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THE EQUAL RIGHTS AMENDMENT: A NEW REASONABLENESS TEST FOR VIEWING SEX—BASED CLASSIFICATIONS

Men and women are frequently subjected to different rules in the law and society. The American legal system currently contains forms of common law principles which result in irrational discrimination on the basis of sex and articulation of a national policy against sex discrimination has not yet been voiced by the judicial system.

On March 22, 1972, the following constitutional amendment was submitted by Congress to the legislatures of the states for ratification:

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

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

The Equal Rights Amendment culminates an effort begun in 1923 to forbid federal and state laws which discriminate on the basis of sex. On four other occasions the Amendment has received serious congressional consideration, but failed due to doubts concerning the
meaning of the concept of "equality". The divergent views expressed by members of the House Committee on the Judiciary demonstrate that considerable uncertainty still remains regarding the concept of equality, and indicate that the debates in the state legislatures will involve such questions as: Is equality of rights with regard to sex sufficiently protected by the fourteenth amendment Equal Protection Clause, or, is specific recognition necessary? If specific recognition of sexual equality is needed, is a constitutional amendment mandatory, or in the alternative, would a statute serve the same purpose? If a constitutional amendment is mandatory, what test will be applied to legislation to determine if the Amendment has been violated? And finally, what impact will the Equal Rights Amendment have on existing law?

Arguments for and against passage of the Amendment have centered around the possibility that sexual equality will be found to be included within the scope of the fourteenth amendment. The United States Supreme Court's interpretation of the Equal Protection Clause, therefore, is crucial to deciding if specific recognition of sexual equality is needed.

Most of the early proponents of equal rights for men and women argued that equal status under law could best be achieved by judicial inclusion of sex discrimination under the protection afforded by the Equal Protection Clause. It was believed that the genius of the Constitution, with its capacity through judicial interpretation for growth and adaptation to changing conditions and human values, would provide sufficient protection against sex discrimination.

The Court has not developed a precise formulation of the concept of equal protection; rather, it has continued to hold that the fourteenth amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.

6. See for example USCCAN, at 845. For a general discussion of the concept of "equality", see Note, Sex Discrimination And Equal Protection: Do We Need A Constitutional Amendment, 84 HARV. L. REV. 1499 (1971).
7. U.S. CONST. amend. XIV, § 1.
8. See Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Law, 48 Neb. L. Rev. 131 (1968) [hereinafter cited as Kanowitz]; Note, Classification on the Basis of Sex and The 1964 Civil Rights Act, 50 IOWA L. REV. 778 (1965); Note, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nw. U.L. REV. 481 (1971). The possibility of judicial inclusion of sexual equality under the Equal Protection Clause was the hope of the Committee on Civil and Political Rights. See CCPR, at 36, 37. See also Brown, supra note 4, at 875.
The constitutional safeguard is violated only at the point at which the classification made becomes "palpably arbitrary,"\textsuperscript{11} or constitutes an "invidious discrimination".\textsuperscript{12} Since the only requirement enunciated by the Court is that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation in which it appears,\textsuperscript{13} such a classification will not be found offensive to equal protection if any state of facts reasonably may be conceived to justify it.\textsuperscript{14} The Court has warned that the broad language of the Equal Protection Clause will not be stretched to dryly logical extremes,\textsuperscript{15} nor interpreted divorced from its historical roots.\textsuperscript{16} Although sometimes used to protect against other types of discrimination, the Court has on several occasions been cautioned that the fourteenth amendment was designed primarily to prohibit the states from discriminating against persons on account of their race and, therefore, cannot be expanded to prohibit every discrimination between groups of people.\textsuperscript{17} Thus, the formulation of the equal protection concept to date demonstrates that absolute equality between classes of persons is not required.

The nature of the scrutiny which sex discrimination has received is revealed in the reasoning of Reed v. Reed.\textsuperscript{18} Reed presented the Court with a challenge to an Idaho statute which gave preference to the father in the administration of a deceased child's estate. Speaking for a unanimous Court, Chief Justice Burger found that in the context of administration of estates, the mandatory statutory male preference could not be justified solely on the basis of sex and was therefore violative of the Equal Protection Clause.

The Court's opinion will likely be remembered more for what it omitted than what it contained.\textsuperscript{19} In addition to providing little or no guidance to lower courts to aid them in dealing with the "welter of discordant decisions"\textsuperscript{20} already brought under various claims of sex

\textsuperscript{19} See 1972 Wis. L. Rev. 626 (1972).
\textsuperscript{20} Id. at 631.
discrimination, the failure of the Court to consider the possibility of a legitimate state interest in the administration of estates raises serious doubt as to the real basis for the Court's decision. The Court made no effort to discuss and clarify the problem of whether classification on the basis of sex was inherently "suspect" and subject to a more rigid standard of scrutiny by the Court,\(^{21}\) or, whether sexual equality was in the nature of a basic civil right and subject to a presumption of invalidity absent a clear and convincing demonstration by the state of an overriding purpose or interest.\(^{22}\) Finally, if Reed reflects a standard of review which requires that the classification merely be reasonable, the Court did not clarify what made this particular classification unreasonable as opposed to those classifications based on sex which have been sustained in the past.\(^{23}\)

The reasoning process used to arrive at the holding in Reed, coupled with the rather conclusory language of the opinion, suggest that the Court did not intend the case to further the proposition that sex discrimination was per se included within the Equal Protection Clause of the fourteenth amendment.\(^{24}\) Not only did Reed fail to place sexual equality squarely within the Equal Protection Clause, the Court avoided an opportunity to eliminate confusion when analyzing legislation that adopts classifications based upon sex. Reed therefore, strongly suggests that there is little likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality without regard to sex.\(^{25}\)

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\(^{21}\) The term "suspect" was first used by Justice Black, writing for the majority in Korematsu v. United States, 323 U.S. 214, 216 (1944). Classifications generally deemed "suspect" are those involving characteristics over which the individual has no control—race, alienage, wealth, illegitimacy—and which are seldom descriptive of an individual's capacities or propensities. For a list of those classifications held "suspect" see note 48 infra.

\(^{22}\) "Basic" civil rights, variously termed "fundamental interests" or "fundamental rights", are those rights which attach to a person by the mere fact of citizenship. Such rights have generally been seen to emanate from the rights already enumerated in the Bill of Rights. For a list of those rights held "basic" see note 50 infra.


\(^{24}\) This suggestion is further confirmed by the decision in Alexander v. Louisiana, 405 U.S. 625 (1972), where the Court refused to reach the issue of sex discrimination in the selection of juries.

\(^{25}\) Similar conclusions were reached prior to the decision in Reed by other commentators. See Brown, supra, note 4 at 875; Murray & Eastwood, supra note 9, at 236; Note, supra, note 6, at 1502. See generally Griffiths, The Law Must Reflect The New Image of Women, 23 HASTINGS L.J. 1 (1971) [hereinafter cited as Griffiths].
If specific recognition of sexual equality is necessary to guarantee equality of rights between the sexes, legislative solutions to discrimination on the basis of sex have apparently not fulfilled this need. One example of legislation that has not filled this constitutional gap is Title VII of the Civil Rights Act of 1964.26

Title VII prohibits employers, employment agencies and labor organizations in industries affecting commerce from discriminating on the basis of race, color, religion, sex or national origin in their employment practices. Despite the fact that Title VII has served as the basis for some significant challenges to present employment discrimination practices, it also contains serious shortcomings which have diluted its remedial effect. For example, Title VII is limited to employers of twenty-five persons or more, exempts educational institutions27 and government agencies, and permits discrimination on the basis of sex where gender is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise.28 Moreover, the agency created by the Act to administer the Title and set guidelines for employers—the Equal Employment Opportunity Commission—has no enforcement powers to compel adherence to its rulings and, therefore, the Commission must resort to the courts for enforcement.29

The treatment which the Title has received in the courts has accentuated what might be considered its inherent defects. The presence of the reasonableness test in the Act has permitted a wide divergence of opinion among courts as to the types of sex classifications which are permissible within Title VII.30 The easy availability of the bona fide occupational qualification exception, as interpreted by courts, has evoked the criticism that the exception might be construed so as to swallow the rule.31 And, notwithstanding the fact that the United

States Supreme Court has stated that the guidelines promulgated by the Equal Employment Opportunity Commission are to be given "considerable weight," in practice these guidelines are often ignored.

The approach many courts have taken in interpreting Title VII and the reasonableness of statutory sex classifications have not had the effect the proponents of legislative change envisioned. The major difficulty with a legislative approach to the problem of sex discrimination is that there are many areas which need attention and no one statute can effectively tackle them all. For example, Title VII does not prevent sex discrimination in public accommodations nor unequal pay scales in equal or substantially similar jobs. Even assuming Congress could justify federal intrusion into the police powers of the states by means of the Commerce Clause or section five of the fourteenth amendment, the burden placed on Congress might well result in piecemeal legislation which would not effectively solve the problems at which it is directed. Finally, commentators have argued that because sex discrimination is so deeply and extensively ingrained in our legal system, federal legislation alone cannot assure its elimination.

The inadequacies of the "judicial inclusion" and "piecemeal legislative" approaches in removing sex discrimination have provided powerful arguments for the proponents of the Equal Rights Amendment. The major motivating force behind the campaign to secure ratification

34. For discussions of the myriad of state prohibitory and protectory laws drawn on the basis of sex, see 38 BROOKLYN L. REV. 789, 796 (1972); Murray & Eastwood, supra note 9, at 253; Note, supra, note 6, at 1300, 1501. See also Freeman, The Legal Basis of the Sexual Caste System, 5 VAL. U. L. REV. 203 (1971).
38. Griffiths, supra note 25, at 10; Brown, supra note 4, at 872.
of the proposed Amendment has been the apparent failure of the Supreme Court to eliminate sex discrimination through the vehicle of the fourteenth amendment Equal Protection Clause.\textsuperscript{39} In addition, the proponents of a constitutional amendment have advanced other compelling arguments in support of ratification.

Unlike a statute, an amendment would be able to reach deep into the well of state law and would be a firm expression of a national commitment to eliminate sex discrimination.\textsuperscript{40} Furthermore, an amendment would at once: provide clear, constitutional authority for protection from sex discrimination; be highly symbolic; guarantee a hearing in the courts for everyone who claimed to be oppressed by an actionable sexual distinction; and have the appearance of permanency. Finally, the adoption of an amendment would have the immediate advantage of creating a uniform, coordinated, objective standard against which all present and future law could be measured, and could potentially guarantee the elimination of every vestige of irrational sex discrimination.\textsuperscript{41}

If the Amendment is ratified, it appears certain that there will be immediate effects upon our legal system. Opponents of the Amendment, perceiving numerous potential dangers with this approach, argue that the very sweep of the language of the Amendment is its most serious weakness.\textsuperscript{42} The dissenting views of the Honorable Emanuel Cellar, Chairman of the House Committee on the Judiciary, are typical of those voiced in opposition to the Equal Rights Amendment.

I stress we are dealing with a constitutional amendment. Every word thereof should have exacting scrutiny. It would be irresponsible to dismiss the language as a mere declaration of policy without consideration of the possible injurious effects that could flow therefrom. In all the swirling arguments and differing interpretations of the language of the proposal, there has been very little thought given to the triple role most women play in life, namely, that of wife, mother, and worker. This is a heavy role indeed, and to wipe away the sustaining laws which help to tip the scales in favor of women is to do injustice to millions of women who have chosen to marry, to make a home, to bear children, and

\hspace{1cm} 39. "There never was a time when decisions of the Supreme Court could not have done everything we ask today . . . . The Court has held for 98 years that women, as a class, are not entitled to equal protection of the laws. They are not 'persons' within the meaning of the Constitution." Hon. Martha W. Griffiths, speaking on H.J. Res. 264, 91st Cong., 2d Sess. (1970), reported at 116 Cong. Rec. H7953 (daily ed. August 10, 1970). \textit{See also USCCAN}, at 837.

\hspace{1cm} 40. \textit{Brown, supra} note 4, at 884, 885; \textit{Note, supra}, note 6, at 1519; \textit{USCCAN}, at 837.

\hspace{1cm} 41. \textit{Griffiths, supra} note 25, at 11, 14.

\hspace{1cm} 42. \textit{Note, supra}, note 6, at 1519.
to engage in gainful employment as well.\textsuperscript{43}

Since a constitutional amendment cannot distinguish between laws which are to be retained and those which will be found unreasonable, it lacks the specific remedial nature of a statute, and, therefore, could result in challenges to socially desirable legislation. The House Committee on the Judiciary, which reported favorably on the Amendment, felt constrained to caution against a rigid interpretation of Section 1 so as not to achieve undesirable results, especially with respect to existing law, such as "protective" legislation designed to accomplish worthy social goals.\textsuperscript{44}

If specific recognition of sexual equality is needed in the form of a constitutional amendment, and the Equal Rights Amendment is ratified, how the Court will read the language of the Amendment becomes important to the fate of legislation measured in light of its provisions.

However, the real question is not \textit{how} the Court will read the wording of the Amendment, but rather, \textit{which} judicial yardstick the Court will use in future sex discrimination cases. It is the nature of the classification, as perceived by the Court, which is of crucial importance to the manner in which the statute is read. If the Court reasons that the Equal Rights Amendment represents a major change in social policy toward equality of treatment without regard to sex, it may elevate any distinction made on the basis of sex to the status of a "suspect" classification, or, may even view the freedom from discrimination on the basis of sex as a "fundamental" civil right.\textsuperscript{45} The question then is what test the Court will use when it considers the proposed Amendment for the first time.

The Court has, after some initial hesitation,\textsuperscript{46} consistently upheld statutory classifications based on sex where the distinction was reasonably related to the purpose of the legislation involved.\textsuperscript{47} The continued adherence to the principle that sex is a valid basis for classification, apparently reaffirmed in \textit{Reed}, reveals that the Court is not prepared to re-examine that premise. Therefore, past decisions of the Supreme Court indicate no tendency to look beyond traditional assumptions and tests for validity of classifications based on sex.

\textsuperscript{43} USCCAN, at 845, 846.
\textsuperscript{44} USCCAN, at 837, 838. \textit{See also} Kanowitz, supra note 8, at 181.
\textsuperscript{45} For the view that the Equal Rights Amendment can only be read in "absolute" terms, \textit{see} Brown, supra, note 4, at 892, 893.
\textsuperscript{46} \textit{See} Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{47} \textit{See} Muller v. Oregon, 208 U.S. 412 (1908); and cases cited in note 23 supra.
There is no doubt that the elevation of distinctions based on sex to the status of a "suspect" classification would be a significant step in the direction of the removal of sexual inequality. A statute which made a sex distinction would bear a strong presumption of unconstitutionality. The similarities between race and sex discrimination are striking, because sex, like race, is highly adaptable to over broad generalizations based on visible differences. The precedents set by the Court in the race discrimination area should provide impetus and direction for adoption of the "suspect" classification interpretation.48 Although the Court has given no indication that it intends to adopt the "suspect" classification test, lower courts have accepted this interpretation and their reasoning may be evidence of the manner in which the Equal Rights Amendment will be interpreted.49

If the Court accepts the argument that the freedom from all distinctions drawn on the basis of sex is in the nature of a "fundamental" right, then the removal of all such classifications would be virtually guaranteed. Like procreation, marriage and voting,50 sexual equality would thereby attain the status of a basic right the Court believes is contained within the penumbra of guarantees already enumerated in the Bill of Rights.51

However, recent treatment of the "fundamental" right approach casts doubt upon its possible adoption by the Court as the standard of review in cases of sex discrimination. In Dandridge v. Williams,52 in which welfare recipients sued to enjoin the application of Mary-

land's maximum grant regulation on the ground that the limitation contravened the Social Security Act of 1935 and the Equal Protection Clause of the fourteenth amendment, the Court specifically excluded "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights,"\textsuperscript{53} from active review under the "fundamental interest" approach. As an example of such social and economic regulation the Court cited \textit{Goesaert v. Cleary},\textsuperscript{54} in which it had upheld a Michigan statute prohibiting the licensing of female bartenders unless they were the wives or daughters of the male owners. Therefore, despite the fact that the "fundamental" right interpretation has been urged by litigants and commentators,\textsuperscript{55} the Court has given no indication of its readiness to accept this approach.

Whether based on historical inertia or the practical considerations of the monumental task of re-examination of existing law, the Court has continually declined to deviate from the "reasonableness" test in the review of sex distinctions.\textsuperscript{56} The test that the Court will apply in interpreting legislation under the Equal Rights Amendment then will continue to involve a determination of whether or not the sex distinction made is reasonable with respect to the goals of the statute. In spite of the absolute language of the Amendment, as long as sex classifications can be justified as distinctions grounded on "status" or "function", they will pass constitutional scrutiny.\textsuperscript{57} For example, legislation which regulates medical treatment of expectant mothers would continue to be viewed as reasonable since women are the only sex which can attain the status of pregnancy and which has the function of bearing children. The Equal Rights Amendment, therefore, will only serve the function of forcing the Court to re-examine what is "reasonable" in light of evolving social trends, and will thereby alter the standards of what is reasonable under the traditional "reasonableness" test.

The probability that this analytical approach to the constitutionality of laws which classify or distinguish on the basis of sex will be used by

\textsuperscript{53} Id. at 484.
\textsuperscript{54} 335 U.S. 464 (1948).
\textsuperscript{55} \textit{See} Brown, \textit{supra} note 4, at 909; Note, \textit{Are Sex-Based Classifications Constitutionally Suspect?}, \textit{supra} note 8, at 495.
\textsuperscript{56} For an analysis of the reasons behind the Court's lack of initiative, \textit{see} Kanowitz, \textit{supra} note 8, at 136; Note, \textit{supra} note 6, at 1505. \textit{See also} Reed v. Reed, 404 U.S. 71 (1971); Alexander v. Louisiana, 405 U.S. 625 (1972).
\textsuperscript{57} "Of course, the presence of the Amendment in the Constitution would not be entirely without special effects. In order to achieve the results suggested . . . the judiciary would have to overcome the specific language of the Amendment. But the point that must be stressed is not only that this would not be impossible of achievement, but that judges could in fact do this very easily, adopting the analytical approach (functional analysis) mentioned earlier." Kanowitz, \textit{supra} note 8, at 182.
the Court reveals that each area in which sex discrimination exists will need to be examined separately. Without purporting to be an exhaustive compendium of all sex distinctions, the following section of the article examines some of the areas which are expected to be affected by the re-evaluation of sexual equality in light of the anticipated "reasonableness" standard.

A. EMPLOYMENT DISCRIMINATION

1. Job Opportunities

One of the more important areas in which sex discrimination has persisted is in equal opportunity for employment. Most employment discrimination on the basis of sex has been directed against women and based upon the traditional role women are expected to play in society.  

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Title VII of the 1964 Civil Rights Act was enacted primarily to provide equal access to the job market for both men and women and to remove the judicially sanctioned practice through which employers establish policies excluding members of one sex from employment solely upon the basis of sex. Since 1964, guidelines enacted by the Equal Employment Opportunity Commission prohibit private employers from denying access to jobs on the basis of sexual stereotypes or on general comparisons made without empirical evidence and require that sex must actually be a bona fide occupational qualification for the particular occupation involved.

59. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139, 140 (1872) [Bradley, J., concurring]. The court in Bradwell held that the right to practice law in the courts of a state was not one of the privileges and immunities belonging to citizens of the United States. See also In Re Lockwood, 154 U.S. 116 (1894); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).
Cases brought by individuals claiming employment discrimination in violation of Title VII have forced the courts to re-examine traditional assumptions regarding the employment of women. An example of this re-assessment is *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, where the employer had refused to consider a woman for the position of commercial representative on the ground that the job required performance of duties which the employer considered a woman unable to perform and attempted to justify the categorical refusal to hire women as within the bona fide occupational qualification exception to Title VII. In a carefully developed and well-articulated opinion, the court held that the fact that the job might, due to its requirements, be unromantic, did not mean that it was functionally related to sex, and hence could not reasonably fall within the bona fide occupational qualification exception. The employer could not justify such an arbitrary exclusion on the basis of physical abilities because the difficult features of the position meant nothing more than that some women, and some men, might not wish to perform such tasks.

As *Cheatwood* explicitly rejected physical differences between the sexes as the sole basis for a blanket prophylactic rule regarding employment of one sex, *Diaz v. Pan American World Airways, Inc.* rejected psychological differences between the sexes as the sole basis for exclusion from employment. In *Diaz*, a male had been denied the position of flight cabin attendant on the basis that female employees could better provide the personal and psychological comfort to passengers in the closed environment of an airplane cabin. The court held that the psychological role allegedly played by a female could not be used as a justification for such a categorical exclusion since the employer did not demonstrate that sex was an absolute occupational necessity. Moreover, the mere fact that passengers may have preferred female employees was irrelevant, because the test for a bona fide occupational qualification is necessity, not business convenience. *Cheatwood* and *Diaz* stand for the principle that categorical denials of the opportunity to earn a living without regard to individual capacities, needs and talents are in violation of the prohibition against sex discrimination contained in Title VII.

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61. 442 F.2d 385 (5th Cir. 1971), cert. den. 404 U.S. 950 (1971). See also *Hailes v. United Air Lines*, 464 F.2d 1006 (5th Cir. 1972).
Despite the success men and women have had in establishing equal access to the job market in general, some areas of sex discrimination remain unaffected. In the area of equal access to professional sports, the courts have been totally unresponsive to claims by women that statutes prohibiting women from public exhibitions of boxing and wrestling are violative of the Equal Protection Clause. Although justified on the basis of public health, safety and morals, these statutory interpretations are clearly rooted in traditional assumptions regarding the role of women in a male-oriented society.

Similarly, the courts have continually denied women access to jobs in taverns and all-night restaurants. Viewed as being within the police power of the state, local “bar-maid” ordinances have been upheld as protective of the public comfort, health, safety, morals and welfare.

Some recent cases have questioned whether these protective laws conflict with Title VII. For example, the California Supreme Court held in *Sail'er Inn, Inc. v. Kirby*, that a California statute providing criminal penalties for employment of women in taverns was violative of the California Constitution, Title VII of the 1964 Civil Rights Act, and the fourteenth amendment Equal Protection Clause. Despite the attempt of the court to circumvent apparent conflict with *Goesaert v. Cleary*, its holding clearly draws the underlying rationale of that decision into question.

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66. Henson v. Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953). See also Goesaert v. Cleary, 335 U.S. 464, the Court stated:

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

See text accompanying note 54 supra.
70. “[The statute] . . . appears to be based upon notions of what is a 'ladylike' or proper pursuit for a woman in our society rather than any ascertainable evil effects of permitting women to labor behind those 'permanently affixed fixtures'
Sail'er Inn is prophetic of the treatment which categorical classifications will receive after ratification of the Equal Rights Amendment. Ratification will be an indelible sign to the Court that the American people believe that the law must reflect a new image of women. The Amendment will compel the Court to give full and equal effect to the proposition that the right to work is one of the basic civil liberties enjoyed by all persons, regardless of their sex, and exhibit that the Court must interpret the reasonableness of a sex classification without consideration of sex roles or stereotypes.

2. Promotion and Seniority

After considering the general re-assessment of the role of women in employment and the success enjoyed by male and female litigants in challenging discriminatory hiring practices, it is not surprising that discrimination in the directly related areas of promotion practices and seniority benefits has been held to be violative of Title VII of the 1964 Civil Rights Act. In Weeks v. Southern Bell Telephone and Telegraph Co., a female employee was refused a promotion to the position of switchman because the position required the lifting of thirty pounds of equipment at regular intervals as well as other strenuous activities. The employer argued that because of the obvious physical differences between men and women, a woman would be unable to perform these required tasks. The court held this sex distinction to be precisely the type of stereotyped classification which Title VII was enacted to correct and, therefore, the employer would have to consider individual qualifications and capabilities in promotion practices.

Bowe v. Colgate-Palmolive Co. involved a similar challenge by female employees. After finding that the general exclusion of women from certain positions within the promotional structure of the employer was violative of Title VII, the court announced the various factors an

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known as bars. Such notions cannot justify discrimination against women in employment." Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 542, 95 Cal. Rptr. 329 (1971).

"The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . . ." Goesaert v. Cleary, 335 U.S. 464, 466 (1948). See note 66 supra.

71. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Traux v. Raich, 239 U.S. 33, 41 (1915). See also Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) [Douglas, J., dissenting].


employer must use when considering a person for promotion: individual qualifications and conditions, physical capability, and physiological make-up; the climactic conditions; and the manner in which any weights are to be lifted. Arbitrary denial of the opportunity for advancement without consideration of these factors then is a direct violation of Title VII.

Practices which limit participation in seniority programs, in whole or part, are also susceptible to attack as violative of Title VII. In *Danner v. Phillips Petroleum Co.* a female employee was discharged by her employer as part of an economy measure and because of her lack of seniority, she could not shift to another position. Under the company seniority plan only male employees were entitled to participate and accrue seniority. The court held that the clear effect of this policy, as applied, constituted a grossly unfair instance of sex discrimination.

Lower courts have established the principle that promotion is to be based upon individual merit and the assessment of individual capabilities rather than stereotyped characterizations related to sex. Promotional and seniority plans must provide equal access to jobs for members of either sex. Rather than forging any new paths, the Equal Rights Amendment will solidify these principles and provide them with Constitutional authority.

3. *Wages*

Despite apparent laxity in other areas, the legislative and executive branches of the federal government have taken significant action to ensure equal pay for equal work. The Equal Pay Act of 1963, which

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was specifically enacted to require that male and female employees receive equal compensation for equal work, has served as the basis for numerous suits by the Secretary of Labor to compel compliance with its provisions. For example, in *Shultz v. Wheaton Glass Co.*,\(^7\)\(^8\) the Secretary brought suit against an employer for injunctive relief and back pay, alleging overt pay discrimination against female employees. The employer, who had been paying female employees ten per cent less than male employees, attempted to justify the disparity by arguing that men had additional responsibilities and were hired on a completely different basis than women. The court held that although the work performed by men and women at the employer's plant was not exactly the same, it was virtually identical, and, therefore, the disparity in pay was violative of the Act.

In *Shultz v. First Victoria National Bank*,\(^7\)\(^9\) the employer attempted to justify its wage discrimination against women on the ground that male employees were engaged in an extensive training program which involved job rotation designed to provide experience at various positions within the employment hierarchy. Looking through form to substance, the court found that the "training program" was a sham, created as a post-event justification for a disparate pay scale, and held the pay scale in violation of the Act.

Therefore, disparities in pay based upon alleged differences in on the job performance cannot stand under the Act where the work actually performed is substantially similar in nature or requires equal skill, effort and responsibility, or where the extra work performed is designed solely to circumvent the provisions of the Act.\(^8\) But, even though litigants have been successful in challenging discriminatory pay practices as unreasonable under the Equal Pay Act of 1963, courts have not been convinced that discrimination between the sexes in the establishment of minimum wage scales is violative of the Act or the fourteenth amendment Equal Protection Clause.

The justifications for this discriminatory treatment in favor of women appear in *West Coast Hotel Co. v. Parrish*.\(^8\)\(^1\) In a five-four de-
cision, the Court upheld a Washington statute which provided minimum wage scales only for women on the ground that it was within the power of a state to pass protective legislation to insure the health, safety, morals and welfare of some (though apparently not all) of its citizens. The language of the opinion clearly delineates the Court's view regarding the position of the sexes in employment. Quoting at length from its decision in *Muller v. Oregon*, the Court reasoned that

... woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and ... her physical well-being becomes an object of public interest and care in order to preserve the health and vigor of the race.

Hence she was properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.

Apparently believing that the rationale of *West Coast* was still valid despite considerable change in social views, the court in *Bastardo v. Warren* recently refused to overturn a Wisconsin minimum-wage law which applied only to women and minors. The court disagreed with the argument that the right to a minimum wage was a "fundamental interest" and that any classification based on sex was inherently "suspect". Instead, it found that the burden would rest on the male plaintiffs to demonstrate that the non-inclusion of men in the statute was an unreasonable classification under the traditional equal protection test, and granted leave to amend for that purpose.

It appears certain that ratification of the Equal Rights Amendment would require a re-assessment of the reasonableness of such classifications in order to attain the goal of equal treatment without regard to sex. Also, it could be argued that, just as there is a necessity for equal pay for equal work under the Equal Pay Act of 1963, equality in pay scales demands that all qualified workers, and not only those perceived by courts and legislatures as being unique and in need of protection, have the benefit of a statutory minimum designed to guarantee a living wage. Interpretation of the Equal Rights Amendment should require that legislation enacted for protective purposes conform to the principle of equal treatment without regard to sex.

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82. 208 U.S. 412 (1908). See text accompanying note 85 infra.
83. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394 (1937).
84. 332 F. Supp. 501 (W.D. Wis. 1971).
4. Hours

Most of the constitutional litigation in the area of employment discrimination has focused upon protective legislation regulating the maximum number of hours a person may work. This protective legislation was enacted to correct abuse of women in employment. The seminal decision in this area is *Muller v. Oregon*, where the Court upheld a 1903 Oregon law which prohibited women from working more than ten hours per day in mechanical establishments, factories or laundries. The reasoning of the Court was based entirely upon the alleged physical dependence of women upon men.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength.

Apparently mesmerized by precedent, the Court continued to uphold legislation regulating the hours women could work in employment situations such as: factories, hotels, telephone or telegraph offices, millineries, dressmaking shops and restaurants.

Despite the Supreme Court authority sustaining such legislation, more recent decisions have begun to re-assess the reasonableness of hours limitations in light of modern working conditions and the evolving trend toward sexual equality. In *Caterpillar Tractor Co. v. Grabiec*, the court held that the Illinois Female Employment Act was violative of the 1964 Civil Rights Act since the Illinois statute required employers to discriminate against their employees on the basis of sex with regard to compensation, terms and conditions of employment, privileges, and working hours. In a similar decision, the

85. 208 U.S. 412 (1908).
86. Id. at 421.
89. ILL. REV. STAT. ch. 48, § 5 (1937).
court in *Kober v. Westinghouse Electric Corp.* held that the Pennsylvania Women's Labor Law of 1913 was invalid as a *per se* violation of Title VII since the Pennsylvania statute regulated the wages of women employees only, and, therefore, discriminated solely on the basis of sex.

Current challenges to maximum hours legislation demonstrate that the underlying rationale of *Muller* is open to serious question. Clearly, if there is a right to work at the occupation of one's choice, limitations upon the hours a person may work are a restraint on the fundamental right of a citizen to control his or her own time. Ratification of the Equal Rights Amendment will pressure the courts to re-examine the premises formulated in prior decisions.

Maximum hours legislation was historically considered to be a social benefit. However, such protective legislation impedes the drive for equality in employment without regard to sex. Legislation that intentionally confers a "benefit" upon one sex, by limiting the number of hours a person of that sex may work, should be construed as a detriment to the other sex, and, therefore, a violation of equal protection. Faced with the empirical evidence of present working conditions for male and female employees, and bearing in mind evolving social trends, the courts should find that this type of protective legislation is unreasonable. The Amendment would have the dual effect of clarifying any doubt that the trend of social evolution is toward sexual equality, and indicating that these protective laws cannot meet the stringent goal of equal opportunity for employment and advancement without regard to sex.

5. *Marriage and Pregnancy*

Employment discrimination on the basis of marital status or stage of pregnancy has also received close scrutiny by the courts. In *Sprogis v. United Air Lines, Inc.*, a stewardess had been dismissed from her job pursuant to a rule of the employer which required that all stewardesses must be unmarried. In addition to arguing that the non-marriage requirement was a bona fide occupational qualification, the employer

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92. Truax v. Raich, 239 U.S. 33, 41 (1915).
94. 444 F.2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971).
contended that in fact it was not discriminating against all women, but rather against married women only, a situation not encompassed within the scope of Title VII. The court held that the non-marriage requirement bore absolutely no relationship to job competence and could not be justified as a bona fide occupational qualification. The court countered the employer's secondary argument with the following reasoning:

The scope of Section 703(a)(1) is not confined to explicit discrimination based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. . . . The effect of the Statute is not diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex. . . .

Therefore, discharge of employees solely on the ground of marital status has been held to constitute a clear and unexplainable discrimination on the basis of sex.96

Most of the laws regulating the treatment of pregnant women as employees are the result of legislative judgment regarding the health, safety and welfare of the mother and her child. The validity of the traditional assumptions invoked to uphold these laws—the weaker physical structure of women and the perceived burdens of motherhood—is questionable.

_Cohen v. Chesterfield County School Board_97 presented the court with a challenge to a school board regulation which required that a teacher who becomes pregnant must take a maternity leave at the end of the fifth month of pregnancy. The court held that the employer had demonstrated no medical or psychological reasons for the regulation, and had not sustained the burden of proving that physical safety or the ability to perform teaching duties was in any manner impaired by pregnancy. Moreover, the court found that even if it accepted the proposition that pregnancy was a physical disability within the meaning of the employer's regulations, the school board had treated this disability differently than other medical disabilities without rational justification.

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95. _Id._ at 1198. _See also_ 29 C.F.R. 1604.3(a) (1965).
In a similar case, the employer argued that permitting a pregnant woman to remain on the job indefinitely would chance delivery in the classroom, and created the additional problem of engaging substitute teachers on short notice. The court in *Williams v. San Francisco Unified School District*\(^9\) held that the school district had presented no medical proof that a woman could not fulfill her duties up to the time of delivery or that the hypothetical situation suggested had any substantial probability of occurrence. Furthermore, the court found that the school district could, and often did, find substitute teachers on short notice.

*Cohen* and *Williams*\(^9\) establish the principle that pregnancy cannot be used as a surface justification for discrimination on the basis of sex. Employers must judge the capacity of an individual to fulfill the duties of employment only upon individual capacities, characteristics and abilities and not upon broad policies founded in unsubstantiated assumptions.

Notwithstanding the reasoning of *Cohen* and *Williams*, the treatment of challenges to employment discrimination based on marital status or stage of pregnancy has not been uniform.\(^1\) For example, in *Cooper v. Delta Air Lines, Inc.*,\(^1\) Delta refused to hire a married woman as a stewardess on the same grounds as those raised by United Air Lines in *Sprogis*. Contrary to the reasoning in *Sprogis*, the court in *Cooper* accepted the argument by the employer that discrimination against married women only was not violative of Title VII, and thus the employer was not guilty of sex discrimination within the meaning of the Act. *La Fleur v. Cleveland Board of Education*\(^2\) found that a regulation very similar to the rule invalidated in *Cohen* was a reasonable measure to minimize disruption of classroom programs due to unforeseen complications in the teacher's condition. *La Fleur* accepted without question the arguments of the employer regarding the health and safety of the employees and the difficulty in obtaining substitute teachers.

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Doe v. Osteopathic Hospital of Wichita, Inc.\textsuperscript{108} indicates that Cooper and La Fleur are not in the mainstream of current thought on employment discrimination. In Doe, a female hospital employee was dismissed due to the fact that she was both pregnant and unwed. The court found that neither the plaintiff's marital status nor stage of pregnancy had any relevance to the performance of her duties as an employee. Neither ground could be reasonably justified as a bona fide occupational qualification.

Ratification of the Equal Rights Amendment would have the effect of causing Doe, Cohen and Sprogis to be accepted as the better view. Freedom from discrimination on the basis of sex surely means that compulsory maternity leave is an "unreasonable" sex classification within the language of the Equal Rights Amendment absent a clear showing that the particular pregnancy involved interferes with the performance of the duties of employment. Similarly, and particularly because marriage has been viewed as a basic civil right,\textsuperscript{104} the language of the Amendment envisions freedom from discrimination on the basis of marital status.

6. Retirement and Pension Plans

Perhaps the trend of decisions in promotion and seniority discrimination has influenced the courts to respond favorably to challenges made against discriminatory practices in retirement and pension programs. In Rosen v. Public Service Electric and Gas Co.,\textsuperscript{108} the male plaintiffs challenged the company retirement and pension plan on the ground that it provided for earlier retirement ages and greater pension benefits for female employees than for male employees. In spite of the fact that the employer had revised the plan during pendency of the suit, the court held that both the new and old plans were sexually discriminatory, caused injury to male employees, and had to be rescinded. Absent any factors other than sex, the court could find no reasonable justification for the beneficial nature of the plan towards women.

It seems unlikely that Congress would enact a statute banning discrimination based on sex and in so doing mean to grant special privileges to one sex at the expense of the other. Title VII rejects


\textsuperscript{104} Cf. Loving v. Virginia, 388 U.S. 1 (1967).

\textsuperscript{105} 328 F. Supp. 454 (D.N.J. 1971).
the notion of “romantic paternalism” towards women and seeks to place them on equal footing with men.106

*Bartmess v. Drewrys, U.S.A., Inc.*107 also involved a challenge to a sexually discriminatory retirement plan. There, a female employee alleged that the company retirement program was sexually discriminatory since it forced her to retire three years earlier than male employees. The court, relying on the reasoning of *Rosen*, held that the plan was violative of both Title VII and Equal Employment Opportunity Commission guidelines. In the course of its analysis of the retirement program, the court found that the classification of employees on the basis of sex was contrary to the intent of Title VII.

*Rosen* and *Bartmess*108 stand for the proposition that an employer cannot discriminate among employees on the basis of sex in the establishment of retirement and pension plans because sex is not in any way functionally related to reception of benefits. Ratification of the Equal Rights Amendment will have the impact of elevating the holdings of *Rosen* and *Bartmess* to the status of constitutionally sanctioned doctrine. If sex discrimination cannot be justified in the earlier phases of employment procedures, it cannot stand in the area of retirement and pension plans.

7. *Summation*

Courts are presently re-assessing the law in the area of employment discrimination. Traditional assumptions and sexual stereotypes have often been rejected as unreasonable in response to the evolving concept of sexual equality. The result of this judicial activity has been to broaden employment opportunities, to fix the criteria for employment, promotion and retirement, and to establish guidelines for the enactment of wage and hours legislation.

However, a clear trend toward freedom from sex discrimination in employment has not been established. For example, the unwillingness of the courts to question some protective legislation has left a considerable gap in the re-examination of existing law. The reluctance of the courts to act in these areas appears to be based upon either the general acceptance of legislative assumptions underlying protective laws or the impediment created by *stare decisis*.

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106. *Id.* at 463, 464.
Since the Amendment will have the effect of forcing a re-evaluation of the reasonableness of sex classifications, it can be expected that the present judicial re-assessment of employment discrimination will be bolstered by its ratification. More important, areas which the courts have been reluctant to examine will be subject to judicial scrutiny. The impact of the Equal Rights Amendment will be substantial because the courts will have the necessary constitutional mandate to examine every area of employment in which sex classifications exist.

B. Preferential Treatment

Employment is not the only area in which men and women have received preferential treatment or experienced sex discrimination. There continue to be other areas in which either men or women are discriminated against solely on the basis of sex.

1. Educational Opportunities

Discrimination on the basis of sex in the attainment of an education is perhaps the most fundamental and invidious form of an equal protection violation. Relying in part upon this rationale, four female applicants to the University of Virginia at Charlottesville brought suit in Kirstein v. Rector and Vistors of University of Virginia109 to compel consideration of their applications to the College of Arts and Sciences. Prior to the suit, the University of Virginia at Charlottesville had been a substantially all-male institution. The court held that even though the pattern of separation by sex in education was long established in America and had substantial historical precedents, the Commonwealth of Virginia could not deny educational opportunities to women on the basis of sex. Crucial to the court's holding was the determination that the educational opportunities offered by the University of Virginia, including its “prestige” factor, were not available in any of the other co-educational or sex-separate educational facilities operated by the state.110

The plaintiffs in Kirstein urged the court to hold that the state could not operate any educational institution separated according to the sexes. The court declined to handle the issue since

110. Since the University of Virginia had altered its policy of denying women admission on the basis of sex during pendency of the suit, the court dismissed the case as moot with leave to re-instate the cause if the university did not adhere to the plan to admit women on the same basis as men. With regard to the impact of the “prestige” factor, see Sweatt v. Painter, 339 U.S. 629 (1950).
obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?  

The questions left unanswered by *Kirstein* were specifically presented in *Williams v. McNair*. In *Williams*, male applicants sued to enjoin enforcement of a South Carolina statute which, in effect, made Winthrop College an all-female institution. The College, a state-supported educational institution, conceded that the male plaintiffs met all other admission requirements. The court found that discrimination on the basis of sex was an integral part of the state scheme of education and that all but two state-supported schools were co-educational: the Citadel was a military school for men and Winthrop College was a liberal arts school for young ladies. Also, the court found that there was no "prestige" factor present as there was in *Kirstein*, and that Winthrop College gave special attention to courses especially helpful to female students. The court held, therefore, that the maintenance of sex-separate educational facilities was not violative of equal protection.

Central to the court's holding was the finding that Winthrop College was only one small part of an overall system of state-supported higher education and that plaintiffs were free to choose from a broad range of alternatives.

While history and tradition alone may not support a discrimination, the Constitution does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason.

After all, flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned.

The impact of the Equal Rights Amendment on this area of sex-classification is difficult to predict. As the court in *Williams* noted, there is a considerable body of educational opinion holding that sex-separate education is both beneficial and desirable. It may well be that even after ratification of the Amendment, sex-separate educational

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facilities could continue to be found reasonable. Essential to this rationale, however, will be that: the sex-separate school orients its curriculum toward training the members of one sex only; the school is one part of an overall scheme of both co-educational and sex-separate educational institutions; and no prestige factor is involved. As long as alternative educational facilities are provided which are of the same general quality as the sex-separate school, individual plaintiffs may not be able to demonstrate actual harm by the denial of admission to the sex-separate school solely on the basis of sex.

On the other hand, future litigants may be successful in convincing the courts that sex-separate educational facilities rely for justification upon traditional assumptions regarding sex-roles. For example, military schools have traditionally been limited to males, either because it is assumed women do not desire to participate in a military-oriented curriculum, or that society cannot tolerate the training of women for military duty. The validity of such judgments is open to serious question in light of the evolving social trend toward sexual equality. Clearly, if the effect of sex-separate education is to foster and maintain sexual stereotypes and unsubstantiated assumptions regarding sex-roles, it is violative of both the letter and spirit of the Equal Rights Amendment. The Amendment may have the effect of causing a serious reconsideration of the reasonableness of the entire scheme of sex-separate education.

2. Personal Appearance

Related to sex discrimination in the attainment of an education is discrimination based on personal appearance, because denial of the opportunity to attend school on appearance factors forecloses the ability to attain an education. In Crews v. Cloncs, a male high school student was refused re-admission to school on the ground that the length of his hair was in violation of unpublished regulations governing personal appearance. As justification for these regulations, the school cited health and safety considerations, physical danger during sports activities and science labs, and the element of disruption among the student body caused by the presence of long-haired males. The court found that the school had demonstrated no health problems or physical dangers to any person, nor that any disturbance or disruption

114. 432 F.2d 1259 (7th Cir. 1970).
among students had actually occurred. Relying on prior decisions, the court held that there was a fundamental right to individual personal appearance and that the school had unnecessarily infringed on that right with its regulations.

Ruling upon the plaintiff's allegation that the denial of re-admission also constituted discrimination on the basis of sex in violation of the fourteenth amendment, the court in Crews reasoned:

... both witnesses admitted in their testimony that although girls engage in substantially the same activities in gym and biology classes, only boys have been required to cut their hair in order to attend classes. Although classification on the basis of sex has been held constitutional in certain circumstances, defendants have offered no reasons why health and safety objectives are not equally applicable to high school girls. On the present record therefore, we believe that defendant's action constitutes a denial of equal protection to male students.

Despite the cogent reasoning of Crews, the majority of courts which have been presented with the appearance issue have held in favor of the school regulations. These courts have either refused to recognize a fundamental right to control personal appearance, or declined to interfere in the local administration of state schools.

Where the issue of sex discrimination has been raised by litigants, these courts have afforded it only cursory treatment. For example, in King v. Saddleback Junior College District, male plaintiffs sued to enjoin the enforcement of a provision of the school dress code providing for limitations on the length of hair worn by male students. Holding that the regulations did not violate due process or equal pro-

115. See Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), where the court held that control of individual personal appearance was a fundamental right.
116. Crews, supra, 432 F.2d 1259, 1266 (7th Cir. 1970).
117. See Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Landsdale v. Tyler Junior College, 41 U.S.L.W. 2195 (5th Cir. 1972).
119. Most litigants in personal appearance cases have relied upon the fundamental right approach, basing their arguments on the cases of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), and Griswold v. Connecticut, 381 U.S. 479 (1965). The difficulties with this reliance is demonstrated by the case of Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), where the court was unable to find that such a fundamental right existed in the Constitution.
120. 445 F.2d 932 (9th Cir. 1971).
tection, the court answered the allegation of sex discrimination with
the following language:

There was no evidence of racial discrimination or that the
regulation in either case was applied in other than an even handed
manner, nor was there any evidence of unequal protection other
than the assertion that boys were treated differently than girls;
i.e., girls could have long hair and boys could not. We do not
consider the latter difference in treatment or classification as cre-
ating any substantial constitutional question.121

The reasoning of King contravenes the specific intent of the Equal
Rights Amendment. The Amendment would provide a strong basis
for challenges to appearance regulations from the standpoint of sex
discrimination because the focus of the attack on these regulations
would shift from the "fundamental right" argument to a sex discrim-
ination argument. Under this view, regulations which require that
one sex dress or appear in a particular manner would be unreasonable
sex discrimination because regulations based upon sexual stereotypes
and traditional assumptions regarding appearance bear no relationship
to functions or abilities.

3. Summation

Many instances of preferential treatment of one sex exist in society.
Litigants have raised challenges to such diverse preferential practices as:
determining domicile on the basis of the residence of the husband;122
according women more favorable treatment in the computation
of social security benefits;123 excluding fathers of illegitimate children
from the status of parent;124 requiring that males be twenty-one years
of age for marriage without parental consent but permitting females to
marry at age eighteen;125 and preferring males over females in the
administration of estates.126

The outcome of these challenges has varied with the success liti-
gants have had in convincing the courts that the particular practice

121. Id. at 939.
123. Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), cert. den. sub. nom.,
Gruenwald v. Cohen, 393 U.S. 982 (1968). See Walker, Sex Discrimination in Govern-
ment Benefit Programs, 23 HASTINGS L.J. 277 (1971). See also Frontiero v. Laird, 327
F. Supp. 580 (M.D. Ala. 1971), cert. granted, 41 U.S.L.W. 3165 (1972), where the
plaintiff challenged the Armed Forces Medical Service Plan as discriminatory against
men.
125. OPINION OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS, File #S-490,
June 30, 1972.
challenged constituted an unreasonable discrimination on the basis of sex. For example, in the area of public accommodations, two members of the National Organization for Women brought suit in *Seidenberg v. McSorely's Old Ale House, Inc.*\(^{127}\) to enjoin continuance of the defendant tavern owner's one hundred and fourteen-year-old policy of serving only men, claiming the practice violated both the Civil Rights Act of 1871\(^{128}\) and the Civil Rights Act of 1964. The court held that there was no rational basis for serving men in public accommodations and not women because sex bore no relationship to the status of being a customer. *Seidenberg* is an example of socially conscious reasoning with respect to sex discrimination because the court indicated that its decision was based in part upon the recognition of the evolving trend toward sexual equality.

Criminal statutes which provide more serious penalties for women than for men have also been successfully challenged. For example, in *United States ex rel. Robinson v. York*,\(^{129}\) a woman serving a criminal sentence petitioned the court for a writ of *habeas corpus*, alleging that the Connecticut statute under which she had been sentenced contravened equal protection because it permitted adult women to be imprisoned for periods in excess of the maximums applicable to men guilty of the same substantive crimes. The court found that the freedom from discrimination on the basis of sex was encompassed within the fourteenth amendment, accepted the argument that statutes drawn on the basis of sex should be viewed as suspect, and held that since there was no rational relationship between sex and the commission of crimes and no rational justification for longer incarceration of women as opposed to men, the statute violated the Equal Protection Clause.\(^{130}\)

All of the areas in which preferential treatment has occurred and continues to occur are premised upon the traditional roles each sex is expected to play in society. Eradication of such forms of preferential treatment will require a substantial alteration in the assumptions underlying these sex roles.

The nature of the reasonableness test employed in *Seidenberg* to invalidate the preferential treatment accorded males in public accom-

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130. For an apparently contrary view, see Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972).
modations represents the approach anticipated under the proposed Amendment. York accepted the labeling of any statute drawn on the basis of sex as suspect, thereby going beyond the reasonableness test anticipated under the Equal Rights Amendment. Even if the rationale of York is not accepted by other courts after ratification of the Amendment, the broad scope of that decision, coupled with the reasoning of Seidenberg, will at least have the function of providing a standard against which these preferential practices are to be measured.

C. RIGHTS AND DUTIES

1. Right to sue for Loss of Consortium

Sex discrimination appears in almost every facet of life, and is especially prevalent in the rights and duties incident to citizenship. For example, the majority of states have permitted suits for loss of consortium only by the husband. Various rationales have been used to justify this discrimination: the need to prevent double recoveries; the remote and indirect nature of the wife's injuries; the unavailability of the remedy at common law; the fact that the wife has no right to her husband's services; and deference to legislative discretion.

There is no question that the denial to the wife of the right to sue for loss of consortium is rooted in the common law concept of marriage.

The common-law rule . . . denying the wife an action for loss of consortium due to the negligent injury of her husband was promulgated at a period in history when all the wife's personal property, money and chattels of every description became her husband's upon marriage. She could neither contract, nor bring any action of any kind. Husband and wife were one, and "he was that one". . . . Since the husband was entitled to his wife's services in the home, as he was to those of any servant in his employ, if he lost those services through the acts of another, that person had to respond in damages. . . . He had a right of action for injury to her grounded on the theory that she was his servant. However, should the husband be injured, the wife, being a legal nonentity . . . could bring no action. A servant could hardly sue for the loss of services of the master.


Notwithstanding the obvious changes in the social, economic and legal status of married women during the ensuing centuries, common law rules allowing the husband a cause of action for loss of consortium but denying the wife a reciprocal action were uniformly adhered to by the courts until 1950. In *Hitaffer v. Argonne Co., Inc.*, the wife of an injured employee brought suit under the Longshoreman and Harbor Worker's Compensation Act for loss of consortium claiming that the injuries to her husband's body deprived her of his aid, assistance, enjoyment and sexual relations. Despite the unanimity of authority denying recovery in such circumstances, the court found itself unable to find any substantial rationale on which to predicate denial of recovery.

There can be no doubt that the expressed view of this court is that the husband and the wife have equal rights in the marriage relation which will receive equal protection of the law. . . . It is not for us, at this late date under the modern concepts of the marriage relations, to deny the wife legal protection of this right. Accordingly, the court held that the wife had a cause of action for loss of consortium due to negligent injury to her husband.

Although *Hitaffer* raised the equal protection issue with regard to rights emanating from the marriage relation, most courts which have rejected the common law disability of wives to sue for loss of consortium have done so on the ground that such denial misperceives the nature of the remedy. For example, in *Dini v. Naiditch*, the Illinois Supreme Court considered and rejected each of the justifications offered by the state for denying wives the right to sue for loss of consortium. After an exhaustive review of the underlying assumptions and common law history of these justifications, the *Dini* court held that cogent reasoning must outweigh numerical authority and the wife's suit for loss of consortium must be recognized by the law.

Even where the equal protection argument has been used to invalidate the denial of the right of the wife to sue, the treatment of this issue has been cursory at best. *Owen v. Illinois Banking Corp.*, where a wife sued to recover damages for loss of consortium, cited

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133. *Id.* at 423. A list of cases adhering to the common law rule is provided in *Hitaffer v. Argonne Co., Inc.*, 87 U.S. App. D.C. 57, 183 F.2d 811, 812, n. 5 (D.C. Cir. 1950).
Hitaffer with approval and concluded that the denial of the right to sue for loss of consortium, when applied to a wife but not a husband, was a clear violation of equal protection.

Hitaffer and Owen did not actually analyze the equal protection problem but rather stated a conclusion, and hence the cases are of limited precedential value. Indeed, subsequent decisions have noted that the conclusions reached in Hitaffer and Owen were unsupported by any substantive reasoning and have suggested that the decisions did not actually rest on equal protection grounds.

Irrespective of their faults Hitaffer and Owen raised a substantial issue which had to be considered by later courts. For example, Ignieri v. CIE de Transports Oceaniques, a case involving a wife's suit for loss of consortium under federal maritime law, attempted to avoid the equal protection issue, and in Miskunas v. Union Carbide Corp. the conclusion of the majority that the classification attacked was permissible sparked a critical dissent which rested entirely upon the equal protection argument.

Decisions which recognize loss of consortium actions by wives would be the trend under the proposed Amendment. The decision which most closely represents the view the courts are expected to adopt after ratification of the Equal Rights Amendment is Karczewski v. Baltimore and Ohio Railroad Co. Karczewski thoroughly analyzed the equal protection problem and, citing such authorities as Prosser, Hitaffer and Dini, the court held that the denial of the wife's right to sue for loss of consortium was a violation of the Equal Protection Clause of the fourteenth amendment.

A classification based on sex is not justified where it restricts rights in a manner which has no bearing on either function or physical characteristics. Clearly, the denial of the right to sue for loss of consortium discriminates unreasonably against women because the right to sue

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140. 323 F.2d 257 (2d Cir. 1963).
141. "Our conclusion, it should be emphasized, does not rest on the discrimination between the sexes criticized by Hitaffer and its supporters . . . ." Id. at 268. See also Lunow v. Fairchance Lumber Co., 389 F.2d 212 (10th Cir. 1968), cert. den. 392 U.S. 908 (1968).
142. 399 F.2d 847 (7th Cir. 1968), cert. den. 393 U.S. 1066 (1969) (Indiana law).
143. Id. at 851 [Schnackenberg, J., dissenting].
145. Id. at 175.
bears no relationship to functional abilities or physical characteristics. Although some courts have found this type of sex discrimination to violate equal protection, ratification of the Equal Rights Amendment would provide the impetus for acceleration of the invalidation of this discrimination and guarantee that where the right to sue for loss of consortium is granted, it is granted on an equal basis to both partners to a marriage.

2. **Jury Duty**

One of the primary duties incident to citizenship is the duty to serve on grand and petit juries. However, for nearly a half-century after adoption of the fourteenth amendment the practice which permitted only men to sit on these juries continued. Although many states altered this practice by statute, women were usually granted limited exemptions or blanket exclusions from service because of their sex.

In 1947, the petitioner in *Fay v. New York*\(^{146}\) challenged the New York jury selection procedure on the ground that it unconstitutionally permitted women a blanket exemption from service on special or "blueribbon" juries. The Court held that there had been no deprivation of due process.

The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment.\(^{147}\)

Fifteen years later, the Court was faced with a similar challenge in *Hoyt v. Florida*.\(^{148}\) A woman, convicted of murder by an all-male jury, appealed claiming that the Florida jury service statute which provided for an absolute exemption for women from service absent a voluntary waiver, violated the fourteenth amendment. Holding that the Florida statute was neither unconstitutional on its face nor as applied, the Court rested its decision on the reasonableness of the classification, since woman is still regarded as the center of home and family life,\(^{149}\) and concluded that it was constitutionally permissable for a state to relieve women from the civic duty of jury service.

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146. 332 U.S. 261 (1947).
147. *Id.* at 290.
149. *Id.* at 62.
The reluctance of the Court to declare sex discrimination in selection of jurors as violative of the fourteenth amendment is further revealed in Alexander v. Louisiana\(^{150}\) where the Court refused to even treat the question. In Alexander, the defendant had been convicted of rape and challenged the grand jury selection procedures of the State of Louisiana alleging that they discriminated against black males and all women. The Louisiana procedures absolutely exempted women from jury service unless they filed a written waiver of the exemption. Despite the urging of Justice Douglas, who was of the opinion that the claim of sex discrimination should be reached and decided,\(^{151}\) the Court held that the jury selection procedures were racially discriminatory and reversed the conviction on that ground alone. Armed with these and other precedents,\(^{152}\) courts have continued to uphold state statutes granting women absolute exemptions absent waiver, on the ground that the legislative distinction made was reasonable.\(^{153}\)

Even at the time Hoyt v. Florida was decided, three states did not permit women to sit on juries at all.\(^{154}\) In White v. Crook,\(^{155}\) male and female residents of Lowndes County, Alabama, sued the jury commission and other state officials in a class action, alleging that the jury selection procedures of the state violated the Equal Protection Clause because black males and all females were systematically excluded from service.

The court held that the systematic exclusion of women from jury service was an unreasonable classification under the fourteenth amendment in view of modern political, social and economic conditions. "[T]he conclusion is inescapable that the complete exclusion of women from jury service in Alabama is arbitrary."\(^{156}\)

The decision in White does not alter the thrust of Hoyt and Alexander. Where women have been granted absolute exemptions absent waiver, as opposed to blanket exclusions from jury service, courts continue to adhere to the precedents set by the Court. But Fay and Hoyt, resting as they do upon traditional assumptions regarding the

150. 405 U.S. 625 (1972).
151. Id. at 634 [Douglas, J., concurring].
152. See Strauder v. West Virginia, 100 U.S. 303 (1879).
156. Id. at 408.
role of women in society, are at least open to question.\textsuperscript{187}

Despite the tolerance with which the Court has viewed state schemes which exempt women from jury duty, it has been considerably less lenient within the federal sphere.\textsuperscript{188} The Federal Jury Selection and Service Act of 1968\textsuperscript{159} expressly prohibits the exclusion of women as a group from jury service and invalidates selection schemes which do not adhere to the letter of the Act,\textsuperscript{160} or discretionary exclusions based on judicial determinations of fitness for service.

For example, in \textit{Abbott v. Mines},\textsuperscript{161} the plaintiff sued a doctor in a malpractice action after contracting cancer of the penis, groin and other areas of his body. The trial court had excluded women from the jury on the ground that the proceedings would be distasteful to women. On appeal, the court held that such a wholesale exclusion of women was not permitted by federal law and that women could be exempted only upon their individual request from a trial involving distasteful subject matter.

Jury service is a form of participation in the governmental process, a responsibility and a right that must be shared by all citizens, regardless of sex.\textsuperscript{162} The denial of the right to sue for loss of consortium may be viewed as an overt form of discrimination based upon traditional assumptions regarding relations between men and women. Sex discrimination in jury service, however, is a more subtle form of discrimination which denies women the duty of participation in the process of self-government.

The exemption of women from jury service based upon outmoded assumptions regarding sex roles carries the same constitutional infirmities as exist in complete exclusions from service. The Federal Jury Selection and Service Act of 1968 can serve as the guide for the requirement that the duty to serve on juries rests on an equal basis upon all citizens regardless of sex.\textsuperscript{163} Ratification of the Equal Rights

\textsuperscript{157} Alexander v. Louisiana, 405 U.S. 625, 641 (1972) [Douglas, J., concurring].
\textsuperscript{158} See Ballard v. United States, 329 U.S. 187 (1946).
\textsuperscript{160} See United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971), where the court invalidated a selection scheme providing for a two to one ratio of males to females in grand jury selection.
\textsuperscript{161} 411 F.2d 353 (6th Cir. 1969).
\textsuperscript{162} White, supra 251 F. Supp. 401, 408 (M.D. Ala. 1966); Abbott, supra, 411 F.2d 353, 355 (6th Cir. 1969). See also Pendergraft v. Cook, 446 F.2d 1222 (5th Cir. 1971).
\textsuperscript{163} Under this view, discretionary exemptions such as that suggested in \textit{Abbott v. Mines}, supra note 161, should be found unreasonable. The “distastefulness” of the subject matter of the trial, by itself, is not a reasonable criterion for exemption since the judgment as to what is distasteful rests upon traditional assumptions regarding sex
Amendment would ensure that jury exemption procedures for women, whether exclusionary or discretionary, be invalidated as arbitrary and unreasonable denials of equality of treatment on account of sex.

3. Compulsory Military Service

The principle of equal treatment under law embodied in the basic language of the Equal Rights Amendment requires that men and women not only be accorded equal rights and privileges, but also that they be subject to the same responsibilities, burdens and duties of citizenship. One of the basic duties of citizenship—the duty to serve in the armed forces of the United States—has traditionally been limited to male citizens.164

Despite the urgings of commentators and litigants, the courts have been unwilling to second guess the legislative wisdom of the classification made in compulsory military service. In United States v. St. Clair,165 the defendant was charged with failing and refusing to submit to registration under the Military Selective Service Act. On appeal, the defendant raised the claim that the Act was unconstitutional in that it made an invidious discrimination on the basis of sex in violation of the fifth amendment Due Process Clause. The court disagreed, stating:

In the Act and its predecessors, Congress made a legislative judgment that men should be subject to involuntary induction but that women, presumably because they are "still regarded as the center of home and family life" . . . should not. Women may constitutionally be afforded "special recognition", . . . particularly since women are not excluded from service in the Armed Forces. . . . For these reasons, the distinction between men and women with respect to service in the Armed Forces is not arbitrary, unreasonable or capricious.166

The reluctance of the courts to interfere with Congressional judgment is further expressed in United States v. Cook,167 where the defendant was prosecuted for failure to report for induction. In response to the allegation that the Selective Service Act was unconstitutional because it discriminated against males, the court found

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166. Id. at 124, 125.
167. 311 F. Supp. 618 (W.D. Pa. 1970). See also Simmons v. United States, 406 F.2d 456 (5th Cir. 1969), where the issue of sex discrimination in the selection of draft boards of appeal was raised but ignored by the court.
[w]hile each of the sexes has its own innate characteristics, for the most part physical strength is a male characteristic, and so long as this is so, the United States will be compelled to establish and maintain armed forces of males which may at least physically be equal to the armed forces of other nations, likewise composed of males, with which it must compete.\textsuperscript{168}

Whether women should be subject to compulsory military service is an emotional issue.\textsuperscript{169} Considerable diversity of opinion exists as to the effectiveness of women as combatants, and the impact on the effectiveness of male soldiers due to the presence of female soldiers. Without attempting to resolve these difficult issues, it is clear that the drafting of women into the armed services on an equal basis with men will have a substantial impact on the structure of the American military system and on related areas which military service affects.

Because the concept of equal protection has its origin in the fourteenth amendment, it is not applicable to the federal government.\textsuperscript{170} This fact has forced litigants to rely on the fifth amendment Due Process Clause for challenges to the Selective Service Act on the ground of sex discrimination. Ratification of the Equal Rights Amendment would at least compel the courts to view sex discrimination in compulsory military service from the standpoint of equal protection. Moreover, the Amendment is specifically applicable to the federal government.

Viewed through the prism of the reasonableness test anticipated under the proposed Amendment and against the background of the movement toward sexual equality, the spectrum of future decisions may be radically different from \textit{St. Clair} and \textit{Cook}. Any system which makes an arbitrary distinction as to who must serve in the military does an injustice both to the individual who is denied the opportunity to serve and to the individual upon whom the burden falls more heavily.\textsuperscript{171} If the time has arrived when protective concepts must yield to equality of treatment under law, the Equal Rights Amendment will provide the vehicle for change in the area of compulsory military service.

4. \textit{Summation}

Equality of treatment under law requires that men and women be

\textsuperscript{168} Id. at 622.
\textsuperscript{171} Hale and Kanowitz, \textit{supra} note 169, at 220.
subject to the same rights and duties of citizenship. The apparent failure of courts to invalidate discriminatory practices which limit rights and unequally apportion duties prevents the attainment of full equality of citizenship. Even more than in the areas of employment and preferential treatment, sex discrimination in rights and duties of citizenship is rooted in traditional assumptions regarding the roles men and women are expected to play in society. The Equal Rights Amendment will require that these traditional assumptions be re-evaluated in light of evolving concepts of sexual equality.

The language of the Amendment leaves no doubt that sex discrimination in the rights and duties of citizenship is unreasonable. The beginning steps made by courts in the areas of loss of consortium actions and jury service will serve as guidelines for initiation of a firm policy of equal treatment without regard to sex. The Equal Rights Amendment will ensure the adoption of this policy in the rights and duties incident to citizenship.

CONCLUSION

The law in areas where sex discrimination exists is currently undergoing considerable judicial scrutiny and re-evaluation. Many courts, in response to the demands of men and women for equal treatment, have begun to re-assess traditional assumptions regarding sex-roles in light of evolving social concepts.

Notwithstanding the presence of productive judicial activity in the analysis of discriminatory treatment of men and women in employment, rights and duties of citizenship and societal practices, considerable sex discrimination continues to exist in every facet of modern life. Men and women face sexually discriminatory laws and practices which range from control of property to sex preference. Since the manifest design of the Equal Rights Amendment is to prohibit sex discrimination where it is deemed unreasonable, ratification of the Amendment can be expected to have a pervasive impact on every area in which sex discrimination exists.

In addition to the various forms of sex discrimination under current judicial review, the Amendment will serve as the basis for challenges to such diverse areas of sex discrimination as: criminal statutes which define crimes on the basis of unreasonable sex classifications or outworn assumptions regarding sex roles; domestic relation laws which

172. For example: prostitution; rape; obscene and vulgar language in the presence of women. See generally Brown, supra note 4, at 954.
inhibit the growth of a marriage as an equal partnership;\textsuperscript{173} legal procedures which place impediments in the path of litigants on the basis of traditional assumptions regarding rights and duties;\textsuperscript{174} rules and regulations which prevent the attainment of educational or employment opportunities due to reliance on sexual stereotypes;\textsuperscript{175} and societal practices grounded in unsubstantiated assumptions regarding sex norms or mores which have as their bases traditional moral or religious doctrines.\textsuperscript{176}

The application of the Amendment in eradicating these forms of sex discrimination, in sum, will be as far-reaching as are the areas.

Unlike the other methods proposed by advocates of sexual equality, the Amendment will result in a re-interpretation of the entire concept of classification of persons on the basis of sex. This interpretation will necessarily disregard prior sexual stereotypes. As the vehicle for social change, the Equal Rights Amendment may be the herald of an entirely new era in which legal policy is oriented toward equality of treatment of all persons without regard to sex and freedom from discrimination on the basis of sex. Nevertheless, as with other major changes in legal and social policy, it will remain for the courts to implement new policies and fashion them into the intricate design of the law as it presently exists.

Bearing the mandate of the overwhelming majority of the American states, the Equal Rights Amendment will be the touchstone for the
courts in the examination of the reasonableness of sex-based classifications. As a constitutional expression of the necessity for equality of treatment between men and women, the Amendment will force the courts to invalidate previously accepted societal practices and legal classifications which rested upon traditional assumptions regarding sex-roles. The Amendment will require that the courts accept the modern concept of sexual equality as the underlying operative principle of the reasonableness test used to examine classifications made on the basis of sex. In the final analysis then, the Equal Rights Amendment will serve as the practical judicial tool the courts will use to attain the goal of equality of rights without regard to sex.

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