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The Equal Rights Amendment as an Instrument for Social Change

Lynn Andretta Fishel and Clarine Nardi Riddle

“The Equal Rights Amendment: Will it do so little, we don’t need it
—or so much, we shouldn’t have it?”

The paradox stems from the arguments of the groups who oppose the Equal Rights Amendment (ERA).¹ On one hand, they claim that the 14th Amendment and Title VII provide all the tools women need, so the ERA won’t be able to accomplish anything uniquely significant. On the other hand they contend, with even greater fervor, that the ERA will be so powerful it will destroy the fabric of society. The paradox is not altogether ludicrous, however, when it is recognized that it has been almost equally difficult for the proponents of the amendment to articulate its benefits and/or drawbacks. This article attempts to estimate the probable impact of the Equal Rights Amendment as an instrument for social change, assuming ratification.²

INTRODUCTION

The Equal Rights Amendment will be more than a symbolic addition to our Constitution. Its immediate impact could include such changes as the acceptance of sex as a suspect classification in interpreting constitutional law, and the complete elimination of the bona fide occupational qualifi-

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cation exception from Title VII implementation, both discussed below. But will it automatically bring about such change as to fundamentally and immediately alter traditional ways of doing things? We think not. The goals and powers of the Equal Rights Amendment are noncoercive as applied to individual life-style. The focus is on equal rights under the law and the enforcement powers are directed against only governmental entities and officials, not private individuals, for possible abridgement of these legal rights. The ideal is to allow each person, regardless of sex, freedom of choice and an equal opportunity for realizing personal objectives and expectations. Countless women, and men, are waiting to utilize its mandate to remove existing obstacles to full achievement, but expansion of the ERA's effect beyond this group—that is, expansion to the society as a whole—will come only so quickly as our culture is ready and willing to change.

IMMEDIATE FORESEEABLE IMPACT

Sex as a Suspect Classification

The 14th Amendment was enacted to deal with problems of race. Though there are many parallels between the problems of the black race and the second sex, there are many dissimilarities as well. Currently notable is the lack of a sense of outrage concerning the treatment of women. Sexism, founded on a pervasive negative socialization, is extremely destructive of women's sense of identity and self-confidence. It places an almost iron grip on the range of the typical woman's aspirations. Sex *should* be a suspect classification, as is race. This would result in strict court scrutiny of any purpose cited by a state to justify treating all members of a class the same. Rather than permitting statutes which so broadly classify, this strict scrutiny generally would result in a requirement that the statute fall or be rewritten in neutral language. But the Supreme Court has been unwilling to stretch the 14th Amendment so far for the purpose of safeguarding the legal rights of women.³

This means that the Constitution, which is supposed to provide the principled underpinnings for our law, is male-oriented—with the exception of the amendment extending suffrage to women. Since that exception could only exist in the context of a contrary “rule,” women are presently in a poor position to have the full sweep of constitutional rights and duties applied to them.

A blatant example is the *Hoyt*⁴ decision concerning jury service by women. The holding, in effect, says women may not be totally excluded from service, but that, if they wish to be selected for jury duty, they must take the initiative in communicating this desire to the local courts. This puts the onus on the woman and immediately casts the performance of civic duties by her in the realm of the exceptional. The deterrent effect of such a system if applied on the basis of race would be immediately recognized and stricken as impermissible discrimination.

Administrative efficiency, a justification for the procedure sustained in *Hoyt*, could be argued to have been eliminated as a legitimate state purpose

for a classification based on sex, by the more recent *Reed*⁵ and *Frontiero*⁶ decisions. But these decisions, by failing to adopt the stricter scrutiny test, leave the burden of proof on the woman assailing the system. In each case, the equivocating about which female stereotype is too dear to strike down “precipitately” will continue. The suspect classification criterion applied to race reverses this burden and places it on the state to show a compelling interest which is to be served. So far, no state interest has been found sufficiently “compelling” to sustain a racially discriminatory classification. This is a more than symbolic distinction and it is probable that passage of the ERA will rectify the discrepancy.

Title VII and the BFOQ

In the area of employment, where the greatest progress has been made toward the goal of equality, the legislation which has so far proved the most important tool for women is Title VII of the 1964 Civil Rights Act.⁷ However, there are drawbacks here as well. The law is encumbered by a bona fide occupational qualification (BFOQ) exception⁸ and an equivocal legislative history.

The Equal Employment Opportunity Commission guidelines concerning the BFOQ would limit it to physical attributes crucial to job performance and sexual attributes necessary for authenticity (actors, actresses and models, for example). While this interpretation would permit very few legitimate BFOQ exceptions to prevent women or men from taking particular jobs, and while the courts have given great lip service to these guidelines, an examination of the cases shows something of the same problem discussed above—an oppressive burden of persuasion on the individual litigant—not to mention the burden of litigation itself.

In *Phillips*,⁹ the Martin-Marietta company had refused the plaintiff so much as a job interview, based on the fact that she had pre-school age children: a sex-plus basis for discrimination. This is inconsistent with the thrust of the act which is to judge individuals on the basis of their own talents and abilities, and was little comfort to the seven children Ms. Phillips had to support. It would be legitimate for any corporation to set minimum standards to which all employees would be expected to conform with regard to tardiness, absenteeism, etc. Any man or woman, with or without pre-school age children, who failed to meet these criteria, could be fired on that basis. But here the whole sub-class was excluded from even the possibility of a job interview on the basis of an unproved belief that such problems would arise.

As with *Reed*, the Court’s opinion in *Phillips* was hardly a ringing affirmation of women’s rights. While “rejecting” the sex-plus basis for discrimination, it indicated that proof of a sex-based BFOQ regarding differential family obligations might be acceptable.

The *Diaz*¹⁰ case, a lower court decision, rejected this “demonstrably more relevant for women” standard of *Phillips*, and ordered the airline involved to redefine “cabin attendant” so as not to exclude all men as a

class. This decision carries the best language so far for undercutting the BFOQ in that, even if the airline continued to believe women were better suited to the job, it was placed under an obligation to interview and hire men, treating each job applicant as an individual—in effect, footing the bill not only for overcoming its own past discrimination, but undercutting societal stereotypes and differential in past training as well.

However, the Supreme Court has yet to go so far. Therefore, the continued existence of the BFOQ in this legislation is a threat to the achievement of complete equality. There is no parallel with regard to race, *no* permissible reason for excluding an entire race as a class. Yet with the BFOQ, women and men who do not fit the current cultural stereotypes must bear the burden of proving this to an employer—must frequently resort to the expensive and time-consuming process of litigation—to prove their ability to handle a particular job.

And what is perhaps even worse, the sex-plus classification method of discriminating against a whole sub-class of women may *not* be completely dead. In *Cohen*,¹¹ a lower Federal court decided a rule forcing pregnant women to leave their jobs before they would have had to do so on the advice of their physicians was not discrimination because of sex. This is a very dangerous ruling and seems to us nothing other than sex-plus thinly disguised. Nearly half the working force is presently comprised of women,¹² and they are not working for luxuries.¹³ It is precisely the women with children, or about to bear children, who most need the shield of the law to maintain their job competitiveness. The decision when to leave the job—or which job to apply for (assuming other necessary qualifications)—should be a matter of individual choice. It should become the company's business only when the woman is demonstrably unable to perform her duties.

The *Cohen* case is currently on appeal to the Supreme Court and will be well worth watching. However, another narrow decision in our “favor” will leave the latent threat of the BFOQ undisturbed.¹⁴ Perhaps only with the passage of the ERA, which does not include a BFOQ exception, will this threat truly be eliminated.

INTERPRETATION AND IMPLEMENTATION

The process of interpreting the Equal Rights Amendment will probably be similar to the history of the 14th Amendment, though hopefully minus the 100 years of inactivity experienced by blacks. We expect the initial construction to be fairly narrow, with the exceptions already noted concerning sex as a suspect classification and the elimination of the BFOQ exception. Thereafter, the applications will probably broaden, extending in the direction taken by the 14th Amendment as to state action and affirmative action. We believe this process will be slow, but with the ERA playing a meaningful role in reducing the number of stereotypes legally applicable to women and expanding the occupational and other roles women will more and more commonly fill.

The anti-ERA forces seem to believe that fundamental change will

somehow be wrought overnight. It is true that both public institutions and private industries and unions will be more likely to examine their laws, regulations, and procedures concerning women after ratification of the ERA than are currently worrying over the applicability of the *Reed* decision to their operations. But fundamental change is not brought about so rapidly, independent of how one might feel about its desirability.

The fears of the opponents are compounded of a lack of perception regarding the present realities of our culture, together with a fear of change per se. We will attempt to deal with three areas of these fears which seem more legitimate to us in that they are areas where, if the ERA is misinterpreted, an element of coercion might be introduced: family law, protective legislation and the draft.

Family Law

In the area of family law after the ERA, we believe the support obligation will be defined in more functional terms based, for example, on each spouse's actual earning power, current resources, and nonmonetary contributions to the family welfare. Many opponents believe that the ERA will indirectly weaken society, the family, and man's desire and obligation to support the family, by forcing unwilling women out to work. The central fear is that the man in the marriage relationship will not assume his responsibilities unless made legally accountable. This is rather ironic since the foes of the ERA are the same ones who continue to uphold the virtues of men as pillars of the family, the church, and community. They see the woman as responsible for supporting the man in whatever role he takes and in whatever decision he makes, should the couple choose to follow the currently accepted pattern of family life. They fail to note, that the current pattern already includes a high proportion of women who have no choice but to work and/or supplement low incomes.¹⁵

Since the law does not typically interfere with the ongoing marriage relationship, the fears that women will be forced to work focus mainly on the divorce proceeding—where the practical effects of current law are not so favorable to women as is the popular myth. Statistics show alimony support is very infrequently awarded by courts.¹⁶ Since public policy and peer pressure encourage all persons to take active roles in the working community after divorce, women are discouraged from seeking alimony, even when they have nearly no working-world skills. In the present child custody system, the payments are usually so minimal in comparison to what is needed to raise the children and combat the day care and other employment obstacles women face, that in actuality women are supplying more than half of the child support.¹⁷

After passage of the ERA, it may be possible to recognize more directly the nonmonetary contributions women make to the family welfare before divorce through more realistic alimony and child support provisions. Since it may be impossible for the man alone to compensate for the lack of employable skills in his ex-wife, forms of woman-power retraining and education might become increasingly available for those who desire it,

subsidized by government scholarships and/or loans. This result may in fact be mandated by a concept of equal treatment of the partners at divorce.

Protective Legislation

Fear of losing protective legislation has been until recently the major line of opposition to the ERA as recited by unions.¹⁸ This concern is probably the most legitimate, when considered in relation to lower-income women who are perennially exploited in the working world. But when extended to other areas it isn't a valid argument, since it is just such legislation which is used to keep women in their lower-paying, lower-status places.

It is an even less valid fear when it is realized that differences concerning weight lifting and other unequal benefits and detriments of employment were the first to be challenged under Title VII. The *Bowe*¹⁹ and *Weeks*²⁰ decisions leave little doubt but that it will be impossible to write future pieces of protective legislation covering a single sex. *Bowe* stands for the proposition that weight limits must first be proved job related, under *Griggs*-type criteria,²¹ and then individuals regardless of sex must be given the opportunity to qualify. This tendency will not be halted by defeating the ERA.

The very legitimate fears of lower-income working women, who are at a definite disadvantage in the work force and who will most probably always be taken advantage of by their employers no matter what the laws are, would be better directed toward the unions whose duty it is to provide fair representation for *all* employees covered in their contracts. Women in fields not presently under union contracts would be no harder to organize than were men in the early days of the union movement if the unions were willing to demonstrate their relevance to these women by allocating program priorities and financial resources to fight for such things as day care facilities and the continuation of benefits during temporary pregnancy leaves.

One can only hope the burdens will not increase after passage of the ERA, but very articulate working women, taking into consideration who they work for and the current union belief that they represent an economic threat, see this not-so-nice-or-easy road as quite plausible. This impact could be avoided by extension of protective legislation to both sexes, or by the adoption of technological changes which could equalize job burdens which impact differentially against women. This would also forestall union fears that seniority and promotion systems will be undermined by "special" treatment for women. Such solutions, including innovative job classifications and descriptions incorporating part-time employment possibilities, may actually be facilitated by passage of the ERA.

The Draft

Some of the most emotional arguments in opposition to ERA raise the specter of women being drafted into the armed services and sent into the front lines of active combat. Commonly ignored are the facts that: 1) Congress has always had the power to authorize the drafting of women;

2) with an all-volunteer army, no one will be in the trenches who has not volunteered to go there

But to deal with these fears, rather than avoid them, let us suppose that the volunteer army fails to raise sufficient personnel, the draft is reinstated in time of war, and women are called. First, there has always been a hardship exemption for men whose families could not survive without their services. This could be invoked to insure that children were not left parentless while both their mother and father donned battle fatigues. Secondly, the conscientious objector status could be expanded to cover both women and men philosophically and psychologically against service. It could be one of the real plusses of passage of the ERA that, with the expansion of the pool of draft-eligible persons, the heretofore strict standards could be loosened for everyone's benefit, and greater numbers of prospective draftees would be channeled away from combat and into alternative service.

But what of the woman who can invoke none of these methods and is drafted? Once you get beyond the draft, the military establishment can be viewed as an industry with so many jobs to be performed, each of which will have job-related standards for qualification. Many women will be able and willing to serve their country—and equally anxious to qualify for the skill training and veterans benefits which follow from such service. Statistically, it is unlikely many women will be in the front lines, for even in time of war, the proportion of military personnel actually in combat is miniscule—and the proportion of women, as compared to men, who will have the physical prowess necessary for actual combat will not be great.

Affirmative Action

The question now centers on a fear plaguing the proponents of the Equal Rights Amendment. What effect will the ERA have on the already-initiated affirmative action efforts of Title VII and the continuation of this type of thrust under new legislation following passage?

As Owen Fiss has articulated²² the purpose of Title VII is in a state of tension between seeking “treatment” through color-blindness or sex-blindness; and seeking opportunity for achievement. For the latter goal, “blindness” is insufficient; it can have the effect of perpetuating the imbalance created by past discrimination. Therefore, groups discriminated against must be recognized as such, at least initially, for purposes of advancing them to a truly competitive position.

The proponents of “blindness,” which requires that we cease considering race or sex, would have us believe that this is more in line with the Constitution as it presently stands and that passage of the ERA will even more definitely mandate that everyone be treated the same. Justice Burger in *Griggs*, however, furthered the interpretation that the thrust of Title VII is toward seeking opportunity and achievement when he required diversifying the pool of qualified applicants and supported the right of the individual to be hired on his or her own merits. Title VII has a section forbidding preferential treatment, which was dismissed as not being an impediment to this interpretation. The power for Title VII is derived from

the 14th Amendment and the Commerce Clause. The language of the ERA is very similar to the 14th Amendment except for the explicit application against sex-based discrimination. After ratification the power for such an interpretation will not be impaired: the ERA will be construed as part of the whole fabric of the Constitution.

Affirmative action can be consistent with remedial action. The continuing effects of past discrimination can be channeled to identify the victims and to provide remedies, as noted in *Ogilvie*,²³ and *Carter*.²⁴ The victim is thereby enabled to participate from a more equitable level, rather than from a disadvantaged point.

Can one say that society was wrong relative to past discrimination and then leave the victim to do all the untangling of the problem? Or must one make society's basic institutions respond by challenging their discriminatory assumptions and then integrating the diversity of the races and sexes on an equivalent footing?

The remedies are very difficult to fashion, but one thing is clear: we will not make discrimination evaporate by closing our eyes. There will still be discriminatory attitudes, acts, and institutions with which to contend. An affirmative duty must be asserted to undo past discrimination and to minimize it when it arises from activities of other institutions in society.

Clearly the passage of ERA would not stall the already begun affirmative action efforts under Title VII. It should instead lead to many more such efforts, tailored to aiding women in areas other than employment to combat the effects of the past.

CONCLUSION

Currently the Court and the Congress seem predisposed to advance progress, albeit incrementally. However, legislative enactments can be defeated and favorable court decisions can be reversed. But an unequivocal constitutional amendment would ultimately have to be interpreted to bring true legal equality to both women and men.

FOOTNOTES

1. The Equal Rights Amendment: Sec. 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.
Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Sec. 3. This amendment shall take effect two years after the date of ratification. H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972); S.J. Res. 8, 92nd Cong., 1st Sess. (1971).
2. As of February 17, 1974, thirty-three states of a necessary thirty-eight had ratified the Equal Rights Amendment. They are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.
3. Justice Douglas remarked in an address at IU that he has always personally felt that the 14th Amendment covered the rights of women, but that this is not a majority opinion on the Court. *Herald-Telephone*, April 27, 1973. Dramatic confirmation of this fact came with the decision of *Frontiero v. Richardson*, 411 U.S. 677 (1973) where Brennan, Douglas, White and Marshall explicitly stated their willingness to declare sex-based distinctions inherently suspect. Concurring in the invalidation of the discriminatory regulations at issue in the case, but not in the more general statements concerning sex discrimination, were Blackmun, Burger, Powell and Stewart. Rehnquist dissented.
4. *Hoyt v. Florida*, 368 U.S. 58 (1961).
5. *Reed v. Reed*, 404 U.S. 71 (1971).
6. *Frontiero v. Richardson*, 411 U.S. 677 (1973). See Footnote 3 above.
7. Civil Rights Act of 1964, 42 U.S.C. §2000 et seq.
8. "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees. . . on the basis of. . . sex. . . in those certain instances where. . . sex. . . is a *bona fide occupational qualification* reasonably necessary to the normal operations of that particular business or enterprise. . ." 42 U.S.C. §2000e-2 (3).
9. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).
10. *Diaz v. Pan American Airlines*, 442 Fed. 2d 385 (5th Cir., 1971).
11. *Cohen v. Chesterfield County School Board*, 474 FEd. 2d 395 (4th Cir., 1971).
12. According to U.S. Department of Labor statistics, in 1971 women comprised 41% of the working force and 42.7% of all women over 16 were employed. This is almost double the number of women in the work force twenty years ago.
13. A 1970, U.S. Department of Labor survey found that 60% of all employed women work in order to provide the sole support for themselves and their dependents or to supplement the income of husbands earning less than \$6,000 a year.
14. Since this was written, the Supreme Court has reversed the lower court decision, *Cohen v. Chesterfield County School Board*, 411 U.S. 947 (1974). By basing its opinion on a theory of deprivation of procedural due process, however, the Court has made the impact of its new ruling difficult to estimate. It is clear, however, that it neither declared sex to be a suspect classification, nor struck the BFOQ exception from the Title VII legislation.
15. In March 1972, of 53,296 thousands families, 6,191 thousands were headed by females. 4,489 thousands of these families were headed by white females (9.4% of all white families) and 1,702 thousands were families headed by black and other females (30.1% of all black and other families). Of the 6,191 thousands, over 33% were in the below low income level. In 1971, the median income of female headed families was \$5,114, compared with \$10,930 for male headed families. See the *Statistical Abstract of the United States 1973*, U.S. Department of Commerce Publication, 39, 40, 42, 339.
16. The only nationwide study of alimony and child support was made by the Support Com-

mittee of the Family Law Section, American Bar Association in 1965, when Ms. Una Rita Quenstedt, then chairperson of the Committee, and Mr. Carl E. Winkler, former chairperson of the Committee, made a survey of 575 domestic relations court judges, friends of the court, and commissioners of domestic relations. This study indicates that alimony is awarded in a very small percentage of cases.

17. See Nagel and Weitzman, "Women as Litigants," 23 *Hastings Law Journal* 171 (1971) and the Quenstedt-Winkler Study mentioned above. In the Nagel-Weitzman article, a study revealed that within one year after the divorce decree, only 38% of the fathers were in full compliance with the support order; 20% had only partially complied, and in some cases partial compliance only constituted a single payment. Forty-two percent of the fathers made no payments at all. By the tenth year, the number of open cases had dropped from 163 to 149 as a result of the death of the father, the termination of his parental rights, or the maturity of the children. By that year, only 12% of the fathers were fully complying and 79% were in total non-compliance.
18. As of February 17, 1974, the following unions and professional associations have endorsed the ERA: Airline Pilots Association; AFL-CIO; Automobile, Aerospace and Agricultural Implement Workers of America, International Union; Barbers, Hairdressers, and Cosmetologists International Union of America; Brewery, Floor, Cereal, Soft Drink and Distillery Workers, International Union of; Cement, Lime and Gypsum Workers International Union; Chemical Workers Union, International; Communication Workers of America; Electrical, Radio and Machine Workers, International Union of; Electrical Workers, International Brotherhood of; Granite Cutters International Association of America; International Union Department, AFL-CIO; International Brotherhood of Teamsters; International Brotherhood of Painters and Allied Traders; Leather Workers International Union of America; The Newspaper Guild; National Professional Employees International Union; and United Auto Workers.
19. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).
20. *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).
21. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Regarding the *Griggs*-type criteria, the court held that Title VII of the Civil Rights Act of 1964 requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and if, as here, an employment practice that operated to exclude Negroes, cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. The Act does not preclude the use of testing, or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance.
22. Fiss, "A Theory of Fair Employment Laws," 38 *University of Chicago Law Review* 235 (1971).
23. *Southern Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (1971).
24. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971).