach requiring proof of discriminatory intent has the virtue of not adding this presumption of discrimination to the Constitution. If this presumption of wholesale discrimination is not true, or is only partially true, it is better to deal with the problem of sex discrimination on a case-by-case basis rather than locking an inflexible rule into the Constitution.

CONGRESSIONAL ENFORCEMENT OF EQUAL RIGHTS CLAIMS

A second substitute for the Equal Rights Amendment was to secure legislation through Congress which would prohibit sex-based discrimination. This was more than merely supplemental to the judicial activity under the fifth and fourteenth amendments because Congress has the affirmative power of legislation. Unlike courts, which usually respond retrospectively to particular cases, Congress can use its powers to investigate and then to formulate a broad-based rule dealing prospectively with a perceived problem. Congress may also enact statutes which require more than the Constitution requires from federal and state governments.[162] In addition, Congress may regulate generally and specifically the conduct of business and other private institutions.[163]

Much of the congressional legislation concerning sex discrimination has dealt with employment and related benefits. It should be kept in mind that although the legislation represents political gains for women's interests, it may have figured, along with the judicial developments, in the defeat of the ERA by making the need for a constitutional amendment less compelling in the minds of some legislators.

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gin, and labor organizing activity. The courts have responded by looking beyond the adoption of the "neutral" classification into the realities of purpose, practical operation, and effect.

160. STATEMENT ON THE EQUAL RIGHTS AMENDMENT, *supra* note 74, at 8.

161. Kemble, *A New Direction for the Democrats?*, COMMENTARY 35 (Oct. 1982).

162. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966). *See also* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

163. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Legislation Concerning Discrimination in Employment

1. Hiring and the Bona Fide Occupational Qualification

Most legislative progress in the area of sex-based employment discrimination has been made through Title VII of the Civil Rights Act of 1964.[164] Title VII prohibits an employer from discriminating on the grounds of "race, color, religion, sex, or national origin."[165] The decision of whether to hire is affected by Title VII and the employer may not discriminate on the basis of sex in the hiring decision unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[166] Thus, for example, the Fifth Circuit Court of Appeals in 1971 held that being female was not a bona fide occupational qualification for the job of airline flight attendant and that the airlines's refusal to hire males solely on account of their sex was unlawful.[167]

In an important case under Title VII, the Supreme Court, in *Dothard v. Rawlinson*,[168] reaffirmed its prior holding in *Griggs v. Duke Power Co.*,[169] a case involving racial discrimination in employment, and held that a woman who alleged sex discrimination could establish a prima facie violation simply on the basis of disproportionate impact.[170] That is, unlike the rule with respect to proving discrimination in violation of the fourteenth amendment, the plaintiff under Title VII may establish a prima facie violation on the basis of disproportionate impact alone. The employer may rebut the prima facie case on the ground that the disparate impact has a legitimate, nondiscriminatory basis.[171] In such instance, the ultimate burden of proving discriminatory intent by the employer remains with the plaintiff.[172]

Faced with a prima facie violation of Title VII, the employer may also defend on the ground that the employment requirement is a bona fide occupational qualification, as the state of Alabama asserted in *Dothard* with respect to height and weight requirements for prison guards. The Supreme Court characterized the bona fide occupational qualification exception as a narrow one: "We are persuaded . . . that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on

164. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

165. *Id.* One of the ironies of this section, illustrative of the uneven commitment to equality, is that the inclusion of sex as a prohibited category was made through amendment to the Act by a Southern Congressman who hoped that, by including the word "sex," the whole Civil Rights Act would fail to win passage in the Congress. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-82 (1967); J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 316 (1978).

166. 42 U.S.C. § 2000e-2(e) (1982). *See* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977); Annot., 63 A.L.R. FED. 402 (1983).

167. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

168. 433 U.S. 321 (1977).

169. 401 U.S. 424 (1971).

170. 433 U.S. 321, 329 (1977).

171. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

172. *Id.*

the basis of sex."[173] The Court did, however, conclude that the height and weight requirements in this case did fall within this exception.[174]

2. *Discrimination Against Employees Who Become Pregnant.*

The employment discrimination statute affects not only hiring, but also terms of employment, such as wages, fringe benefits, sick leave policy, and promotion. One recurring question has concerned the treatment of employment disability due to pregnancy. *Geduldig v. Aiello*[175] involved a challenge to California's disability insurance system for private employees not covered by workers' compensation. The program excluded normal pregnancies and suit was brought by women who had incurred temporary employment disabilities because of normal pregnancies. The Supreme Court did not find the pregnancy exclusion to be discriminatory, reasoning that the program "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensible disabilities."[176] The fact that the excluded disability affected women exclusively did not persuade the Court that there was sex discrimination. Rather, "[t]he program divide[d] potential recipients into two groups—pregnant women and nonpregnant persons."[177] The Court was even more specific in *General Electric Co. v. Gilbert*,[178] holding that a disability plan for employees which fails to cover pregnancy related disability does not violate Title VII. Not surprisingly, much critical commentary followed the *Geduldig* and *Gilbert* decisions.[179]

Congress responded directly to *Geduldig* and *Gilbert* by enacting the Pregnancy Discrimination Act of 1978[180] (PDA), which amended Title VII to

173. 433 U.S. at 334.

174. After citing the problems of maintaining order in the maximum security prisons, the Court concluded:

> In this environment of violence and disorganization, it would be an oversimplification to characterize [the height and weight requirement] as an exercise in 'romantic paternalism.' [Citation omitted]. In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum security male prison.

Id. at 335.

175. 417 U.S. 484 (1974).

176. *Id.* at 497 n.20.

177. *Id.*

178. 429 U.S. 125 (1976).

179. *See, e.g.*, Kirp & Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947 (1979); *Gender in the Supreme Court, supra* note 54, at 9-11; Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805; Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974); Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Note, *The Impact of Geduldig v. Aiello on the EEOC Guidelines on Sex Discrimination*, 50 IND. L. REV. 592 (1975); Comment, *Differential Treatment of Pregnancy in Employment: The Impact of General Electric Co. v. Gilbert and Nashville Gas Co. v. Satty*, 13 HARV. CIV. RTS.-CIV. LIB. L. REV. 717 (1978); Comment, *Sex Discrimination—Distinctions Between Title VII and Equal Protection—General Electric Co. v. Gilbert*, 31 RUTGERS. L. REV. 91 (1977); Note, *Civil Rights—Discrimination Under Title VII of the Civil Rights Act of 1964: General Electric Co. v. Gilbert*, 13 WAKE FOREST L. REV. 813 (1977); Comment, *General Electric Co. v. Gilbert: A Lesson in Sex Education and Discrimination—The Relationship Between Pregnancy and Gender and the Vitality of Disproportionate Impact Analysis*, 1977 UTAH L. REV. 119.

180. 42 U.S.C. § 2000e(k) (1982).

include in the prohibition of discrimination "on the basis of sex" any discrimination due to pregnancy, childbirth, or related medical conditions. It is clear that Congress intended the PDA to prohibit all employment practices which use pregnancy related criteria to distinguish among employees and thereby adversely affect working women.[181] The PDA applies both to medical insurance benefits and to disability benefits.[182]

The Supreme Court acknowledged this congressional mandate in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[183] The Court noted that the intent of Congress was to overturn both the holding and the reasoning of *Gilbert* through enactment of the PDA.[184] The *Newport News* decision went even further, holding that discrimination against male employees could be established by showing discrimination against their spouses in the provision of fringe benefits. A health insurance plan which provides less extensive pregnancy benefits for wives of male employees than it does for the female employees discriminates against male employees in violation of Title VII.[185] Therefore, after an initial reluctance by the Court to regard pregnancy as a problem of sex discrimination, it has responded favorably to the congressional mandate in the PDA.

3. Discrimination in Wages and Comparable Worth.

Another important piece of legislation from Congress affecting the terms of employment was the Equal Pay Act of 1963.[186] The Act imposes the requirement of equal pay for equal work. The concept of "equal work" is somewhat elusive; the Act defines it as a job "the performance of which requires equal skill, efforts, and responsibility, and which [is] performed under similar working conditions."[187] The Supreme Court in *Corning Glass Works v. Brennan*[188] considered whether a pay differential between male night shift inspectors and female day shift inspectors was justified on the basis that the two jobs did not have "similar working conditions." The company itself, however, had

181. H. REP. NO. 95-948, 95th Cong., 2d Sess. 5-6, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753.
182. *Id.* at 4753-54.
183. — U.S. —, 103 S. Ct. 2622 (1983).
184. *Id.* at 2628.
185. *Id.* at 2631-32.
186. The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938, § 6, *as amended*, 29 U.S.C. § 206 (d) (1982) and reads as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, efforts, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

187. *Id.*
188. 417 U.S. 188 (1974).

not treated the time of day as a compensable factor and thus the difference in pay was held to be illegal under the Act.[189]

The Court recognized that Congress did not intend to abolish wage differentials which were based on objective differences in skill, effort, responsibility, and working conditions.[190] Congress intended "to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act."[191] This limits the scope of the Act to wage differentials among jobs which are substantially similar[192] and does not extend to jobs which are not similar but which are alleged to have "com-

189. *Id.* at 202-03.

190. *Id.* at 199.

191. *Id.* at 201.

192. *See* Berry v. Bd. of Supervisors of L.S.U., 715 F.2d 971 (5th Cir.1983) (violation established where female associate professor was assigned a course load of 18 to 21 hours per semester while her male counterparts were assigned only 9 hours per semester with the opportunity to earn additional pay for extramural courses; her hours and responsibilities were substantially similar to her male colleagues but she was paid less because she did not teach the extramural courses); E.E.O.C. v. Central Kansas Medical Center, 705 F.2d 1270 (10th Cir.1983) (violation established where hospital paid its male janitors more than its female housekeepers who performed substantially equal work and had substantially equivalent responsibilities); Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir.1982) (violation established where females who operated multineedle sewing machines for the Government Printing Office were paid less than some of the male bookbinders even though their jobs were substantially similar); Nulf v. Int'l Paper Co., 656 F.2d 553 (10th Cir. 1981) (no violation established where female secretary-receptionist did not perform the same duties as the male order desk employees; although she performed some of the same tasks as the order desk employees, she did not perform them with the same frequency and, in addition, she spent approximately one-half of her time on secretary-receptionist duties); Orahood v. Bd. of Trustees of the Univ. of Ark., 645 F.2d 651 (8th Cir.1981) (no violation established where a female research project analyst had fewer responsibilities and different education and experience requirements for her position than was the case with the male colleague who was paid a higher salary); Usery v. Richman, 558 F.2d 1318 (8th Cir. 1977) (no violation established where male cook in cafe received a higher wage than female cooks because the male cook worked on the "most demanding" shift, was responsible for training other employees, had authority to make effective recommendations with regard to discipline, was assigned the heavy work at the cafe, and in whom the owner had special confidence); Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.1970), *cert. denied*, 398 U.S. 905 (1970) (violation established where male selector-packers received a pay rate 10% higher than the female selector-packers even though both performed identical work); Lanegan-Grimm v. Library Ass'n of Portland, 560 F. Supp. 486 (D. Ore. 1983) (violation established where female employee of a library was employed in the position of bookmobile driver/clerk and was paid less than a male employee who drove a delivery truck); Francoeur v. Corroon & Black Co., 552 F. Supp. 403 (S.D.N.Y. 1982) (female employee who was hired as a personnel manager/office administrator failed to show that she was performing a substantially similar job as her male predecessor in order to be entitled to relief under the Equal Pay Act); E.E.O.C. v. Rhode Island, 549 F. Supp. 60 (D.R.I. 1982) (violation established where female cleaners and male janitors of state college had substantially similar skills, efforts, and responsibilities although the janitors alone shampooed the carpets and buffed and waxed the floors); Schulte v. Wilson Industries, Inc., 547 F. Supp. 324 (S.D. Tex. 1982) (violation established where a female who worked as an expediter and later as an assistant account manager was paid less than males who were similarly classified); E.E.O.C., v. Hay Assocs., 545 F. Supp. 1064 (E.D. Pa. 1982) (violation established where female financial analyst and counselor was paid less than a new male employee whose job was substantially similar; however, she did not establish a prima facie case with respect to a male financial analyst because the male analyst had more responsibility and had different job duties); Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 65 (N.D. Cal. 1978) (no violation established for disparity in pay between personnel managers and telephone sales operators because the two jobs were not substantially similar); Taylor v. Franklin Drapery Co., 441 F. Supp. 279 (W.D. Mo. 1977) (no violation established where female employees who did sewing and seamstress work were paid less than male employees in the same department who made cornice boards because the duties of the two positions were not substantially similar in skill, effort and responsibility).

parable worth."[193]

The Equal Pay Act also expressly provides several defenses to an action under the Act. The employer has a defense if the pay differential is based on "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. . . ."[194] Litigation based on these defenses has centered primarily on the "any factor other than sex" defense, with employers attempting to justify pay differentials between males and females on "other factors."[195] For example, in *Hodgson v. Robert Hall Clothes*,[196] the employer operated a men's apparel department staffed exclusively by male employees and women's apparel department staffed exclusively by female employees. The employees were found to be engaged in equal work, but were paid at unequal rates, the males earning substantially more.[197] The employer's defense was not that the men were more productive, but rather that the men's department produced a greater profit and greater profit was a "factor other than sex." The court accepted the employer's argument, relying on the literal meaning of the statutory language.[198] This conclusion, however, tends to make the "other factors" defense a self-fulfilling prophecy. The courts, to their credit, have established some restrictions on the breadth of this defense.[199] A common argument made by employers and rejected by the courts

193. *See, e.g.*, Brennan v. City Stores, Inc., 479 F.2d 235, 238-39 (5th Cir. 1973) ("The restrictions in the Act were meant to apply only to jobs that are substantially identical or equal. While the standard of equality is clearly higher then mere comparability yet lower than absolute identity there remains an area of equality under the Act the metes and bounds of which are still indefinite."); Cox v. Am. Cast Iron Pipe Co., 585 F. Supp. 1143, 1156 (N.D. Ala. 1984) (One of the plaintiffs "relies on the comparable worth theory, a concept which the Court again points out is not the law under the Equal Pay Act which she did not invoke, nor under Title VII which she did.")

194. 29 U.S.C. § 206(d)(1) (1982).

195. *See, e.g.*, E.E.O.C. v. Maricopa County Community College Dist., 736 F.2d 510 (9th Cir.1984) (bureaucratic delay which prevented job reevaluations was not a sufficient defense as a factor other than sex); Hein v. Oregon College of Education, 718 F.2d 910 (9th Cir. 1983) ("In a professional setting, wage variation may stem from a multitude of factors that do not implicate sex discrimination."); Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983) (differential between male and female employees of health spa chain justified on the basis of different size markets for men's and women's memberships); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982) (prior salary may be a basis for a differential not based on sex, but the defendant could not show in this case that this factor had been reasonably applied); Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981) (defendant found to be in violation of the Act because, although differentials can be justified on the basis of a bona fide training program, the defendant's training program was an after the fact justification of unequal pay for equal work); E.E.O.C. v. Aetna Ins. Co., 616 F.2d 719, 722 (4th Cir.1980) (differential in starting salary between a male and a female was based on the company's expectation that the man's greater "underwriting and managerial experience would allow him to take on greater responsibility and would make him a more valuable employee"); Handy v. New Orleans Hilton Hotel, 532 F. Supp. 68 (E.D. La. 1982) (the payment of starting salaries commensurate with experience was a legitimate factor other than sex because it helped to maintain a competitive position in the recruiting of qualified personnel); Brennan v. Sears, Roebuck & Co., 410 F. Supp. 84 (N.D. Iowa 1976) (a person's trainee status constitutes a factor other than sex legitimizing a higher salary for a male employee).

196. 473 F.2d 589 (3d Cir.1973), *cert. denied sub nom.* Brennan v. Robert Hall Clothes, Inc., 414 U.S. 866 (1973).

197. *Id.* at 591-92.

198. *Id.* at 593-94.

199. *See, e.g.*, E.E.O.C. v. Maricopa County Community College Dist., 736 F.2d 510 (9th Cir. 1984) (bureaucratic delay which prevented job reevaluations was not a sufficient defense as a factor other than sex); Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981) (defendant found to be in

is the "market forces" argument. An employer may not justify a wage differential as based on a factor other than sex on the ground that women are willing to work for less.[200]

With the enactment of the Equal Pay Act in 1963 and Title VII of the Civil Rights Act in 1964, there arose a question concerning the relationship, if any, between the two Acts. The Equal Pay Act dealt specifically with discrimination in pay. Title VII dealt more generally with the problem of discriminatory employment practices, but did include "compensation" within its purview. For a number of years, wage discrimination claims were not litigated under Title VII.[201] Nevertheless, the possibility of using Title VII to escape some of the limitations of the Equal Pay Act was raised, particularly the requirements that the jobs be substantially similar.[202] In order to address this potential conflict between Title VII and the Equal Pay Act, the Bennett Amendment to Title VII was enacted.[203] The amendment provides that it shall not be unlawful for an employer under Title VII "to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of [the Equal Pay Act]."[204] The question left unanswered by the amendment was whether it meant that no Title VII wage discrimination claim could be made unless it was also an Equal Pay Act claim, or that only the specific Equal Pay Act defenses would be incorporated into Title VII actions. The former interpretation would limit Title VII claims to wage differential between jobs which were "substantially similar." The latter interpretation would allow Title VII actions for wage discrimination claims even though the jobs were not similar but alleged to be of "comparable worth."

The comparable worth theory is based on the assumption that discrimination against women in the marketplace is pervasive and reflects the old stereotypical views of the dominant role of the male as the principal breadwinner and the subordinate role of the female as a supplemental contributor, at

violation of the Act because, although differentials can be justified on the basis of a bona fide training program, the defendant's training program was an after the fact justification of unequal pay for equal work); Schultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969) (pay differential could not be justified on the basis that the male employees had taken a training program where the program was, in practice, non-existent or illusory). *Accord*: Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973), *cert. denied sub nom.* Behrens Drug Co. v. Brennan, 414 U.S. 822 (1973); Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (8th Cir. 1972); Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972).

200. *See, e.g.*, Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973).

201. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 665 (1984).

202. Bellace, *supra* note 201, at 667-68; Golper, *The Current Legal Status of "Comparable Worth" in the Federal Sector*, 34 LAB. L.J. 563, 564-68 (1983); Thomas, *Pay Equity and Comparable Worth*, 34 LAB. L.J. 3, 5-6 (1983); Comment, *Equal Pay for Comparable Work*, 15 HARV. CIV. RTS.-CIV. LIB. L. REV. 475 (1980); Comment, *Title VII Comparable Worth Claims: Analysis of Liability, Proof, Defenses and Remedies for Sex-Based Wage Discrimination*, 18 SAN DIEGO L. REV. 685, 686-98 (1982).

203. 42 U.S.C. § 2000e-2(h) (1976).

204. *Id.*

best.[205] In order to overcome this widespread discrimination, it is argued that it is necessary to restructure the marketplace so that the jobs which are held predominantly by females will be paid according to their intrinsic worth, rather than accepting, by acquiescence, the wage standards established in an earlier age of discrimination.[206] Evidence of this discrimination is said to be represented by the studies which show that women, on the average, earn approximately fifty-nine percent of what men earn.[207]

The Supreme Court chose to incorporate only the Equal Pay Act defenses in Title VII actions without ruling on the merits of the comparable worth theory in *County of Washington v. Gunther*.[208] In *Gunther*, suit was brought under Title VII by female guards who worked in the female section of the county jail. The suit alleged that the county paid substantially lower wages to the female guards than was paid to the male guards employed in the male section of the jail.[209] The lower court found that the jobs were not substantially similar because the men guarded more prisoners and the women performed clerical duties in addition to their guard duties.[210] The Supreme Court indicated that the female guards claims were not based on the concept of comparable worth. The Court instead framed the issue narrowly as whether the claims under Title VII were precluded by the Bennett Amendment.[211] Justice Brennan, writing for a 5-4 majority, stated that the purpose of the Bennett Amendment was merely to incorporate the four specific defenses of the Equal Pay Act into Title VII and thus parties claiming intentional sex-based wage discrimination could sue under Title VII even though the substantially similar work standard of the Equal Pay Act was not met.[212] Because of the allegation of intentional discrimination, the Court did not consider whether a claim could be based on the theory of comparable worth.[213] The Court left the door open, however, for proponents of comparable worth to pursue wage discrimi-

205. *See, e.g.*, Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 420-28 (1979); Shepela & Viviano, *Some Psychological Factors Affecting Job Segregation and Wages*, in COMPARABLE WORTH AND WAGE DISCRIMINATION (H. Remick ed. 1984); Comment, *Equal Pay for Comparable Work*, 15 HARV. CIV. RTS.-CIV. LIB. L. REV. 475, 478-79 (1980).

206. *See generally* Blumrosen, *supra* note 205. *See also* Johnston, *The Prima Facie Case of Comparable Worth*, 11 OHIO N.U.L. REV. 37, 39 (1984); Steinberg, *"A Want of Harmony": Perspectives on Wage Discrimination and Comparable Worth*, in COMPARABLE WORTH AND WAGE DISCRIMINATION (H. Remick ed. 1984) [hereinafter cited as *"A Want of Harmony"*].

207. *See, e.g., "A Want of Harmony," supra* note 206, at 5, Table 1-1; U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-60, 1977 (No. 118-Table 45) (median income of year-round full-time workers, 25 to 64 years old); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-60, 1976: (No. 114-Table 45) (median income of year-round full-time workers, 25 to 64 years old); Mann, *Work Values*, Washington Post, October 6, 1982, C1. *See also* the speech by Rep. Geraldine Ferraro in accepting the Democratic Vice-Presidential nomination. N.Y.Times, July 20, 1984, at A14.

208. 452 U.S. 161, 168-71 (1981).

209. *Id.* at 163-64.

210. *Id.* at 165.

211. *Id.* at 166.

212. *Id.* at 165, 168.

213. *Id.* at 166.

nation claims based on that theory under Title VII.[214] Further, the *Gunther* Court approved of the use of employer-conducted job evaluation surveys as an evidentiary foundation for the employee's wage discrimination claims.[215] This allows the employee to establish a case for comparable worth discrimination on the basis of employer conducted job evaluations rather than convincing a reluctant and inexperienced court to make such a determination.

In the comparable worth cases under Title VII since the *Gunther* decision, the plaintiffs have not been very successful.[216] The lower federal courts have been reluctant to embrace this theory, largely out of fear of the potential consequences. A statement contained in the petitioner's brief in *Gunther* is representative: it places "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts."[217] The fear is that the judiciary will be converted into a "Fair Wages Board" with the power to impose its judgment as to the fair value of a person's work in comparison with other "comparable" jobs.

In December of 1983, however, a federal district judge in the state of Washington approved a claim based on the theory of comparable worth. In *American Federation of State, County, and Municipal Employees v. State of Washington*,[218] the plaintiffs challenged the state's failure to rectify an acknowledged disparity in pay between predominantly male and predominantly female job classifications. The plaintiffs' claim was based on a state-conducted study of its own job classifications and compensation rates which showed that the jobs held predominantly by males paid more than the jobs held predominantly by females.[219] The state had acknowledged the disparity as a problem and had agreed to rectify it gradually and prospectively. The district court judge said this was not sufficient, finding a violation of Title VII.[220]

The state of Washington had a legitimate basis for claiming it was "whipsawed"in this lawsuit. Its own study had the effect, in the judge's view, of an admission of discrimination. Moreover, the state's failure to provide an immediate remedy, notwithstanding the enormous cost, was then held to be an *in-*

214. *Id.* at 181 n.6. *See* Bellace, *supra* note 201, at 669; Thomas, *Pay Equity and Comparable Worth*, 34 LAB. L.J. 3, 6-7 (1983).

215. 452 U.S. at 180-81.

216. *See, e.g.*, Wilkins v. Univ. of Houston, 654 F.2d 388, 405 n.26 (5th Cir. 1981) (In response to a Title VII suit against the university and an affiliated television station, the court stated: "Our decision is based on the evidence and bears no relation to the 'comparable worth' concept."); Power v. Barry County, 539 F. Supp. 721, 722, 724 (W.D. Mich. 1982) (the court reached the conclusion that "comparable worth is not a viable theory under Title VII and thus cannot be utilized by plaintiffs" and also noted that other lower courts since *Gunther* had rejected the comparable worth theory as well); Schulte v. New York, 533 F. Supp. 31, 39 (E.D.N.Y. 1981) (the court declined to apply the comparable worth theory in a case where psychologists who were predominately male were paid at a higher rate than social workers who were predominately female). For cases prior to *Gunther* rejecting the comparable worth theory, see, *e.g.*, Lemons v. City of Denver, 620 F.2d 228 (10th Cir.1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Martin v. Frontier Federal S. & L. Ass'n, 510 F. Supp. 1062 (W.D. Okla. 1981); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980).

217. 452 U.S. at 180.

218. 578 F. Supp. 846 (W.D. Wash. 1983).

219. *Id.* at 860-61.

220. *Id.* at 867-68.

tentional violation of Title VII.[221] The state pointed to the irony that it was the first to order such a study of its wage practices and the first to be penalized because of it. The district court responded:

> This court is of the opinion that it is indeed ironic and tragic that the State of Washington is in the eighth decade of the Twentieth Century attempting to use the American legal system to sanction, uphold and perpetuate sex bias. Defendants are struggling to maintain attitudes and concepts that are no longer acceptable under the provisions of Title VII.[222]

The court also rejected the argument that the state was relatively innocent because it had begun to take steps to remedy a problem which had only recently come to light. The court found, on the contrary, that the state "historically engaged in employment discrimination of the basis of sex."[223] The state was therefore ordered by the court to make an award of back pay to the plaintiffs (over 15,000 in number) in accordance with the state's own comparable worth study.[224] It is estimated that it will cost the state as much as $500 million to $1 billion in order to comply with the judge's order.[225] Whether other lawsuits based on a comparable worth theory will be successful remains to be seen.

It is unclear whether the ERA, if ratified, would mandate the adoption of comparable worth in wage discrimination claims. If the ERA has the anticipated effect of establishing discrimination claims on the basis of disproportionate impact alone, then possibly comparable worth will be incorporated into the Constitution. This could, in its own way, cause many of the same difficulties as the *Lochner* era when laissez-faire economic theory was read into the Constitution. The constitutionalizing of economic theory has dangers, as the experience of that earlier era should remind us.

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221. *Id.* at 864.

222. *Id.* at 868 n.17.

223. *Id.* at 866. The evidence cited by the judge for this conclusion should be noted. The judge cited one case, Bloomer v. Todd, 3 Wash. Terr. 599, 19 P. 135 (1888), which upheld the denial of a woman's right to vote. This was not an unusual holding prior to the adoption of the nineteenth amendment in 1920. The judge then drew the following conclusion on the basis of this single case:

> In view of the foregoing it is apparent that discrimination against women was lawful in Washington Territory. In fact, discrimination was lawful in the State of Washington until 1971 when the State's Civil Rights Law was amended to prohibit sex discrimination.
>
> Perhaps Defendant adopted the practices and concepts of sex discrimination against women in employment as just another manifestation of centuries old discriminatory attitudes and practices of a male dominated society. The Declaration of Independence probably sheds some light on the practices and concepts of sex discrimination so rampant in this country. . . . "That all men are created equal; That they are endowed by their creator with certain inalienable rights; That among these are Life, Liberty, and the Pursuit of Happiness." The female gender is conspiciously absent in the Declaration of Independence.

Id. at 866 n.11. The finding of historic employment discrimination by the state was thus based on one voting rights case, the fact that there had been no express prohibition of sex discrimination until 1971, that the state had "perhaps" adopted the attitudes of a male dominated society, and that these attitudes, which were so "rampant" in this country, are reflected in the Declaration of Independence. The flimsiness of the court's argument indicates its contempt for the state's contention that it was relatively innocent.

224. *Id.* at 868-71.

225. Krauthammer, *From Bad to Worth*, THE NEW REPUBLIC, July 30, 1984, at 16; Levin, *Comparable Worth: The Feminist Road to Socialism*, COMMENTARY, Sept. 1984, at 13.

It should be emphasized that Congress has not yet addressed the issue of comparable worth in a definitive manner. The broad language of Title VII simply prohibits discrimination in wages.[226] The issue has arisen in the courts and therefore provides an insight into the inclination of the courts to interpret open-ended language in order to remedy perceived problems of systemic sex discrimination. Much of the appeal of the comparable worth theory stems from the undisputed fact that women, on the average, earn less than men.[227] This fact, however, obscures by its starkness important factors which point to nondiscriminatory causes of the disparity. The wage figures represent the impact of choices made by many women to sacrifice a business or professional career in favor of marriage and motherhood. Part-time work or jobs which allow for easy entry, exit, and re-entry (usually lower paying jobs) are attractive to some women who make a commitment in favor of their families. Women, on the average, work fewer hours per year than men.[228] This is due, in part, to the fact that a greater proportion of women are employed as part-time workers[229] and also that women who are employed full-time work fewer hours, on the average, than men.[230] Among women who are employed full-time, they have, on the average, fewer years of employment on a given job.[231]

Probably the most important factors in wage comparisons are marriage and parenthood.[232] Marriage and parenthood have, from a statistical standpoint, an opposite effect on men and women. Males who marry have higher

226. 42 U.S.C. § 2000e-2(a): "It shall be an unlawful employment practice for an employer (1) to . . . otherwise discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex. . . ."

227. *See supra* note 207 and *infra* note 233. For discussions of the issue that are critical of the concept of comparable worth, see T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 91-108 (1984) [hereinafter cited as CIVIL RIGHTS]; Flick, *The New Feminism and the World of Work*, 71 THE PUBLIC INTEREST 33 (1983) (*reprinted in* 12 HUMAN RIGHTS 26 (1984)); Levin, *supra* note 225, at 13-19; Majors, *The Comparable Worth Muddle*, 7 J. OF COMTEMP. STUD. 49 (Summer 1984); Nelson, Opton & Wilson, *Wage Discrimination and The "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980).

228. Smith, *Estimating Annual Hours of Labor Force Activity*, MONTHLY LABOR REV., Feb. 1983, at 15, Table 1 [hereinafter cited as *Estimating Annual Hours of Labor Force Activity*]. The annual average hours of employment for men were, in 1981: 1850 hours; in 1980: 1865 hours; and in 1979: 1902 hours. By comparison, the annual average hours of employment for women were, in 1981: 1445 hours; in 1980: 1443 hours; and in 1979: 1431 hours.

229. U.S. DEPT. OF LABOR, 31 EMPLOYMENT AND EARNINGS, No. 5 (May 1984), at 38 (Table A-30—Persons at work in nonagricultural industries by sex, age, race, marital status, and full- or part-time status).

230. *Estimating Annual Hours of Labor Force Activity, supra* note 228, at 20, Table 9. The annual average hours for male full-year, full-time workers were, in 1981: 2270 hours; in 1980: 2277 hours; and in 1979: 2291 hours. The annual average hours for female full-year, full-time workers were, in 1981: 2107 hours; in 1980: 2110 hours; and in 1979: 2115 hours.

231. Horvath, *Job Tenure of Workers in January 1981*, in U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN 2162, JOB TENURE AND OCCUPATIONAL CHANGE 1, 2 (1982):

> Men have higher overall median levels of tenure than women, 4 years compared with 2.5. . . . Part of this difference is because of the greater proportion of working women under the age of 25. Another factor is the greater likelihood of women leaving jobs to care for young children. . . .
>
> * * *
>
> The inhibiting effect young children have on the worklives of wives may help account for differences in job tenure by marital status. . . . While single men and women had small relative differences in years on the job, wives had far fewer years than husbands.

232. CIVIL RIGHTS, *supra* note 227, at 92-93.

incomes than males who do not marry, whereas females who marry have lower incomes than females who do not marry.[233]

233. Compiled from U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-60, 1982 (No. 142-Table 45); 1981 (No. 137-Table 45); 1980 (No. 132-Table 49); 1979 (No. 129-Table 50). The difference in average income between all women who are single (never married) and all women who marry, particularly where the husband is present in the household, is quite dramatic. The ratios run from a low of 45% (1979 median income) to a high of 65% (1982 mean income). The difference between married and never married women is far less dramatic among the full-time workers, with the ratio in the range of 86% (1979 mean income) to 90% (1982 mean income). The inference is that many women, as a result of marriage, curtail their participation in the employment market thus bringing down the average income for women as a group.

Average Income—Persons 25 to 64 Years Old

		Male				Female				
		Single (Never Married)	Married Wife Present	Married Wife Absent	Widowed	Divorced	Single (Never Married)	Married Husband Present	Married Husband Absent	Widowed	Divorced
Median											
1982	All	12,615	20,578	13,411	14,189	16,384	11,016	6,088	6,848	8,669	11,452
	Full-time	17,964	24,053	19,738	23,255	21,555	15,754	13,877	13,289	15,169	15,536
Mean											
1982	All	14,844	23,285	16,665	18,807	18,808	12,513	8,156	9,051	11,687	12,925
	Full-time	19,787	27,178	22,388	26,520	24,686	16,699	15,075	14,982	17,684	17,241
Median											
1981	All	12,199	20,154	12,850	13,016	16,163	10,599	5,631	6,692	7,623	10,936
	Full-time	17,054	22,500	19,614	21,127	20,771	14,463	12,680	12,140	13,535	14,422
Mean											
1981	All	14,348	22,279	16,853	17,044	17,853	11,656	7,393	8,517	9,889	11,979
	Full-time	19,001	25,293	22,835	24,261	22,781	15,501	13,818	14,015	15,318	15,627
Median											
1980	All	11,612	18,838	12,043	11,107	14,426	10,306	5,000	6,686	7,256	10,050
	Full-time	15,666	21,070	17,270	17,794	18,622	13,444	11,728	11,766	12,360	13,191
Mean											
1980	All	13,252	20,853	15,333	14,112	16,384	11,039	6,719	8,343	9,391	11,003
	Full-time	17,193	23,503	20,183	19,851	20,672	14,645	12,676	13,033	14,311	14,623
Median											
1979	All	10,751	17,594	11,397	10,593	13,687	9,461	4,289	6,022	6,635	9,184
	Full-time	14,656	19,595	15,692	17,130	17,142	12,020	10,642	10,704	11,349	11,839
Mean											
1979	All	12,179	19,761	13,986	13,287	15,268	10,323	5,951	7,293	8,440	10,008
	Full-time	15,874	21,987	18,327	19,609	19,000	13,296	11,397	11,387	13,040	12,774

This tendency is even more pronounced when the factor of parenthood is also considered. Married men with children earn the most; married women with children earn the least.[234] Another measure of the impact of marriage and parenthood on income may be observed when one compares the wages of women who do not marry with the wages of men who do not marry. Here, the wage differentials are much closer than the widely publicized fifty-nine percent.[235]

From a statistical standpoint, the disparity in income between wives and husbands is quite dramatic: wives, on the average, earn only twenty-five to thirty percent of what their husbands earn.[236] This would indicate very strongly that marriage is an economic partnership between the husband and the wife, with the wife contributing substantially to the earnings of the family unit. However, this contribution is, under the laws of most states, not credited to the wife.[237] These marital property laws, which do not fairly acknowledge the value of the wife's contribution to the partnership, are a more likely contributing cause of the wage disparity than pervasive wage discrimination by employers.[238]

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234. CIVIL RIGHTS, *supra* note 227, at 93. The number of hours worked by husbands with a wife present in the household tends to increase as there are more children. Conversely, the number of hours worked by women decreases as the number of her children increase. *Estimating Annual Hours of Labor Force Activity, supra* note 228, at 19, Table 8.

235. *See supra* note 233. The ratio of single women's wages to single men's wages runs from a low of 81% (1981 mean average of all persons) to a high of 89% (1980 median average of all persons). Among the full-time employees the range is from 82% (1979 median average of full-time workers) to 88% (1982 median average of full-time workers). As Professor Sowell points out, not even these differences can be attributable solely to employer discrimination:

> [W]omen are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal mining, and the like. Moreover, the rise of unwed motherhood means that even among women who never married, the economic constraints of motherhood have not been entirely eliminated.

CIVIL RIGHTS, *supra* note 227, at 92.

236. *See supra* note 233.

237. *See* Bingaman, *The Impact of the ERA on Marital Economics*, in IMPACT ERA, *supra* note 118, at 116; A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT, *supra* note 146, at 225-46.

238. The marital property laws of the separate property jurisdictions are vulnerable under existing equal protection analysis. The assumptions underlying the common law rules concerning marital property indicate that the husband is viewed as the sole provider for the family unit. *See, e.g.*, 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (Univ. of Chicago Press ed. 1979):

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverature*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

With the application of the fourteenth amendment to sex discrimination issues, this underlying basis of the marital property laws points to the need for a re-examination of these laws. Although the description by Blackstone is no longer accurate, the effects of the common law assumptions regarding marriage continue nonetheless. The data shown in note 233, *supra* illustrate that marriage is an economic partnership between husband and wife, but the wife remains an undercompensated partner. For a discussion of the consequences this undercompensation has for the wife in matters of support, during and after the marriage, and property settlements in the event of divorce, see A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT, *supra* note 146, at 225-46.

The case for comparable worth does not become any stronger when a comparison is made between the pay rates of traditionally male jobs and the pay rates of traditionally female jobs. The evaluations made of "comparable" jobs are subjective and often too limited with respect to the factors considered.[239] Factors such as "training" and "responsibility" are relevant but hard to measure accurately because the elements of *what these factors are worth to the employer* is not the primary focus, if it is a consideration at all. This is particularly a problem when an observer whose own money is not at risk purports to make this assessment. The absence of market forces from the analysis can distort the end result. Sol Chaikin, president of the International Ladies' Garment Workers Union, has criticized the comparable worth theory on this basis: "I'll be damned if I know a way to get the women more money. . . . The value of their work isn't set by theoretical principles but on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour."[240] As Charles Krauthammer points out, to raise the wages of garment workers on the basis of comparable worth would do more than free them of "discrimination," it would also free them of their jobs.[241]

Wages are shaped not only by "outside" market forces, they are also shaped by the market impact of the collective demands of workers themselves. Preferences for indoor work, or for work where prior experience or the need for re-training is not a significant barrier, tend to drive down wages for those types of jobs. The difficulty of attracting people to do unpleasant jobs is hard to measure other than by looking at the wage it takes for an employer to hire a person to do that job.[242]

The problem appears to be that comparable worth presumes the fact of discrimination and disregards evidence that suggests the disparities are the result of individual choice or the natural consequence of the aggregate of pref-

239. Charles Krauthammer of the *New Republic* writes:

> [The comparable worth studies are], above all, a mandate for arbitrariness: every subjective determination, no matter how whimsically arrived at, is first enshrined in a number to give it an entirely specious solidity, then added to another number no less insubstantial, to yield a total entirely meaningless. (An exercise: compare, with numbers, the 'mental demands' on a truck driver and a secretary.) Everything is arbitrary: the categories, the rankings, even the choice of judges. And even if none of this were true, even if every category were ontologically self-evident, every ranking mathematically precise, every judge Solomonic, there remains one factor wholly unaccounted for which permits the system to be skewed in any direction one wishes: the *weight* assigned to each category.

Krauthammer, *supra* note 225, at 17 (emphasis in original).

240. *The New Pay Push for Women*, BUSINESS WEEK, Dec. 17, 1979, at 66, 69.

241. Krauthammer, *supra* note 225, at 18. *See also* Majors, *The Comparable Worth Muddle*, 7 J. OF CONTEMP. STUD. 49, 51-52 (Summer 1984):

> [C]omparable worth will do for women (and a few men) who enter the labor market through traditionally feminine jobs what minimum wage laws have done for minority teenagers: it will price them out of the labor market. . . . A 1981 report of the National Research Council noted that comparable worth would result in 'reducing employment either because employers shift to alternative, less labor-intensive methods of production or [if the new labor costs were paid and passed on] because consumers might switch to other, less expensive goods and services.'

242. CIVIL RIGHTS, *supra* note 227, at 107-08.

erences of like-minded individuals. To borrow an image from George Will, people who drive on the freeway at "rush hour" want to get home as soon as possible and do not wish to be delayed in traffic, but the traffic congestion is the natural consequence of the aggregate desire of many individuals to get home from work as soon as possible.[243] Women don't choose to work for lower pay, but the consequence of a high demand for jobs which allow one to enter and leave the workplace more easily is to drive down the wages paid for those jobs.

The belief that disparities in earnings are solely the result of widespread employer discrimination ignores these other factors which indicate nondiscriminatory conclusions.[244] Discrimination becomes a self-fulfilling prophecy. If one regards the choices made by women themselves as reflecting past discriminatory attitudes which should be eliminated, then it indicates that the concern for comparable worth is not primarily economic, but rather a means for readjusting social attitudes, both men's and women's, about work and family. It is fair to question whether this is a proper function of government in a liberal democracy.[245]

The controversy over comparable worth is one that should, in any event, be resolved by the legislative branch of government. Fundamental questions about social and economic policy are best resolved in representative bodies, which gather evidence, listen to testimony (not restricted as is a court by the rules of evidence), debate, deliberate, and reach a solution through compromise and consensus. If a state decides to devote a substantial part of its budget to remedy what is believed to be an economic injustice, then that decision should be made by elected officials and not by one person. The same holds true for intervention in the private sector, if not more so because of the market forces argument.[246] In the end, the kind of activism manifested by the federal court in the Washington state employees case may do more harm than good to the women's movement, and to the judiciary as well.

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243. Will, *American Politics Today*, in J. WARD, ET AL., DE TOCQUEVILLE'S AMERICA: 1982 at 20 (1982).

244. Levin, *supra* note 225, at 15.

245. This is not to suggest that it is never legitimate to use the powers of government to shape public opinion. Lincoln, for example, sought to shape public opinion toward greater conformity with the principles of the Declaration of Independence. *See supra* note 16. This is consistent with the Declaration's competing principles of equality and consent. It is particularly appropriate for government to use its moral authority to persuade its citizens to respect the equal rights of others. Respecting the rights of others includes respect for them as persons. This is consistent with the idea that individuals are best suited to judge for themselves how best to pursue life, liberty, and happiness. When government denies, however, that people ought to be able to make this judgment for themselves, then it has undercut the moral authority upon which its just powers are based.

246. It should be noted that included within the market forces is the employer's desire in some cases to reduce overhead by paying low wages to women willing or forced by circumstances to accept them. For the reasons stated in the text, however, it is probably not possible for the law to deal with this problem without causing more problems than it could equitably resolve. If there is unfairness in pay schedules, this is best resolved through private means, particularly through collective bargaining or the threat of collective bargaining. *See Not 'Worth,' Maybe, but Equity*, N.Y. Times, Jan. 2, 1985, at Y18.

4. Retirement Benefits and Sex-Based Mortality Tables

Another matter of concern in the area of employment compensation involves retirement benefits. Until the mid-1970's, sex-distinct mortality tables were commonly used to justify higher insurance premiums or lower retirement benefits for women. The asserted justification was that the cost of funding a retirement program was higher for women because they, on the average, live longer than men.[247] Notwithstanding this factual basis for the different treatment, there is a problem with discrimination here. An individual woman is told that she must pay more or receive less because women, on the average, live longer. The individual is made to bear a group burden. An individual ought not to pay more or receive less solely on account of being female, or male for that matter. Moreover, the statistics are likely to be misleading. A female who is working for business or the government encounters the same kinds of stresses that have generally shortened men's life span. As more women enter the professional and business marketplace, the life expectancy rates of women will more closely approximate those of men. The medical studies in this area are beginning to confirm this common sense observation.[248] In 1978, the Supreme Court, in *City of Los Angeles v. Manhart*,[249] took a firm stand against this type of discrimination by holding that Title VII prevented a city from deducting higher pension fund contributions from the paychecks of female employees. In *Manhart*, the Court acknowledged the ostensible validity of the sex-based mortality tables showing that women tend to live longer than men.[250] However, the Court emphasized that fairness to the individual was paramount:

> The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin'. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.[251]

The class generalization, even if true, is unfair to the individual who does not fit the generalization. "[F]airness to individuals rather than fairness to classes" is required by the underlying policy of the statute.[252] This also ties in with the observation of Justice Brennan in *Frontiero* that legal burdens should bear some relationship to individual responsibility.[253] The language of Title

247. *See, e.g.*, City of Los Angeles v. Manhart, 435 U.S. 702, 704 (1978); Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, — U.S. —, 103 S. Ct. 3492, 3495 (1983).

248. *See, e.g.*, Haw, *Women, Work and Stress: A Review and Agenda for the Future*, 23 J. OF HEALTH AND SOCIAL BEHAVIOR 132 (June 1982); Waldron, *Why Do Women Live Longer Than Men? Part II*, 2 J. OF HUMAN STRESS 19 (No. 2, 1976).

249. 435 U.S. 702 (1978).

250. *Id.* at 707.

251. *Id.* at 708 (emphasis by the Court).

252. *Id.* at 709.

253. 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)).

VII together with the Court's implementation of its underlying policy thus provide a remedy for discrimination attributable to sex-based mortality tables.[254]

Legislation Concerning Discrimination in Education

In addition to the prohibition of discrimination in employment under Title VII, there is also protection under Title IX of the Education Amendments of 1972 against sex discrimination in education.[255] Title IX requires educational institutions who receive federal aid to comply with the basic nondiscrimination provision of Title IX and with the regulations promulgated by the Department of Education.[256] Under the aegis of Title IX, colleges and universities are required to equalize their athletic programs for men and women.[257] Title IX also covers admissions policies[258] as well as institutional procedures and practices.[259] The triggering device of Title IX coverage is the receipt of federal money and it is this requirement which led to a recent and controversial decision by the Supreme Court on the scope of Title IX.

In *Grove City College v. Bell*,[260] the Department of Education asked the college for an Assurance of Compliance with the nondiscrimination provisions. They made this request on the ground that many of the Grove City College students were recipients of federal aid, although the college itself was not the direct recipient of federal moneys.[261] The college asserted that it did not have to comply with this request because it was not a recipient of federal funds. Indeed, Grove City was one of the few private colleges in the United States which had always declined any governmental assistance because it

254. More recently, the Supreme Court reaffirmed the nondiscrimination principle with respect to mortality tables in the case of Arizona Governing Committee for Tax Deferred Annuity ad Deferred Compensation Plans v. Norris, — U.S. —, 103 S. Ct. 3492 (1983). The Court held that the government violates Title VII by offering employees the option of receiving benefits from private insurance carriers who pay women lower retirement benefits. *See generally* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980).

255. 20 U.S.C. § 1681(a)(1976).

256. *See* North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) (upholding the authority of the Department of Education to promulgate regulations regarding sex discrimination in employment).

257. *See, e.g.*, Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (athletic program covered by Title IX even though the program did not benefit directly from earmarked federal dollars); Bednar v. Nebraska School Activities Ass'n, 531 F.2d 922 (8th Cir. 1976) (denial of a girl's participation in the sport of cross-country was a violation of Title IX). *See also* U.S. COMM'N ON CIVIL RIGHTS, ENFORCING TITLE IX (1980); Johnson, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U.L. REV. 759 (1981); Note, *Title IX: Women's Collegiate Athletics in Limbo*, 40 WASH. & LEE L. REV. 297 (1983); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254 (1979).

258. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

259. Grove City College v. Bell, — U.S. —, 104 S. Ct. 1211 (1984); Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983) (termination of federal funding for the University of Miami which had not taken sufficient measures to disassociate the university from an all-male honorary recognition society).

260. — U.S. —, 104 S. Ct. 1211 (1984).

261. *Id.* at 1214.

wished to retain its independent status.[262] Justice Powell, in a concurring opinion, was careful to note that the college had not violated the anti-discrimination provision of Title IX.[263] "The undisputed fact is that Grove City does not discriminate—and so far as the record in this case shows—never has discriminated against anyone on account of sex, race, or national origin. This case has nothing to do with discrimination past or present."[264] The litigation arose not on account of any allegations of discrimination but solely because the college refused to execute the Assurance of Compliance requested by the Department of Education. As Justice Powell observed: "One would have thought that the Department, confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this college. But common sense and good judgment failed to prevail. The Department chose to litigate. . . ."[265]

The Supreme Court nevertheless held that the college was obliged to comply with Title IX because Congress had not distinguished between direct and indirect aid.[266] However, the Court said that the receipt of indirect aid did not subject the entire college to Title IX jurisdiction. Only those programs which benefited from the federal aid would be required to comply.[267] According to the Court: "Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small [grant] or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent."[268]

This last conclusion set off much activity in Congress because it left other programs within the college free of Title IX requirements with the corresponding prospect that these programs would be free to discriminate. The initial concern in Congress was to reverse the result in the *Grove City College* case.[269] Several Senators characterized the result as a major reversal of civil rights policy.[270] The House quickly passed a bill entitled "The Civil Rights Act of 1984."[271] However, the companion bill in the Senate met with stubborn opposition by a few Senators who questioned whether the bill was simply intended to reverse *Grove City College* or would instead operate as substantial expansion of federal influence over *all* private institutions.[272]

The key provision in the Act defined "recipient" as: "any State or political subdivision thereof . . . or any public or private agency, institution, or

262. *Id.* at 1223 (Powell, J., concurring). Hillsdale College is another such institution. *See* Hillsdale College v. H.E.W., 696 F.2d 418 (6th Cir. 1982).
263. *Id.* at 1224. *See* MacKenzie, *Why Grove City College Won't Take the Pledge*, The Wall St. J., Dec. 14, 1983, at 30, col. 3.
264. — U.S. —, 104 S. Ct. at 1224.
265. *Id.*
266. *Id.* at 1217.
267. *Id.* at 1220-21.
268. *Id.* at 1221.
269. 130 CONG. REC. S4584-4605; H2946 (daily ed. April 12, 1984).
270. *See, e.g.*, the remarks of Senator Kennedy (*id.* at S4591), Senator Packwood (*id.* at S4589), Senator Cranston (*id.* at S4591), Senator Moynihan (*id.* at S4599), and Senator Glenn (*id.* at S4605).
271. 130 CONG. REC. H7057 (daily ed. June 27, 1984).
272. *See, e.g.*, 130 CONG. REC. S12514-15 (daily ed. Oct. 1, 1984).

organization, or other entity . . . [or any successor, assignee or transferee] to which Federal financial assistance is extended (directly or through another entity or person). . . ."[273] This language was repeated in the Act by way of amendments to the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Civil Rights Act of 1964.[274] A question was raised concerning the meaning of "private agency, institution, or organization, or other entity." Would this mean that the grocer who accepts food stamps from customers, the liquor store which cashes a Social Security check, or the landlord who rents to a tenant receiving Social Security would be obligated to execute an Assurance of Compliance? What about the farmer who participates in the PIK program? The questions raised about the scope of the Act were motivated primarily by concern for the constitutional implications of further erosion of the public/private distinction and by the prospect of unnecessary and burdensome requests for information by the federal bureaucracy.[275] To the argument that expansion of federal administrative jurisdiction and assertion of federal power is not the intended purpose of the Act, the conduct of the Department of Education in the *Grove City College* case gives little comfort.

The opposition to the Civil Rights Act of 1984 was ultimately successful in blocking passage. In light of the questions raised about the broad potential impact of the Act's key provisions, this should not be interpreted as a retreat by Congress in its commitment to civil rights. A more carefully drawn provision, which limits itself to the issue of actual discrimination in education, would serve to put this issue back into the mainstream of the civil rights movement.

THE EQUAL RIGHTS AMENDMENT: PROBLEMS AND PROSPECTS

The judicial and legislative activity in the area of sex discrimination illustrate that equal protection analysis requires consideration of fairness to the individual. There are problems with fashioning conclusive presumptions into the laws and regulations concerning the proper role of men and women as citizens, workers and family members. These assumptions may provide easy excuses for the continued denial of equal rights under the law. The individual should be entitled to demonstrate that he or she does not fit the assumption underlying a particular statute or regulation or that the assumption is unfair to the individual. Legal burdens should be made to bear some relation to individual responsibility. It is not sufficient to tell the individual who is denied equal protection that the remedy is to seek out politically influential members of one's own "group" or "class" in order to obtain redress in the legislature. The language of the fourteenth amendment plainly requires that all person are entitled to equal protection of the laws.[276]

273. 130 CONG. REC. S4588 (daily ed. April 12, 1984).
274. *Id.* at §§ 3(b), 4(e)(3), 5(c).
275. *See, e.g.*, 130 CONG. REC. H7031 (daily ed. June 27, 1984); S12514-15 (daily ed. Oct. 1, 1984).
276. In this respect, the language of the equal protection clause of the fourteenth amendment is

One consequence of this judicial and legislative activity has been to undercut the legal and political necessity of the Equal Rights Amendment. Without this progress, the political pressure for the ERA would have been overwhelming. The more moderate reforms have contributed significantly to the failure of a more sweeping reform. The Supreme Court has extended the protections of the fifth and fourteenth amendments to cover cases of sex discrimination. Its equal protection jurisprudence, although not going as far as the Equal Rights Amendment would likely require, indicates sensitivity to the problems of discrimination and fair-mindedness about their resolution. Congress has exercised its powers under the commerce clause[277] and the enabling clause of the fourteenth amendment[278] to eliminate discrimination from many areas of public life. With the political setback of the ERA at the present time, Congress can be expected to be even more active in this area.

If the case for the ERA is no longer as compelling in the legal or political sense, can the argument be made on broader public policy grounds? Isn't it better to affirm a strong public policy in favor of equal rights, instead of groping toward that end on a step-by-step basis? There is good precedent for this. As discussed earlier, the Declaration of Independence stated the principle of equality in such a persuasive manner that it shaped the course of American politics and eventually brought the law into conformity with that policy.[279] The fourteenth amendment has had a similar influence. Implementation of social policy on a practical level usually works better when there is a common ground of understanding which shapes the direction of that implementation. Therefore, the case for the ERA may be more than simply a symbolic gesture, it may help to shape the law in a coherent and consistent direction.

Why then did the ERA fail to win approval in the remaining states and, later, in Congress? Was it due to pressure against it from some women, notably Phyllis Schlafly? To a certain extent, she was able to stir up fears about the potential consequences of ERA ratification. There was, of course, the infamous "potty problem." The proponents of the ERA argued over and over that the ERA would not override other established constitutional rights such as the right of privacy, so as to require integrated bathrooms.[280] However, this and other examples in the "parade of horribles" remained politically effective in the fight against ERA ratification, notwithstanding assurances that the

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preferable to the language of the ERA because it requires that the state shall not deny to any *person* the equal protection of the laws. The ERA omits this individual perspective and states that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *See supra* text accompanying note 1. This omission, while possibly not meaningful, may give rise to a stronger argument for group rights under the ERA than under the fourteenth amendment.

277. U.S. CONST. art. I, § 8, cl. 3.

278. U.S. CONST. amend. XIV, § 5.

279. *See supra* notes 7-18 and accompanying text.

280. *See, e.g., Equal Rights for Women, supra* note 23, at 900-02; *Gender and the Constitution, supra* note 110, at 23; STATEMENT ON THE EQUAL RIGHTS AMENDMENT, *supra* note 74, at 22-24. *But see* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (holding that the privacy rights of major league baseball players were subordinate to the interest of a female reporter in obtaining equal access to the locker room after the baseball game).

extreme hypothetical cases would not occur as a result of ERA ratification.[281] The underlying reason why the ERA proponents could not give complete assurance about the outcome of such extreme hypotheticals may point to a politically significant phenomenon: a growing distrust of the judicial branch of government.

This fear of government by judiciary was probably instrumental in the defeat of the ERA when it was reintroduced in Congress. The testimony before the Senate subcommittee on the Constitution was quite revealing in this regard. One of the co-sponsors, Senator Paul Tsongas of Maryland, appeared before the subcommittee to testify in favor of ratification. The principal questioner was Senator Orrin Hatch of Utah.[282] Hatch pressed Tsongas for answers to particular issues in order to build a record of what the chief sponsors of the ERA intended as the impact of the ERA on certain anticipated issues.[283] Hatch asked whether the ERA would invalidate the practice of giving a hiring preference to veterans because most veterans are men. Tsongas replied rather curtly: "[W]e have what is called the Supreme Court, which is in a position to resolve those particular matters."[284] Hatch asked whether the ERA would prohibit the current restrictions on federal funding for abortions. Tsongas said the courts would answer that question.[285] Would the ERA call into question the existence of private women's colleges or, at least their tax-exempt status? Again, Senator Tsongas responded that, while he had personal views on the question, the impact of the ERA on each issue would be resolved in the courts.[286] Senator Hatch posed many other specific cases and requested what the ERA would mean in each particular instance. Among them were: Would the ERA require denial of tax exemptions to religious groups, such as Roman Catholics, Mormons, or Orthodox Jews, which practice some forms of sex discrimination?[287] Would the ERA require housing discrimination laws to include marital status as prohibited ground of discrimination?[288] Would the ERA override seniority systems because women often have less seniority than men?[289] To all of these questions, Tsongas replied that it would be up to the courts to decide.

Many of the issues had, in fact, been raised and answered in the courts, albeit for the time being. Would the ERA change those previous answers? The intent of Congress with respect to the meaning of any constitutional amendment is, of course, of prime importance in subsequent constitutional

281. *See* J. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS 1-8 (1979); Dow, *supra* note 4, at 58-61.

282. For an expression of Senator Hatch's views on the ERA, see O. HATCH, THE EQUAL RIGHTS AMENDMENT: MYTHS AND REALITIES (1983).

283. *Hearing on the Equal Rights Amendment before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 99th Cong., 2d Sess. 27, 33 (May 26, 1983) (statement of the Hon. Paul E. Tsongas) [hereinafter cited as *Hearings*].

284. *Id.* at 31.

285. *Id.* at 34.

286. *Id.* at 35.

287. *Id.* at 36.

288. *Id.* at 47, 48.

289. *Id.* at 58.

litigation.[290] The absence of substantive content established by Congress beyond broad statements about "grant[ing] women full status as equal citizens under the Constitution"[291] indicates that many important decisions would be delegated to the nonelected judicial branch.

The idea of the judicial branch of government interpreting an open ended provision of the Constitution is not a novel one. The courts have long served an important *democratic* function of deciding problems under the basic provisions of the Constitution which had become too politically dangerous for the legislature to resolve. The best example is probably the case of *Brown v. Board of Education*,[292] where the Supreme Court struck down the long-standing practice of "separate but equal" schools and brought the law into conformity with the fundamental policy of the Constitution. The judiciary has served an indispensible function in keeping the laws in line with the basic principles of the regime.

Nevertheless, there is a reasonable ground for questioning whether such a broad delegation of discretionary power is wise. Delegation of discretionary power to a judiciary which is essentially political poses a significant problem. A judge does not practice politics in the traditional sense of reaching a resolution through compromise and consensus. In fact, courts are attractive to advocates of the ERA because courts can be used to achieve political solutions without the participants having to resort to politics in the traditional sense. Moreover, there has been much praise for the jurist who is able to "transcend" the letter of the law and decide the case on the basis of what the judge believes it right or what is best for the country.[293] As a result, many judges "transcend" the law and impose their own personal views on the outcome of case.

A recent book by Richard Neely, a justice on the West Virginia Supreme Court of Appeals, is illustrative. His book is entitled *How Courts Govern America*[294] and Judge Neely speaks very candidly about how he thinks judges decide cases involving public policy:

> Since every conceivable issue known to government can be phrased in constitutional terms, and since a craftsmanlike judge can write in proper legal form an opinion justifying almost any result he wishes to achieve, what the Founding Fathers intended in 1789 when the Constitution was ratified is not what constitutional law is now about. Constitutional law is neither about a 'constitution,' nor about 'law,' rather, constitutional law is about *institutions* and the way they interact with other institutions.[295]

If this is true, constitutional law (and the Constitution) is in a crisis. Neely says there are no legal restraints on judges, only institutional and polit-

290. *See, e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).
291. *Hearings, supra* note 281, at 2 (prepared Statement of Sen. Tsongas).
292. 347 U.S. 483 (1954).
293. *See, e.g.*, G. WHITE, EARL WARREN: A PUBLIC LIFE (1982).
294. R. NEELY, HOW COURTS GOVERN AMERICA (1981).
295. *Id.* at 10.

ical restraints. His attitude reflects a growing cynicism among judges and among law professors concerning the possibility of principled constitutional interpretation.[296] In the academy, one is considered naive if one believes that the text of the Constitution or the original intent of the framers provides any worthwhile guidance for constitutional interpretation.[297] Anyone so primitive as to harbor such beliefs is labeled an "interpretivist."[298] Judges are now urged to look to their own values in reaching a decision in what are now commonly called human rights cases, rather than constitutional law cases. For example, Professor Michael Perry writes:

> Inevitably, each justice will deal with human rights problems in terms of the particular political-moral criteria that are, in that justice's view, authoritative.
>
> . . . .[W]hat the notion of moral evolution *can* help explain and justify is a policymaking institution (the Court) whose members, not every one of which has the same criteria of moral rightness, deal with moral problems, not passively, by bowing to established moral conventions, but actively, creatively, by subjecting those conventions to critical reevaluation. It can explain and justify a policymaking institution whose morality is 'open,' not 'closed'—an institution that resolves moral problems not simply by looking backward to the sediment of old moralities, but ahead to emergent principles in terms of which fragments of a new moral order can be forged.[299]

It should be evident that this type of constitutional "interpretation" is oligarchical in nature. Judges who act as "prophets" can impose personal "visions" on the citizenry. This is antithetical to the principle of equality and ultimately undermines the authority upon which judicial power is based. A judiciary which has no respect for the views of its citizens will not inspire loyalty to the authority of judicial power. The role of the courts is rather to persuade and thus win consent to the principle of equality.

The fear of judicial activism in connection with the ERA is not entirely well founded because, as this Article has attempted to demonstrate, the Supreme Court has followed a generally moderate course in the area of gender discrimination. The development of the law by the Court has been measured and radical shifts in approach have been disfavored. Nevertheless, the fear of revolution by interpretation or government by the judiciary has some legitimate basis. Until the judiciary can convince an increasingly skeptical public that it will exercise restraint in constitutional interpretation, consent to further expansion of judicial powers will probably be withheld.

The Equal Rights Amendment states a simple maxim that equality of rights under the law shall not be denied on account of sex. Judges should not

296. *See, e.g.*, R. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME 162-90 (1984).

297. *See, e.g.*, R. NEELY, HOW COURTS GOVERN AMERICA 17-18 (1981); DEMOCRACY AND DISTRUST, *supra* note 47, at 11-41.

298. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 11 (1982); DEMOCRACY AND DISTRUST, *supra* note 47, at 1.

299. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 111 (1982).

use this simple truth as an occasion for imposing their own personal agenda. Otherwise our democratic form of government and our Constitution will be subverted by those who have sworn an oath to defend them.