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THE PROPOSED EQUAL RIGHTS AMENDMENT

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BRIEF LEGISLATIVE HISTORY

The proposed Equal Rights Amendment to the United States Constitution, which passed the Congress in March 1972, and is pending before the State legislatures, has been introduced in various forms in Congress since 1923. The first Equal Rights Amendment was introduced in 1923 by Senator Charles Curtis, later Vice President of the United States, and Representative Daniel R. Anthony, Jr.

The language of the early version provided:

> Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.
>
> Congress shall have power to enforce this article by appropriate legislation.

The Senate Judiciary Committee in 1943, reported out the following language:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation.

From that time until 1971 and the 92nd Congress the Equal Rights Amendment had been introduced in this form.

Hearings were held by both the House of Representatives and the Senate Judiciary Committee beginning in 1929. Both reported the Amendment. Before 1972, the Senate twice passed the Amendment, in the 81st Congress on January 25, 1950, and in the 83rd Congress, on 16, 1953. On both occasions, the measure was amended on the floor to include what was known as the "Hayden rider," which provided that:

> The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex.

In 1964, the Senate Judiciary Committee reported that this rider "is not acceptable to women who want equal rights under the law. It is under the guise of so-called 'rights' or 'benefits' that women have been treated unequally and denied opportunities which are available to men." 1/

The House of Representatives passed the Equal Rights Amendment in the 91st Congress on August 10, 1970, after the discharge procedure was used to free the proposal from Committee. There had been no Committee action on equal rights amendments for 22 years, and it was a major goal of proponents of the Amendment, in the 91st Congress led by Representative Martha Griffiths, to bring the bill to the floor of the House.

Earlier, in May 1970, the Senate Subcommittee on Constitutional Amendments, chaired by Senator Birch Bayh, held three days of hearings and favorably reported the Amendment to the full Senate Committee on the Judiciary. On September 9, 10, 11, and 15, the full Committee held hearings, chaired by Senator Sam J. Ervin, Jr. *

During Senate consideration of H.J. Res. 264 two amendments were adopted: 1) to guarantee that nothing in the women's rights amendment would require the drafting of women into the armed forces if Congress chose not to draft them, and 2) to permit recitation of "non-denominational" prayers in public schools and all other public buildings.

1/ S. Rept. No. 1558, 88th Congress, 2d Sess., p. 2.

* Senator Ervin chaired the hearings at the request of Senator James O. Eastland, Chairman of the Committee.

On October 14, 1970, following the adoption of these two amendments, Senator Bayh introduced a substitute amendment which read:

> Neither the United States nor any State shall on account of sex, deny to any person within its jurisdiction the equal protection of the laws.

Women's organizations supporting the Equal Rights Amendment opposed the two amendments added by the Senate and Senator Bayh's substitute resolution because they believed that this would still allow protective labor laws which were possible under the 14th amendment. The Senate laid aside the proposed Equal Rights Amendment, and no further action was taken by the 91st Congress.

Between the 91st and 92nd Congress, the wording of the second section of the proposed Equal Rights Amendment was changed by the proponents to meet the objections raised by several constitutional lawyers including Senator Ervin. The Equal Rights Amendment as introduced in the 92nd Congress read as follows:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Hearings were held in the 92nd Congress by Subcommittee No. 4 of the House Judiciary Committee on the Equal Rights Amendment (H.J. Res. 208) and the Women's Equality Act (H.R. 916) on March 24, 25 and 31 and April 1, 2, and 5, 1971. On April 29, 1971, the Subcommittee reported H.J. Res. 208 to the full on June 23, 1971, with two amendments. The first amendment reworded the measure by adding the words "of any person" as follows:

> Equality of rights <u>of any person</u> under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> (emphasis added)

The second amendment, known as the "Wiggins Amendment", added the following section to the bill:

> This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or any State which reasonably promotes the health and safety of the people.

However, when the House of Representatives considered the Equal Rights Amendment on October 12, 1971, it rejected the Committee amendments and approved the measure by a roll call vote of 354-24 2/ in the form in which it was introduced:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

On February 29, 1972, without hearings the Senate Committee on the Judiciary favorably reported out the Equal Rights Amendment in its original form. The Senate began debate on the measure (S.J. Res. 8, S.J. Res. 9, H.J. Res. 208) on Friday, March 17, 1972. During the two days prior to the final vote of the Senate, Senator Sam Ervin introduced a total of ten amendments to the ERA in an effort to modify its application. The amendments include the following:

> No. 1058 - to exempt any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex (withdrawn, March 21, 1972)
>
> No. 1065 - to exempt women from compulsory military service (defeated, 73-18, March 21, 1972)

2/ Vote recorded and reported in Congressional Record, v. 117, Oct. 12, 1971: 35815.

No. 1066 - to exempt women from service in combat units (defeated, 71-18, March 21, 1972)

No. 1067 - to exempt laws extending protections or exemptions to women (defeated, 75-11, March 21, 1972)

No. 1068 - to exempt laws extending protections or exemptions to women (defeated, 77-14, March 22, 1972)

No. 1069 - to exempt laws maintaining fathers' responsibility (defeated, 72-17, March 22, 1972)

No. 1070 - to exempt laws securing privacy (defeated, 79-11, March 22, 1972)

No. 1071 - to exempt laws pertaining to sexual offenses (defeated, 71-17, March 22, 1972)

No. 472 - to exempt laws based on physiological or functional differences between the sexes (defeated, 78-12, March 22, 1972)

Excerpts from the debate on the proposed amendments to the ERA provide a basis for determining the intent of Congress in passing the Amendment. For example, one will find the intent of Congress with respect to women and the draft in the pro and con debate on proposed amendment no. 1065, to exempt women from compulsory military service. This debate also summarizes most of the concerns about the Equal Rights Amendment.

On March 22, 1972, after rejection of the Ervin amendments, the Senate passed the House version of the Equal Rights Amendment by a vote of 84-8.

CURRENT STATUS OF THE EQUAL RIGHTS AMENDMENT

The proposed Equal Rights Amendment to the United States Constitution which passed Congress on March 22, 1972, is pending before the State legislatures. If it is ratified by 38 States before March 22, 1979, the measure will become the 27th amendment to the Constitution and would take effect two years after ratification.

The first State to ratify the ERA was Hawaii, which voted within hours after final passage by the Senate. During the first year after passage by the Congress, 30 States had ratified the Amendment. Then ratification slowed down as opposition to the Amendment increased. 3/

In fact, some States which have ratified the proposed Equal Rights Amendment have subsequently voted to rescind ratification, raising again the question of whether a State has the power, once it votes to ratify, to withdraw its ratification. Article V of the Constitution, which provides for the amending of the Constitution, does not address this question. The Supreme Court considered this issue in Coleman v. Miller, 307 U.S. 433 (1939), declaring that rescission is a "political question for Congress to decide."

The first rescission vote on a constitutional amendment was in the case of the Fourteenth Amendment. The States of Ohio and New Jersey both ratified and subsequently passed rescinding resolutions. The Congress

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3/ The current status of ratification is in Issue Brief No. 74122, the Equal Rights Amendment (Proposed), Congressional Research Service, Library of Congress.

requested the Secretary of State to report on the number of States ratifying the proposed amendment and the Secretary's message specifically noted the rescinding actions of the Ohio and New Jersey legislatures. However, the resolution adopted by Congress listed the 29 States which had ratified and included Ohio and New Jersey. Likewise, in the case of the Fifteenth Amendment, the State of New York, which had ratified and later rescinded its ratification, was listed among those ratifying States. While these previous actions have established precedent for congressional non-recognition of rescission, the actions of one Congress are not necessarily binding on another, which means the rescission matter may result in a separate congressional decision in the event 38 States ratify the proposed ERA. 4/

Legislation was introduced in the 95th Congress to allow States to rescind their ratification of a constitutional amendment.

With just about 18 months left until the deadline for ratification of the ERA and 35 States having ratified of the 38 States necessary to make the proposed ERA an amendment to the Constitution, a movement began to extend the deadline for ratification. Legislation was introduced in the 95th Congress to extend the deadline seven years until March 22, 1986. Hearings were held in November, 1977.

Proponents of the extension argue that the debate on the Equal Rights Amendment is more complex than that surrounding other recent amendments and has not "run its course," therefore, the original "reasonable time" limit set by Congress should be extended. Opponents of the

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4/ For a more comprehensive discussion refer to "The Efficacy of State Rescission of Ratification of a Federal Constitutional Amendment" by Johnny Killian, Congressional Research Service, Library of Congress. (See section on Additional Congressional Sources)

extension argue that the States have had a reasonable amount of time to consider the proposed Amendment and they have expressed their will. They further argue that it is unfair and illegal "to change the rules in the middle of the game."

The seven year time limitation on the proposed ERA was not incorporated in the actual language of the proposed Amendment passed by the 92nd Congress. Rather it was a part of the resolution introducing the proposed Amendment. This has not always been the case for time limitations placed on the ratification of constitutional amendments.

The first amendment to have a time limit was the 18th amendment and that time limit was written into the constitutional amendment. The 20th, 21st and 22nd amendments followed the pattern of the 18th. Then the 23rd, 24th, 25th 26th and the proposed 27th amendment (ERA) did not have the time limit incorporated in the actual language of the amendment, but had it placed in the resolution proposing the Amendment.

Acticle V of the Constitution gives the Congress authority to propose amendments to the Constitution, but it does not mention how long States have to ratify nor does it state that Congress may impose a deadline. Two court cases have dealt with the issue of time limits for ratification of proposed constitutional amendment. The Supreme Court in Dillon v. Gloss, 256 U.S. 368 (1921), held that amendments must be ratified within some reasonable time which Congress has the authority to set. The Court specifically held that the seven year period fixed by Congress in the 18th amendment was reasonable. The Court in Coleman v. Miller, 307 U.S. 433 (1939), indicated that the question of reasonable time limits was a political matter for Congress to decide.

If Congress has the authority to extend the deadline, another question arises as to what would be necessary to enact such an extension- a two-thirds vote or a simple majority. Those who argue that a two-thirds vote is necessary point out that this is the vote required for passage of any constitutional amendment. And therefore a two-thirds vote is necessary for the proposed extension of the ratification deadline of a constitutional amendment. Those who argue that a simple majority is all that is necessary point out that the deadline was a part of the resolution proposing the Amendment and was not a part of the Amendment submitted to the States. Therefore, a simple majority is all that is necessary for making this change in the deadline for ratification.

A further question raised is whether a change in the time limit for ratification would have to be submitted to the States, and particularly to the States which have ratified. Those who argue that it is necessary to submit this to the States argue that this is not a "procedural" change but a "substantive" change. They further argue that some members of Congress and some state legislators might not have approved the ERA resolution if there had been a different deadline or no deadline. Those who argue that it is not necessary to submit an extension of the deadline for ratification to the States argue that this not a change in "substance" but is a "procedural" change. They further argue that the original seven year dealine was not submitted to the States and thus such a change would not require State approval.

THE EQUAL RIGHTS AMENDMENT: PRO & CON

Controversy over the proposed Amendment relates to four major areas: (1) interpretations of its probable effects in areas such as right of privacy, military service, marriage and the family, and social security benefits for non-working wives, protective labor laws, and criminal laws relating to sexual offenses, (2) whether there should be room in the law for "reasonable" distinctions in the treatment of men and women, (3) whether a constitutional amendment is the proper vehicle for improving the legal status of women in our Nation, and (4) whether or not the proposed Amendment invades the rights of the States.

There is little disagreement about the general intent of the proposed Equal Rights Amendment. Legislative intent in this regard is found in the Senate debate on the measure in March, 1972, the pertinent House and Senate Judiciary Committee reports, and congressional hearings held in 1970-71. As stated in the Senate Judiciary Committee report, "The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or women... The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected."

The Equal Rights Amendment would require that governments treat males and females equally as citizens and individuals under the law. It is directed at eliminating gender-based classifications

in the law which specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, Federal or State law or official practice that makes a discriminatory distinction between men and women would be invalid under the Equal Rights Amendment. Both proponents and opponents of the Amendment agree that proper interpretation of the ERA would result in the elimination of the use of sex as the sole factor in determining, for example, who would be subject to the military draft, if it were reinstated; who in a divorce action would be awarded custody of a child; who would have responsibility for family support; or who would be subject to jury duty. Moreover, public schools could not require higher admissions standards for persons of one sex than the other and courts could not impose longer jail sentences on convicted criminals of one sex. Thus certain responsibilities and protections which once were or are now extended to members of one sex, but not to members of the other sex, either would have to be extended to everyone or eliminated entirely.

Probable Effect of the ERA

The first area of identifiable controversy is the probable effect of the Equal Rights Amendment in the areas of privacy, military service, marriage and the family, social security benefits for non-working wives, protective labor laws, and criminal laws relating to sexual offenses.

Right of Privacy

One issue of interpretation on which opinions still are divided is whether the existence of separate restrooms, prisons, and dormitories for males and females would be permissible under provisions of the proposed Equal Rights Amendment. The legislative history of the proposed Amendment does reveal that the Congress recognized the right of privacy doctrine as it was developed by the U.S. Supreme Court in Griswold v. Connecticut 381 U.S. 479 (1965). In this case, the Court recognized that the right of privacy derived from specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments. The Senate Judiciary report on the effect of the ERA states that: "The constitutional right of privacy established by the Supreme Court in Griswold v. Connecticut...would ...permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions." 5/

The Court's opinion in Griswold and other cases has sustained the right of privacy in areas relating to "marriage, procreation, contraception, family relationships, and childbearing and education." It is this lack of precise definition and uncertainty over court interpretation under the ERA that concerns opponents of the ERA. They point to the following areas where allegedly the privacy aspect of the relationship between men and women would be changed: (1) police practices by

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5/ S. Rept. No. 92-689, 92nd Congress, 2d Session, p. 12.

which a search involving the removal of clothing will be able to be performed by members of either sex without regard to the sex of the one to be searched, (2) segregation by sex in sleeping quarters of prisons or similar public institutions would be outlawed, (3) segregation by sex of living conditions in the armed forces would be outlawed, and (4) segregation by sex in hospitals would be outlawed. Proponents argue that previous Court decisions' in which it has recognized an individual's right to control his or her bodily functions without interference by the state, would not be in conflict with the ERA, and would thus protect an individual's right to perform personal bodily functions, such as sleeping, showering, and disrobing, without intrusion by members of the opposite sex.

Opponents also state that the most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, they argue that if the ERA is construed strictly, then there can be no exception for elements of publicly imposed sexual segregation between men and women on the basis of privacy. Proponents argue that the legislative history is clear on this issue and that the existence of separate restrooms in no way discriminates on the basis of sex and does not violate the equality-of-rights principle which underlies the Equal Rights Amendment. 6/

6/ For more detailed discussion refer to "The Proposed Equal Rights Amendment and the Right of Privacy" by Karen Lewis, Congressional Research Service, Library of Congress. (See section on Additional Congressional Sources)

Military Service

It is generally accepted today that the Equal Rights Amendment would require Congress to treat men and women equally with respect to the draft, if a draft were reinstated. This would mean that both men and women who meet the physical and other requirements, and who are not exempt or deferred by law, will be subject to conscription according to the Senate Judiciary Committee report on the effects of the Equal Rights Amendment.

Senator Ervin attempted to guarantee that passage of the ERA would not affect Congress' right to exclude women from combat and the draft. His proposals, however, were defeated.

Still uncertain under the ERA, however, is whether women would be compelled to serve in combat units. Proponents believe that the ERA would mandate equal opportunity for women in the military and that training programs would have to be the same unless individuals show certain physical differences or incapacities requiring different treatment. Under this approach, according to a CRS report, "ERA may require assignment of physically able women to combat units."7/ If women are assigned to combat units with men, proponents believe that the Secretaries of the Services would have the authority to assign men and women according to their individual capabilities taking into consideration the questions of privacy with respect to sleeping quarters and restrooms. As Congresswoman Griffiths stated: "The draft is equal. That is the thing which is equal. But once you are in the Army, you are put where the Army tells you where you are going."8/

7/ U.S. Library of Congress. Congressional Research Service. Sex Discrimination and the Military -- Women in Combat, [by] Donna Parratt. [Washington] 1977: 17.

8/ S. Rep. No. 92-689, 92nd Congress, 2d Session, p. 13.

Opponents of the ERA express concern that women will have to be assigned direct combat roles in the field in the same manner and in the same number as men. They charge that this would adversely affect the efficiency and discipline of our forces. Opponents also point out that if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.

Traditionally, the doctrine of military necessity has been cited as reason enough for judicial reluctance to interfere with military decisionmaking. The judiciary has, according to a recent CRS report on women in combat, assumed that "Congressional and military decisions to exclude women from combat have been rational and sensible. Recognizing that national defense is a concern of constitutional dimension and that Congress is empowered 'to provide for the common defense,' the courts have refrained from interfering with this area of legislative prerogative."9/ For example, in a 1944 Supreme Court case involving racial discrimination, the Court deferred action to the military.

There appear to be two compelling, perhaps competing, national interrests - one to eliminate discrimination based on sex and another to provide for national defense. A District Court in United States v. Dorris 319 F. Supp. 1306, 1308 (1970) dismissed the defendent's argument that the draft law was "invidiously discriminatory" because it exempted females, stating that: "Such classifications as age and sex are not arbitrary or unreasonable,

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9/ Ibid., p. 4-5.

and the classifications are justified by the compelling government interest which is to provide for the common defense in a manner...which would both maximize the efficiency and minimize the expense of raising an army."

Currently women are excluded by policy from serving in the infantry, in field artillery, or to operate tanks in the Army. By statute women are excluded from service on combat ships in the Navy or combat aircraft in the Navy and Air Force. It appears that if the ERA is ratified these statutes requiring different treatment on the basis of sex would have to be changed. How the ERA would affect policy decisions concerning assignment of women is still a major question.

If the policies of the Armed Services were to not assign women to combat and a challenge was made in the courts, there could be several possible outcomes. One might be to overturn the Armed Services' policies and require that women be assigned to combat on the same basis as men. Or, the court might decide not to interfere with policies developed by the Armed Services and refer the case to the military.

Marriage and the Family

One of the most important areas of concern to opponents of the Equal Rights Amendment is the possible effect of the Amendment on the family as a social unit. The concerns are specifically on the roles of the husband and wife in an ongoing marriage, on the effects on the marital partners and the children when there is a break-up of the marriage, and on the possibility that marriage laws will be changed allowing persons of the same sex to marry. Opponents of the Amendment say that it will destroy the family. They further argue that it will take away the privileges that women now enjoy.

One concern is whether the ERA would invalidate State laws which require the husband to support his wife. If the ERA would invalidate these laws, opponents argue that it would take away a wife's "legal right" to be a fulltime wife and mother supported by her husband and would force her into the job market in order to fulfill the equalized duty of support. Opponents interpret the equalization of the duty of support to mean one-half the financial support. However, proponents of the Amendment argue that in the legislative history it was stated that "the support obligation of each spouse would be defined in functional terms based, for example on each spouse's earning power, current resources and nonmonetary contributions to the family welfare." 10/ This they believe will strengthen the legal status of the homemaker. Further proponents point out that in none of the eleven States, which have adopted equal rights amendments to their State Constitution and equalized the duty of support, are wives obligated to work for compensation outside the home in order to equalize their contribution.

10/ S. Rept. No. 92-689, 92nd Congress, 2d Session, p. 17.

Opponents argue that women upon divorce will lose their right to alimony and child support. Proponents agree that divorce laws would have to be sex-neutral and that factors other than one's gender would have to be used in determining the payment of alimony and the custody of children. These factors could include needs of a dependent spouse, and the ability of the wage earning spouse to pay, which the proponents point out are now included in the Uniform Marriage and Divorce Act adopted by the National Conference of Commissions on Uniform State Laws.

Upon the death of her husband under the ERA, opponents say, a woman would lose her right to dower, an outright interest she has by law in some States in the real estate of her deceased husband. Proponents of the Amendment argue that dower rights could be extended to men.

Another concern raised by opponents of the Amendment is that it will permit persons of the same sex to marry. The rationale is that no law will be allowed which makes a distinction on the basis of sex. In the congressional debate on this issue, Senator Bayh stated that "the equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited to women partners. All it says is that if a State legislature makes a judgement that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman." 11/

11/ Congressional Record, v. 118, March 21, 1972: 9331.

Social Security Benefits for Non-Working Wives

Until a recent Supreme Court decision, men and women were treated differently by the Social Security Administration in the application of the dependency requirements for old-age and survivor benefits. To be entitled to these benefits a husband or widower had to prove that he was dependent on his wife for at least half his support before monthly benefits could be paid to him based on her earnings. On the other hand, women are presumed to be dependent on their husbands. Accordingly, a wife or widow became entitled to benefits on her husbands earnings without regard to whether she was, or is, dependent on his earnings for support.

Opponents and proponents agree that this difference in treatment would be illegal under the Equal Rights Amendment. Opponents argue that women will be required to have an earnings record of their own or that their husbands will have to pay into the Social Security Fund twice -- once for the wife and once for himself.

While this difference in dependency requirements still remains a part of the Social Security Act, it is, in fact, no longer in effect since the Supreme Court ruled on March 2, 1977, in Califano, Secretary of Health, Education and Welfare v. Goldfarb (75-699) that the Social Security Administration must make old-age and survivor's benefits available to widowers on the same basis that they are now available to widows. Therefore, widowers will no longer have to prove dependency in order to qualify for benefits. Without writing an opinion, the Court on March 21st affirmed several lower court decisions (Califano v. Silbowitz (75-712), Califano v. Jablon (75-739), and Califano v. Abbott (75-1463)) which had declared that the dependency required of husbands of covered female wage

earners applying for old-age benefits was unconstitutional. Therefore, husbands will no longer have to prove dependency in order to qualify for benefits on their wives earnings.

Protective Labor Laws

Unions for several years opposed the Equal Rights Amendment on the grounds that it would invalidate the protective labor laws. These include weight-lifting laws applicable only to women, laws limiting the hours women may work, and so forth. However, protective labor laws have been addressed by Title VII of the Civil Rights Act of 1964 which prohibits sex discrimination in employment. To enforce this Act, the Equal Employment Opportunity Commission has issued sex discrimination guidelines which interpret the "bona fide occupational qualification" narrowly. The EEOC guidelines declare that State laws which prohibit or limit employment of women (in certain occupations, in jobs requiring the lifting or carrying of specified weights, for more than a specified number of hours and during certain hours of the night) discriminate on the basis of sex, because they do not take into account individual capacities and preferences. Accordingly, they conflict with and are superseded by Title VII. A series of court cases have upheld this guideline. According to a recent Women's Bureau report, "the conflict between State and Federal laws on this point was for the most part resolved in the early 1970's." 12/

12/ U.S. Department of Labor. Employment Standards Administration. Women's Bureau. State Labor Laws in Transition: From Protection to Equal Status for Women. [Washington] 1976. p. 18.

Criminal Laws Relating to Sexual Offenses

Because of different physical characteristics, moral standards and health considerations, legislatures have adopted some criminal laws which apply to only one sex. These include seduction laws, statutory rape laws, sodomy laws, and laws on prostitution. The opponents to the Amendment say that the ERA will forbid all existing and future criminal laws which make a legal distinction between men and women.

Under the ERA, it may be that those laws which are limited to one sex would have to be extended to both or the law would be invalid. For example, many prostitution laws make only the acts of women criminal and not those of men. These laws could be extended to cover both the buyers and the sellers of both sexes.

For laws such as statutory rape, proponents of the Amendment argue that the legislative history makes it clear these would be justified under the "unique physical characteristics qualification." Some States, however, have already changed their laws against rape, sodomy, and the like placing them under a sexual assault code applied equally to both sexes, thereby eliminating any problem which might arise as a result of the ERA.

Should There Be Absolute Equality?

A second area of disagreement brought out by opponents concerns whether it is in the interest of the Nation, or of the women of the Nation, to establish absolute, unequivocal equality of treatment for men and women under the law. There are some who believe that because of unique physical characteristics and traditional societal roles, women should receive more or different legal protection than men. Others believe that all citizens without regard to sex should share equally the rights and responsibilities of citizenship under the law.

Should There Be A Constitutional Amendment?

This basic conflict leads to the third major area of disagreement--whether a constitutional amendment is the most appropriate means for improving the legal status of women in the United States. One view is that a constitutional amendment is unnecessary because the equal protection clause of the 14th amendment, if properly interpreted, would nullify every law which makes distinctions based on sex without a rational basis. This idea is closely allied with the view that men and women should not always receive absolutely equal legal treatment. It is argued that the approach of relying on the 14th amendment appears to offer more flexibility of interpretation than does the proposed Equal Rights Amendment, which forbids any sex-based classification. Those who hold this view also point to the Supreme Court decision in Reed v. Reed, 404 U.S. 71 (1971), as a strong indication that the Court would find sex-based

discrimination to be in violation of the equal protection clause of the 14th amendment. In the Reed case, the Supreme Court ruled unconstitutional an Idaho statute requiring preference of male relatives over female relatives as administrators of estates. The Reed decision represented the first time the Supreme Court had struck down a law because it discriminated against women.

Since Reed, several other decisions have struck down gender classifications: Frontiero v. Richardson, 411 U.S. 677 (1973), concerning military benefits; Taylor v. Louisiana, 419 U.S. 522 (1975), concerning jury selection; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), concerning social secuirty benefits for widowed fathers; Stanton v. Stanton, 421 U.S. 7 (1975), concerning the age of majority; Craig et al. v. Boren, Governor of Oklahoma, et al., concerning the age of majority in the sale of 3.2% beer; and Califano v. Goldfarb, 75-699 (1977), concerning social security benefits for widowers. On the other hand, other recent Supreme Court decisions have upheld gender classifications which discriminated against men and in favor of women on the ground that they are intended to overcome historic discrimination against women. For example: Kahn v. Shevin, 416 U.S. 351 (1974), regarding tax exemptions benefitting widows; and Schlesinger v. Ballard, 419 U.S. 498 (1975), which involved promotion systems in the Navy.

Because gender classifications have not been struck down with consistency in recent Supreme Court decisions, supporters of a constitutional amendment argue for the establishment of a constitutional amendment which

makes clear that gender classifications are suspect and that they must be justified by showing a compelling interest in order to be sustained. To date, the Court has not held that sex discrimination is "suspect" under the equal protection clause of the 14th amendment, thus leaving the burden of proof on the complainant that a sex-based classification is a "fair and substantial relationship." Those who support passage of the Amendment also argue that an amendment to the Constitution is necessary to establish a national policy and to set a standard for the elimination of discrimination based on sex. Without this constitutional standard, they say, current laws could be amended and weakened. This constitutional standard would also prohibit the passage of future laws which discriminate on the basis of sex.

Opponents of the Amendment further argue that with the passage of recent laws such as the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Credit Opportunity Act of 1976, discrimination on the basis of sex in employment, education and credit is now illegal. Other areas of discrimination, they argue, could be taken care of on a law-by-law basis.

The Enforcement Clause

A fourth area of controversy is the enforcement clause of the proposed Equal Rights Amendment. When the ERA was first introduced in 1923, the section stated: "Congress shall have power to enforce this article by appropriate legislation." The wording of the Amend-

ment was changed to conform with the enforcement provision of the prohibition (18th) amendment, which read: "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation." This is not surprising when one considers that many of the women who were active in the women's rights movement early in this century were also involved in the prohibition movement.

Between the 91st and 92nd Congresses the wording was changed by the proponents to read: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The proponents decided upon this change of language after Senator Ervin's hearings during which he asked several constitutional lawyers to analyze the meaning and intent of the second clause. Since these constitutional lawyers agreed that the language should be changed, the proponents agreed to change the wording to conform to other constitutional amendments.

Some people view the enforcement section of the proposed Equal Rights Amendment, in its current form, as a "gigantic grab for power" by the Federal Government at the expense of the States. Proponents of the Amendment point out however that this wording conforms to that of the 13th, 14th, 15th, 19th, 23rd, 24th, and 26th amendments. The 18th amendment, which was ultimately repealed, was the only constitutional amendment which provided for enforcement by Congress and the States. The 10th amendment to the Constitution states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Therefore, it has been argued by some that it is only necessary to delegate the authority to the Congress because the States already have this authority.

Section 3 of the Amendment states that the Equal Rights Amendment would take effect two years after the date of ratification. The purpose of this section is to give the States and the Federal Government time to bring their laws into conformity with the ERA.

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