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EQUAL RIGHTS AMENDMENT:

Selected Floor Debate and Votes

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THE PROPOSED EQUAL RIGHTS AMENDMENT: IMPLICATIONS AND INTENT

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INTRODUCTION

The proposed Equal Rights Amendment (ERA) to the United States Constitution would provide the following:

> 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.

The ERA was first introduced in 1923, and passed the 92nd Congress (H.J. Res. 208) in 1972. The House of Representatives approved the measure on October 12, 1971; and the Senate passed the ERA on March 22, 1972. During the two days previous to the final vote of the Senate, extensive debate on the measure took place on the Senate floor. Senator Sam Ervin introduced a total of ten amendments to the ERA during this debate in an effort to modify its application. Nine of these amendments were defeated by wide margins in roll call votes, and one amendment was withdrawn.

These amendments take on more than mere historical interest in several ways. First, excerpts from the debate on the proposed amendments to the ERA provide an excellent summary of the objections to, and support of, the equal rights amendment. By defining his objections in the form of individual amendments, Senator Ervin made it possible to easily identify pro and con summaries of the various issues suggested by the proposed constitutional amendment. For example, one of the best sources available for information about the possible effects of the ERA on women and the draft would be the pro and con debate on proposed Amendment no. 1065, to exempt women from compulsory military service.

Further, the Congressional Record debate on the amendments to the ERA, with the final vote tallies, may be used as evidence of legislative intent. Legislative intent is also indicated by the majority and minority reports of the Senate Committee on the Judiciary, excerpts from which are included in this report.

The equal rights amendment must be ratified by three-fourths (38) of the states, and must then wait a provisional two year period before taking effect. It is difficult to predict the actual implications and effects that this measure would have on our society if it were fully ratified. Ultimately, the final interpretation of the ERA would necessarily await determination by the courts. However, by presenting a summary of the final debate on the ERA and on suggested amendments which identify some objections to the measure, an indication of its implications and intent can be ascertained.

The text has been edited to provide the best summaries of each issue, as the debate in its original form is lengthy and somewhat repetitive.

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AMENDMENT NO. 1058

Mr. ERVIN. Mr. President, I call up Amendment No. 1058 and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read the amendment as follows:

On page 1, line 12, after the period insert the following: "This article shall not apply to any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex.".

On page 2, line 3, strike "amendment" and insert "article".

Mr. ERVIN. Mr. President, the Wall Street Journal for August 13, 1970, published an editorial entitled "The Ladies and the Constitution." I read that editorial:

That Constitutional Amendment liberating women broke on the public consciousness so quickly no one's quite sure what its real effect would be.

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," is what it says. Sounds fine, at least until the lawyers and courts get at it, but it's been languishing in Congress since 1923. Lately Congressman Celler, who's against it, has kept it bottled up without even committee hearings. But when Congresswoman Griffiths strong-armed it out on the floor with a discharge petition, it whizzed through the House by 346 to 15.

The upshot is that it was passed with only an hour of debate, which wasn't exactly time enough to clear up all the little hazy areas. Everyone seems to think it would finally implement that unassailable principle that women ought to get the same pay as men for the same work, but someone ought to take time to notice the words do not mention private employers. We were assured that it wouldn't affect such things as maternity benefits or rape laws, somehow. And what with a volunteer army almost here we don't need to worry about its implications for the draft.

Well, we're all for the ladies, but even so, before we write some new words into the Constitution it'd be nice to know what they really do mean.

Frankly, Mr. President, I do not know what the ERA means in one aspect. Therefore, I have offered the following amendment which would amend the joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for women for man and women, as follows:

On page 1, line 12, after the period insert the following: "This article shall not apply to any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex.".

Now, Mr. President, the idea that this law would legalize sexual activities between persons of the same sex or the marriage of persons of the same sex did not originate with me. I do not know what effect the amendment will have on laws which make homosexuality a crime or on laws which restrict the right of a man to marry another man or the right of a woman to marry a woman or which restricts the right of a woman to marry a man. But there are some very knowledgeable persons in the field of constitutional law, such as Prof. Paul Freund of Howard Law School, Prof. James White of the Michigan Law School, and Prof. Thomas Emerson of Yale Law School, who take the position that if the equal rights amendment becomes law, it will invalidate laws prohibiting homosexuality and laws which permit marriages between men and women.

The constitutional amendment which the Senator from Indiana is proposing states that:

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

Professor Freund of the Harvard Law School and Professor White of the University of Michigan Law School have reasoned that the ERA will mean that activities which are permitted between members of different sexes cannot be the basis of criminal prosecution against members of the same sex. Thus, State criminal laws relating to sexual conduct between members of the same sex will be unconstitutional under the ERA because it denies them equality of rights because of their sex. Marriage laws, in the same way under the ERA, could not be restricted to members of different sexes. In other words, the professors reason that laws and activities which are allowed to members of different sexes will have to be extended to members of the same sex or they will be denied their "equality of rights" . . . on account of their sex, as the ERA states.

In the hearings before the Senate Judiciary Committee last year, Prof. James White of the Michigan Law School mentioned these bizarre results which would flow from passage of the ERA. Professor White said:

With the exception of Illinois and perhaps a few other states, there are laws on the books which make it a crime to engage in certain kinds of homosexual activity. First of all, I suppose the amendment would bring in question all that law . . . I think the question is, is this the way we should do away with it or should we allow the states to control this themselves?

Prof. Paul Freund of the Harvard Law School also testified during the Judiciary Committee hearings that:

Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

Prof. Thomas Emerson of the Yale Law School mentioned in an article in the Yale Law Journal that:

Courts will most likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike.

I do not agree with these results and frankly I do not feel the Members of the Senate intend the results which Professor Freund of the Harvard Law School, Professor White of the Michigan Law School, and Professor Emerson of the Yale Law School say will flow from the passage of the ERA regarding homosexual activity.

Mr. BAYH. Mr. President, will the Senator from North Carolina yield to me for a question, please?

Mr. ERVIN. I will be glad to yield to the Senator from Indiana for a question.

Mr. BAYH. That is exactly what I wanted to ask the Senator, and I appreciate his courtesy. I have not had a chance to give a great deal of lengthy study to homosexuality, but I would ask the Senator, is homosexuality limited to men or to women?

Mr. ERVIN. Some forms of it are and some are not. But if there is a problem here, as these legal scholars say, perhaps the Senator's Constitutional Amendments Subcommittee should study the subject before we pass a constitutional amendment which legal scholars say could effect this area of the law.

Mr. BAYH. Is homosexuality limited to men or to women? In other words, if a State legislature says it is against the law——

Mr. ERVIN. They make a distinction. Unlike this amendment, the phraseology relating to that matter does make a distinction between men and women, as a rule. It applies the term "homosexuality" to abnormal sexual activities between men——

Mr. BAYH. But, is this——

Mr. ERVIN (continuing). And sometimes to abnormal sexual activities between women.

Mr. BAYH. How is this term defined by the statutes which concern the Senator from North Carolina? I ask this question not to get involved in anything that might be embarrassing, but we do have to be specific here.

Mr. ERVIN. The Senator from Indiana is asking a question, but the Senator from North Carolina would not have the time, if he had the learning, to explain to the Senator from Indiana what the laws of the 50 States have to say on the subject. But, I will tell the Senator what some very smart constitutional lawyers, including Prof. Paul Feund of Harvard, Prof. James White of Michigan Law School, and Prof. Thomas Emerson of Yale Law School, have had to say about the effect of this amendment in the general field of sexual activity and marriage relations.

Mr. BAYH. The Senator has been kind to permit me to ask the question which he has not yet answered.

Mr. ERVIN. I profess my inability to educate the distinguished Senator from Indiana on the phraseology of all the laws of the 50 States which make homosexuality a crime, but they are multitudinous, and perhaps there should be a subcommittee study of them before the Senate acts.

Mr. BAYH. The Senator from Indiana would——

Mr. ERVIN. If the Senator will remember his Bible, he will recollect that sodomy was practiced in Nineveh and that was the reason Nineveh was wiped from the face of the earth.

Mr. BAYH. Let me suggest that the argument the Senator proposes at this point might have been relevant at the time of Nineveh, but it does not seem relevant today. I refer to the original question the Senator from North Carolina was considerate enough to accept

from the Senator from Indiana. That, I do not think, has been answered. I think it is possible to make a real distinction between the sexuality of a man or woman and various acts they practice. There are, of course, very real physical differences between men and women.

Mr. ERVIN. But the act says that there are not.

Mr. BAYH. Mr. President, I asked the Senator——

Mr. ERVIN. The Senator is not now propounding a question.

Mr. BAYH. Yes I am. I am now trying to redefine it so that the Senator might finally answer it. He has not yet answered. I asked the question whether the word "homosexualty," or act of homosexuality, or statutes prohibiting homosexuality are confined to men or women.

Mr. ERVIN. It depends on the phraseology of the statute.

Mr. BAYH. I wish the Senator would describe a homosexual act.

Mr. ERVIN. I am not going to describe homosexual acts on the floor of the Senate.

Mr. BAYH. The Senator from Indiana did not want to embarrass anyone. However, I am trying to get at the different definitions of homosexuality. The Senator described various capacities that men or women have.

Mr. ERVIN. The Yale Review article by a great student of constitutional law, Thomas Emerson, who Senator BAYH has deemed a great legal scholar, says that this constitutional amendment would invalidate every statute which makes homosexuality or lesbian activity dependent on the sex of the participant.

Mr. BAYH. Would it be possible for a State legislature, after the passage of this amendment, to enact a statute saying that it shall be unlawful under the laws and statutes of State X to participate in any type of homosexuality whatsoever, p-e-r-i-o-d?

Mr. ERVIN. If the Senator had studied a little anatomy as well as a little law, he would find that there are some offenses which go under the general term of homosexuality which only men can commit. And that is true with respect to discrimination against sex being wiped out. This act of sexuality would be made lawful instead of unlawful under the amendment and I am against this result.

Mr. BAYH. Mr. President, we have time, and I would like to get the Senator's opinion. If he does not want to give it, that is all right. However, he has significant constitutional expertise. We might differ as to the wording of different statutes. However, the question I propound is whether it would be possible for such a State statute to be enacted. The Senator from Indiana is not an expert on anatomy. However, he is an expert on his own anatomy.

Mr. ERVIN. That ought to be enough to apprise the Senator from Indiana with the fact that there are certain acts of homosexuality that only men can commit.

Mr. BAYH. I have read about it. However, I have not had any expertise in that area.

Mr. ERVIN. I am not implying that the Senator had and neither have I.

The PRESIDING OFFICER (Mr. GAMBRELL). The Senators will suspend until the galleries come to order. There will be no demonstrations in the gallery with reference to what is taking place on the floor.

Mr. ERVIN. This is on my time, and I prefer to speak on my time. Let the Senator from Indiana speak on his time.

Mr. BAYH. Mr. President, may I yield myself 2 minutes?

Mr. ERVIN. No; I have the floor. The Senator from Indiana can have the floor after I have had a chance to speak. I do not mind the questions, but I do mind being heckled.

Mr. BAYH. Was the Senator from North Carolina being heckled?

Mr. ERVIN. Yes; the Senator from Indiana is heckling the Senator from North Carolina and trying to impede the Senator from North Carolina in his effort to explain the thoughts of Professor Freund of Harvard, Professor White of Michigan Law School and Professor Emerson of the Yale Law School who say that laws dealing with homosexual activity will be unconstitutional after passage of this amendment.

Mr. BAYH. Would the Senator from North Carolina permit me to strike my questions from the RECORD?

The PRESIDING OFFICER. Will the Senator from North Carolina yield to the Senator from Indiana? The Senator from North Carolina has the floor.

Mr. ERVIN. No; I do not yield.

Mr. BAYH. May I ask unanimous consent?

Mr. ERVIN. I do not yield for that purpose.

The PRESIDING OFFICER. The Senator from North Carolina has declined to yield, and the Senator from North Carolina has the floor.

Mr. BAYH. May I propound a parliamentary inquiry?

The PRESIDING OFFICER. Will the Senator from North Carolina yield for a parliamentary inquiry?

Mr. BAYH. Is not a parliamentary inquiry appropriate at any time? I merely want to find a way to remove whatever remarks I made that might cause my good friend to think that I was heckling him.

The PRESIDING OFFICER. The Chair has ruled that the Senator from North Carolina has the floor. No parliamentary inquiry may be made without the permission of the Senator from North Carolina.

Mr. BAYH. Will the Senator from North Carolina permit me to make a parliamentary inquiry?

Mr. ERVIN. I do not know why the Senator from Indiana wants to heckle the Senator from North Carolina and prevent the Senator from North Carolina from telling the Senate what these legal scholars think.

Mr. BAYH. The Senator knows that is not the intention of the Senator from Indiana.

Mr. ERVIN. The Senator from Indiana will not permit the Senator from North Carolina——and I hate to say it, but the truth compels me to say so——to proceed for a minute without an interruption. And when the Senator from North Carolina yields for a question, the Senator from Indiana makes a speech on the time of the Senator from North Carolina.

If the Senator from Indiana thinks that the Senator from North Carolina ought not to be permitted to express his views on this matter uninterruptedly, the Senator from Indiana can continue to engage in this heckling. But the Senator from North Carolina, in order that he not be impeded too much and in order that he may be privileged to resume this discussion at a time when the Senator from Indiana and the Senator from North Carolina will have had an opportunity to read the statutes of some of the States, the Senator from North Carolina will temporarily withdraw the amendment.

The PRESIDING OFFICER (Mr. GAMBRELL). The amendment is withdrawn.

AMENDMENT NO. 1065

Mr. ERVIN. Mr. President, I call up Amendment No. 1065.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

At the end of section 1 add the following sentence:

This article shall not impair, however, the validity of any laws of the United States or any State which exempts women from compulsory military service.

Mr. ERVIN. Mr. President, I yield to the distinguished Chairman of the Committee on Armed Services, who is as knowledgeable a man as this country has on the subject of recruitment of personnel for our Armed Forces, for such time as he may desire to use on the amendment.

Mr. STENNIS. I thank the Senator from North Carolina very much.

Mr. President, will the Chair call to my attention when 20 minutes have expired?

The PRESIDING OFFICER. The Senator will be recognized for 20 minutes.

Mr. STENNIS. The real effect of the women's rights resolution, Mr. President, is a very serious proposed constitutional amendment and it proposes a very grave question from the standpoint of national security as well as the treatment of womanhood.

First, I want to address myself briefly to the overall import of the proposed resolution.

The resolution purports to be a fair and evenhanded measure giving the women of this Nation equal legal rights, and if it were, it would be something that every Member of the Congress could readily accept and cosponsor. In past years I have cosponsored amendments requiring equal rights for women myself. But, Mr. President, the joint resolution now before us needs the changes proposed by the Senator from North Carolina, and without them its effect will almost certainly be very harmful to the stability and fairness of our laws and to the very fabric of our social system. I am prepared to vote for any bill or constitutional amendment which would really give equal rights to the women of this country and always have been but the resolution now before us, as it will probably be interpreted by the courts, has far more bad effects on both men and women than it has good.

It is my firm belief that the overwhelming majority of women in this country seek equality of the sexes under the law and not absolute sameness. The basic concern which most women have expressed to me about this resolution is its effect on the right of women to receive equal pay for equal work and to have equal job opportunities with men. In studying this problem over the past few years it has become clear to me that women in this country generally do not receive jobs or pay on a par with men. This situation continues to exist in spite of numerous laws on the books requiring equal treatment of all persons in this country, including: The 14th amendment to the United States Constitution, assuring equal protection of the laws to all persons; the Fair Labor Standards Act of 1938, with its 1966 amendments pertaining to women; the Equal Pay Act of 1963, explicitly requiring equal pay for equal work regardless of sex; Title VII of the 1964 Civil Rights Act specifically prohibiting employment discrimination based on sex; and numerous executive orders of Presidents Kennedy, Johnson, and Nixon.

In light of this large body of Federal law already abolishing employment discrimination against women, which so far has not been effectively enforced, it is clear that the need is not for further laws or constitutional amendments, but for solid enforcement of the laws already on the books. What we in Congress must not do is merely appear to favor the legal rights of women by voting for this resolution in this election year when its actual effect will be to destroy many useful laws favoring women which most men and women would wish to see preserved.

There is the key to the major part of the argument, I think, about this matter and resolution.

Although I feel sure that this resolution is offered in good faith and with high hopes that it will actually benefit the women of this Nation, I deeply fear that its actual effects will do much harm and little good for our country and for the women of our country. That is why I am speaking out in favor of the amendments to the resolution offered by Senator ERVIN. If those amendments are added to the present resolution, I will gladly support it.

As I see it, Mr. President, the basic flaw of the resolution as it now stands is that it legislates and requires absolute sameness as to men and women rather than legal equality. Only Senator ERVIN's amendments exempting women from the military draft and allowing legal distinctions between men and women based on physiological and functional differences can cure the defects of the resolution.

I would like to explain, with some specific examples from the laws of Congress and of my own State, what would be some of the negative effects of this resolution if it were enacted into law.

I know that each Senator has heard or read some of the objections which have been raised against this resolution as it now stands, but unfortunately there seems to be a kind of apathy about it, bred perhaps by a fear of appearing to oppose equal rights for women. I strongly urge every Senator to seriously consider the adverse effects of adopting this resolution without the Ervin amendments.

Under the resolution as it now stands no man in the United States could be drafted into the Army unless women were equally subject to the draft. The only way we could continue a military draft to provide for the defense of our country and to meet our treaty commitments would be to draft young women on exactly the same basis as men. How many Senators would want to see the young women of this country, many of them the mothers of small children, living in barracks, wearing combat boots, carrying M–16 rifles and hand grenades, driving tanks, going through boot camp and being taken prisoner in the jungles of Vietnam. Mr. President, if we adopt the resolution without amendment, that is what it will require, because the U.S. Army would not be allowed to exclude women from combat or other hazardous duty on the basis of sex, since that would discriminate against men, and the present resolution requires absolute sameness of treatment regardless of sex.

That might be a point that has been overlooked to a large degree. This amendment, as drawn, requires absolute sameness, and that means that unless we do draft women and put them in hazardous service where they are physically able, then the man or men drafted into the Army could absolutely put a stop to all draft calls, as far as they were concerned, on a claim, which could reasonably be interpreted as valid, that the men were being discriminated against, that they were not being treated in the same way, that they were being drafted and were being put in these hazardous places because they were men, and to that extent this amendment was being violated.

I do not think there is any duobt about the seriousness of that claim, and we had a complete and extended debate here last summer in which every conceivable phase of the application of the law that was finally passed, for a 2-year period at least, was considered, and every Senator already is familiar with the problems that go with the enforcement of that legislation. The final decision of the Congress was that it was necessary to have a military draft, and that we were going to try to carry along with it a volunteer system, at least on a trial basis.

Now we are trying this voluntary system and proceeding as rapidly as reasonably possible, with very close care being given, though, to getting the quality men, the quality personnel that can fill all these assignments, hazardous or not. It is a vrey serious experiment, very difficult to carry out, and the results are far from known.

My opinion is that we will have to continue the draft in some form for a considerable number of years to come. So we will be back here next year in all probability, for renewal in some form of the draft act. If we adopt the present women's rights resolution now, it will be hanging fire before the country, and there will be a question as to whether or not it will be adopted, and there will be great doubt, confusion, and even chaos as to just what this resolution means with reference to forced military service by women in this country.

I wish to emphasize that I do not for a moment doubt the courage or dedication of the women of this country who have served so unselfishly both in uniform and as civilians during past wars and now in

Vietnam, and I remind those women who have served and now serve in the WAC's and WAVE's that those forces would also be effectively abolished by the proposed resolution.

Every Senator who seriously considers the picture of our young women being taken prisoner in combat will know that we could not and will not subject them to military service on the same basis as men. It is unthinkable. Since the present resolution would require sameness of treatment of men and women under the draft law and in the military generally, the obvious effect of adopting the resolution would be to abolish indirectly the draft, little more than a year after the Senate adopted the draft bill following lengthy debate. Although I recognize and share the current feelings of concern about the war in Vietnam, the way to deal with military problems is by full debate on military bills, as I have urged, and not by the back-door method of a measure purporting to grant equal rights to women. The Senate should remember that this resolution, unamended, would be in effect not only until the end of the war in Vietnam, but forever, and could seriously affect and impair the operation of our Army in operating efficiently to defend our own country. I strongly object to such an illogical and unreasoned result.

The organizations, with our military, have rendered tremendous service and have filled in and carried out in a fine way some of the bravest and most highly important assignments to be found anywhere in the military. There is no question about their dedication, but this is a question here of sameness and the treatment of the sexes alike, and in trying to get apparent equality we are going to destroy, I think, our ability to deal effectively with the men in our armed forces which is absolutely essential to carrying out military assignments.

Mr. President, I have another thing in mind. I have visited in countries where I saw gangs of women laborers out there in the street with pick and shovel, repairing the streets, with blacktop, hot, boiling, creosote material, laboring hour upon hour. With all deference to those countries, we do not have anything like that in mind for our womanhood. We do not want that. We want the very opposite, and it is in the opposite direction, as pointed out by State laws, that we have been traveling for many years and decades now. This amendment in its present form would wipe out those laws at the State level and at the Federal level. This is traveling in exactly the opposite direction from what we have been doing as a matter of policy and as a matter of legal requirement both in industry and at other levels, for many, many decades.

I do not have to picture our young women being taken prisoners in combat and going into the unthinkable consequences of those situations. It is possible perhaps even now that some could be captured in performing some of their very fine present services, but that is a wholly different situation and on a far smaller scale from what we would have here if the proposal now before us should be adopted without the Ervin amendments.

The only fair, sensible, and practical answer to this dilemma is to amend the resolution by clearly exempting women from the draft, and permitting legal distinctions between men and women under the resolution, based on recognized physiological and functional differences such as would certainly affect their fitness for combat service in the military. As I say, that is the only sane and sensible approach to this matter. I think we are going off chasing a theory, and we would bring great difficulty, chaos, and bitter disappointment to the womanhood of this Nation, who have had their expectations raised so high with respect to this resolution.

The unamended resolution would also require women to serve in the National Guard of each State on the same basis as men. In Mississippi the State constitution, article 8, section 214, makes all males aged 18 to 45 subject to State military duty; so does section 8519 of the Mississippi Code. Both these provisions, approved by the people of our State, would be abolished if the present resolution becomes an effective constitutional amendment, and the people of Mississippi, even if they opposed the constitutional amendment, would be forced to either disband the National Guard or make women subject to the same military service duties as men.

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Mr. BAYH. I thank the Chair.

In the judgment of the Senator from Indiana, who has been involved in the equal rights debate for a long, long time, the issue which is now joined is one of the most difficult with which to deal. I must say I share the concern of every Member of this body that the impact of this amendment and its relationship to the military will not be the kind of impact that will turn mothers away from their children or irreparably damage lives or home life. I can see how Members of this body can have a different opinion on this amendment. But I think it is important for us to consider its impact, or perhaps I should say the impact of the equal rights amendment on women in the military on the basis of the facts as they are now and as they are liable to be reasonably in the future, and not permit us to be deterred from a study of the facts by establishing straw men, by which we are led to believe that, if this equal rights amendment passes, every mother is going to be dragged, kicking and screaming from the cradle of her child.

This assertion, in the judgment of the Senator from Indiana, is a bit farfetched, to be kind.

Let us look at the entire picture of the military in the involvement of women and in the involvement of women if the equal rights amendment passes. First of all, in the very near future, we are going to be facing that type of military situation. I hope and pray, that has confronted our country throughout most of its history: namely, we will no longer have a war; thus, we will no longer have a draft. And, if there is no war and no draft, there are not going to be any women, mothers, whoever they may be, whatever their capacity in life, either being drafted or sent into combat.

Second, given a situation of a continuation of hostilities—which I hope will not be long, but given a situation in which we have sent citizens of this country into battle, to perhaps give their lives—there has been a great move in this body to increase the number in the military, if not all members of the military, to be a part of a volunteer service. Then the question has to be asked, well, if a woman wants to volunteer, should she be treated differently from a man?

By the words spoken by the Senator from Mississippi a while ago in his remarks, he suggested that WACS and WAVES and nurses that are now in the military are subjected to the hazards of actual combat, but that that is a different situation from actually drafting women against their normal will and forcing them into the military.

Let us look more specifically at the draft. No peace exists. A combat situation exists where we are not able to supply the manpower needs—and I use the word "manpower" advisedly—by voluntary means. What would be the role of the women of this country?

First of all, I think the role of the women of this country would be the same as the role of the men of this country traditionally throughout the years, inasmuch as Congress has traditionally established and allowed a number of exemptions in which, if a man qualifies, he can claim that exemption and he does not have to go.

The equal rights amendment requires that those exemptions would have to be sex-neutral exemptions rather than those that apply to one sex.

What type of exemptions are you talking about, Senator BAYH? Well, it is entirely possible that Congress would establish an exemption in which any parent could be exempted from the draft. Ridiculous, you say? Well, throughout most of the 1950's and 1960's this is exactly an exemption that applied to men and women—it did not apply to women, because they were not subject to the draft, but it did apply to every man. Any father was exempted. So that exemption could exist under the equal rights amendment. Any parent, mother or father, could claim that exemption and not be subjected to the draft.

Congress could also provide that the parent who has the primary duty of rearing the children or caring for the home would be exempt. In the judgment of the Senator from Indiana, this would be perfectly constitutional under the equal rights amendment. Congress would be excluding the parent there, whether it be mother or father; but, indeed, we can look around at most of the homes around the country, and in some of these homes,

wage earner and the mother has the primary responsibility for rearing the children and taking care of the house, and she could claim this sex-neutral exemption.

Congress could take a further look and provide that no more than one parent in any family would be subject to conscription.

Then, let us move past the exemptions. Let us look at those who are not able to claim an exemption and those who are subject to the draft. What size burden are we really talking about? Does every 17, 18-, or 19-, or 22-year-old woman feel that she is going to be drafted?

Let us look at the facts as they are today as far as men are concerned. Let us take the 1971 draft call, the most recent draft call. There were, in 1971, 1.9 million men in this country eligible for the draft; 50.5 percent, or over half of those, were rejected for induction for one reason or another; 24.9 percent were rejected at induction.

So when we get right down to it, less than 25 percent of the men of this country were ever subjected to the draft in the first place. That number was between 400,000 and 500,000. Of this almost 500,000-man pool of men subjected to the draft after the various rejections, only 98,000 were ever called, and only 94,000 of those were ever inducted.

In other words, 5 percent of the eligible males in the country were inducted into the Army last year. Less than 15 percent—and I wish the Senator from Mississippi were here to verify this, because we are concerned about combat—out of that pool of 5 percent out of almost 2 million men were assigned to combat branches. That means that less than 1 percent of the eligible males in the whole country that were ever assigned to a combat unit.

It might be fair to say that is about the same risk women would be subjected to, except it would be fairer to assume that the sex-neutral standards that would be established by the Armed Forces on the basis of physical competence would exclude an even greater percentage of women because of the ordinary physical standards required, such as pushups, chins, running, and other physical and combat characteristics that are necessary for any member of the armed services.

Now, of this less than 1 percent—and if you look at all of the physical rejections that could occur, you would get down to significantly less than 1 percent of all the women in the pool who would be drafted in the first place—would they be assigned to combat duty?

Admittedly, there is no way we can guarantee they would not be, but in the judgment of the Senator from Indiana, they would be assigned to duty as their commanders thought they were qualified to serve. Just as 85 percent of those who are now in the armed services and who are men are not assigned to combat duties, so the commander would not need to send a woman into the front trenches if he felt that it would not be in the best interests of the combat unit to make such an assignment.

I want to suggest that I hope the time will not come when we have women drafted and sent into combat. I hope the time will not come when they are drafted, very frankly. But I suggest that right now we have a significant number of women in all of our military services who are serving with distinction, and many of them are serving in combat zones. You ask a nurse serving in an Army hospital in Danang whether she is in a combat zone or not, and whether she might be spirited away or detained by the V.C., and I am sure she will tell you that is something she has thought about.

If we look at the kind of confrontation which may develop, God forbid, if we ever get involved in a nuclear exchange, then find me a noncombat zone, for I think that is where most of us would want to be.

I think the experience of other nations which have conscripted women might be of help in our deliberations on this subject. I have looked at this situation in Israel. I am sure many people may feel that Israeli women, having been conscripted, are sent into combat. That is really not the case. Women who are conscripted are given combat training, and why should they not be, in the event their position is attacked. But those women are not sent into combat areas, and the Senator from Indiana suggests that with very few exceptions that would be the case here if the equal rights amendment passes.

At this time, I ask unanimous consent to have printed in the RECORD a letter addressed to me from Col. Stella Levy, a military attaché to the Israeli Embassy, describing in more detail the condition which actually exists with respect to women in the armed services of Israel.

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Mr. BAYH. I suggest we are not talking about just a one-way street. In passing an equal rights amendment and thus raising the possibility that some of the women of this country are going to be drafted into the armed services, we are not just talking about a pure sacrifice on the part of the women. We are talking about a sacrifice; yes. We are talking about a responsibility; yes. But we are also talking about a significant benefit to be derived as a result of this service for the country.

I suggest that right now we are operating under a very unfortunate dual system, in which everyone admits that women volunteer and no one can deny that numbers of them now serve in combat zones but the quality and the criteria that must be met by a woman to gain admission to the armed services are different than those for a man. Even if a woman wants to volunteer today, she has to meet a higher standard.

We permit men to volunteer at age 17. A woman cannot volunteer until she reaches 18, despite the fact that most people believe that a woman matures significantly in advance of a man.

A woman, before she is even considered in our services today, must have a high school diploma. That is not true for a man. So the first impact of this equal rights amendment as far as the military services are concerned would be to say that any woman who wants to serve her country will have the same opportunity to do so, and will be either admitted or denied admission on the basis of the same grounds used to admit or deny men.

I want to look at what this means, because there are significant benefits that are denied to women of this country because of the way that they are denied equal access to the military services, either voluntarily or by conscription.

The GI educational bill which has provided the greatest reservoir of talent that this country has ever known, is the first example that comes to mind. This talent has been primarily limited to men, because the services have been primarily limited to men. I wonder how many young women would make the same choice that the Senator from Indiana and many other young men made. When trying to weigh whether I should volunteer or not, one of the things I considered was not only what I could do in the Army, but that if I went in the Army and served my country for a certain period of time, it would permit me, on my own self-reliance, to provide an educational opportunity for myself. Most young women in this country do not have that choice today. This amendment would give them that choice.

It would also give them the benefit of GI loans for homes, farms, and businesses. There are hundreds of thousands, in fact millions of our citizens today who finance the purchasing of a farm, a home, or a business, not because they have any unique talent, but because they have had the opportunity to serve in the U.S. Armed Forces. We do not make this financial capacity available to young women who may want to take advantage of it as well.

GI life insurance is another benefit that is gained if you serve in the Armed Forces. We would make the same benefit available to women. Veterans' mortgage insurance, up to a $30,000 guarantee on a mortgage, would be made available to young women as well as young men, as would nonservice-connected death benefits.

Perhaps the most insidious type of discrimination that results because of the way our Army is treated today is in the employment area. If you are a veteran, the Veterans' Administration seeks to assist you in seeking employment. There are a number of job opportunities, on-the-job apprentice training, and other tools provided. We know that there are certain types of employment by our U.S. Government where, if you are a man and you have been in the military, you get X number of points added to your score, to get the job over someone who may be a woman and has never been a veteran, even if that woman is smarter than you

are and gets a higher score on the intellectual part of the test. By the time you add those points for service to your country, the woman goes to the bottom of the list.

What we are saying is not that this is bad. If persons serve their country, give them the extra points. They earned them. But make this opportunity available on an equal basis to the young women of this country. To suggest that this is all a one-way street, I think, is to suggest something that really is not borne out by the facts.

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The PRESIDING OFFICER. All time on the amendment has expired. The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. LONG (after having voted in the affirmative). Mr. President, on this vote I have a pair with the Senator from Minnesota (Mr. HUMPHREY). If he were present and voting, he would vote "nay." If I were at liberty to vote, I would vote "yea." Therefore, I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Maine (Mr. MUSKIE), the Senator from Alabama (Mr. SPARKMAN), and the Senator from Washington (Mr. JACKSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Washington (Mr. JACKSON), the Senator from Alabama (Mr. SPARKMAN), the Senator from Maine (Mr. MUSKIE) and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The result was announced—yeas 18, nays 73, as follows:

[No. 113 Leg.]

YEAS—18

Bennett	Fannin	Hollings
Buckley	Ervin	Miller
Byrd, Va.	Fannin	Saxbe
Byrd, W. Va.	Fong	Stennis
Cooper	Goldwater	Talmadge
Dominick	Hansen	Thurmond

NAYS—73

Aiken	Brooke	Ellender
Allen	Burdick	Fulbright
Allott	Cannon	Gambrell
Anderson	Case	Gravel
Baker	Chiles	Griffin
Bayh	Church	Gurney
Beall	Cook	Harris
Bellmon	Cotton	Hart
Bentsen	Cranston	Hatfield
Bible	Curtis	Hruska
Boggs	Dole	Hughes
Brock	Eagleton	Inouye
Javits	Nelson	Spong
Jordan, N.C.	Packwood	Stafford
Jordan, Idaho	Pastore	Stevens
Kennedy	Pearson	Stevenson
Magnuson	Pell	Symington
Mansfield	Percy	Taft
Mathias	Proxmire	Tower
McGee	Randolph	Tunney
McGovern	Ribicoff	Weicker
Metcalf	Roth	Williams
Mondale	Schweiker	Young
Montoya	Scott	
Moss	Smith	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Long, for.

NOT VOTING—8

Hartke	McClellan	Muskie
Humphrey	McIntyre	Sparkman
Jackson	Mundt	

So Mr. ERVIN's amendment (No. 1065) was rejected.

S 4395;
S 4401-3;
S 4406-7

AMENDMENT NO. 1066

Mr. ERVIN. Mr. President, I call up my amendment No. 1066.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which exempt women from service in combat units of the Armed Forces.".

Mr. ERVIN. Mr. President, I yield myself such time on the amendment as I may use.

I am sure that the fathers and mothers of America are delighted to know that the Senate of the United States has voted 72 to 18 to draft their daughters into the military service of the country. But I can assure my colleagues that I still expect to be guided by the second verse of the 23d chapter of Exodus, which says:

Thou shalt not follow a multitude to do evil.

Mr. President, while sufficient Senators are in the Chamber, I ask for the yeas and nays on this amendment.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, this amendment is designed to prevent the conversion of Annapolis and West Point and the Air Force Academy and the other service academies into coeducational war colleges. It is also designed to prevent sending the daughters of America into combat, to be slaughtered or maimed by the bayonets, the bombs, the bullets, the grenades, the mines, the napalm, the poison gas, and the shells of the enemy.

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Mr. FONG. Mr. President, the balance of the replies I received to my inquiry as to the effect House Joint Resolution 208 would have on legislation administered by a department or agency involved replies from the Department of Defense, covering service in the Army, Navy, and Air Force; the Selective Service System, involving the draft; the Department of Transportation, covering the Coast Guard; the Department of Commerce, involving the merchant marine; and the Veterans' Administration, involving veterans' benefits.

DEPARTMENT OF DEFENSE

In answer to my request for a list of laws administered by the Department which might be affected by House Joint Resolution 208, the Department sent me a printout of the Federal statutes—I have it here. It is, as you can see, on sheets approximately 15 by 12 inches and is 1½ inches thick—a total of 1,285 documents.

Neither the Department of Defense nor I have as yet been able to analyze this information. Accordingly, I shall not at this time insert it in the RECORD.

Nor, in their letter of February 24, 1972, could the Department of Defense determine the precise effect of the amendment on individual statutes. In lieu thereof, they sent me a copy of a letter of like date to Senator BAYH in answer to his inquiry.

While endorsing the equal rights amendment, that letter states:

We, like the Department of Justice, believe it important that full consideration be given to the complications and litigation that might result should the amendment be adopted.

Depending on how the amendment was interpreted, the Department of Defense feels that two basic types of problems might arise—(1) those related to a requirement for assigning women to all types of duty, including combat duty, and (2) those related to whether or not separate facilities would be allowable and/or feasible to protect the privacy of both men and women.

At the request of the House Subcommittee Chairman, Mr. Behnquist sent a letter dated May 7, 1971 to the Subcommittee detailing the effect of the enactment of the Equal Rights Amendment on several areas of law including the military draft. With respect to the draft, the letter stated:

"The question here is whether Congress would be required either to draft both men and women or to draft no one. A closely related question is whether Congress must permit women to volunteer on an equal basis for all sorts of military service, including combat duty. We believe that the likely result of passage of the equal rights amendment is to require both of those results. As has been pointed out by many of the amendment's supporters that would not require or permit women any more than men to undertake duties for which they are physically unqualified under some generally applied standard.

"To what extent such integration of the services would extend to living conditions and training and working units is uncertain. Proponents have indicated that some segregation would be permissible."

Further, there is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.

On the other hand, 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.

If this amendment allowed no discrimination on the basis of sex even for the sake of privacy, we believe that the resulting sharing of facilities and living quarters would be contrary to prevailing American standards.

Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforced.

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CONCLUSION: WHAT DOES THIS ALL MEAN?

Mr. FONG. In my opinion, with this background we are ready to face, and I trust solve, the real problems which will face us on passage of this equal rights amendment.

As responsible legislators, we must revise our Federal laws so that women are not disadvantaged because of sex.

However, it is my firm conviction that the great majority of American women do not wish to be drafted to serve in our Armed Forces or to perform combat duty. I, for one, am not ready to compel them to be drafted and to force them to become combatants. With this reservation, whether this amendment passes in its present form or not, I am preparing to introduce extensive amendments to our present laws, so that women will be treated equally under Federal law. I urge my colleagues to join as cosponsors of such legislation.

We can do no less—our Nation, our conscience demands that so that each woman is enabled to use her full abilities, training, and talents for the benefit of this Nation and all its people.

Each State must do the same—each State legislature must also review and revise its laws so that archaic detrimental provisions are eliminated and laws which benefit its citizens are extended to encompass both men and women, regardless of sex.

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Mr. COOK. Mr. President, amendment No. 1066 reads:

This article shall not impair the validity, however, of any laws of the United States or any State which exempt women from service in combat units of the Armed Forces.

Thank goodness, Mr. President, that Joan of Arc did not know she could be exempt from the draft when she decided to take the French people and beat the English in the 100 Years War and win the Battle of Orleans. And thank goodness that no soldiers in the two respective campaigns thought that there would be some inconvenience in the battlefield because men and women would be together.

I am delighted that they did not understand the problems they would have, because somehow or other, they had to win the war.

And thank goodness that out in Frederick, Md., one of the ladies of history, Barbara Fritchie, did not know she would have some exemption under the Constitution and did not have to enter combat when she said, "Shoot, if you must, this old gray head." She did not mind that she was going to be shot. She just did not want anybody fooling with the American flag.

Is it not amazing, Mr. President, that there would be placed in the Constitution something which states in essence that this is the way our country shall be based and that this is the right that you shall have under this Constitution, that somehow or other, by some stretch of the imagination, 53 percent of the population of this Nation, if this country were invaded, do not have any responsibility to defend it? I cannot imagine by the farthest stretch of my imagination that that is what you would want to say.

But let us look at modern warfare. The Senator from Hawaii had us in the fields in France and marching across the fields of Germany, but look at what combat

means today, and see if it might not be a little different.

Combat today may be a lady sitting at a computer at a missile site in North Dakota. Does that mean that when it says she does not have to be in combat that she can get up and walk out?

I suggest it might be wise for us to understand and realize that there are many, many nurses today in Southeast Asia that are in combat zones and who are being paid combat pay. I would only suggest that this is another means by which somehow or other we want to clutter up one of the most remarkable documents in the world, the Constitution of the United States.

Mr. BAYH. Mr. President, will the Senator yield before he goes ahead? I do not want to interrupt the Senator.

Mr. COOK. I yield to the Senator from Indiana.

Mr. BAYH. With respect to the point the Senator just made, there are also WACS, WAVES, and WAFS in combat service, and the position taken by the distinguished chairman of the Committee on Armed Services earlier was that they were different than men who might otherwise be conscripted. If that is the case, that is not the way we have been training men.

I notice the Department of Defense report which I have before me shows the draftees comprise 88 percent of the infantry riflemen in ground combat units, and thus the casualty rate is higher for them than for [illegible]. Of course, with respect to women, it is our expectation that few if any will be in combat.

I think the Senator is very much on the mark to point out that there are women there right now.

Mr. COOK. Not only that but let me say something that is a little more serious. This Senator has four daughters. My oldest daughter ventured into a new life for her, I guess, on Saturday when she was married. I would hate to have something in the Constitution that she might tell her children that if they happened to be female they do not have to ever worry, because they will not have to defend their country, that they can depend on all their brothers to defend it; and if the percentage goes from 53 percent female, which it is now, to perhaps, 60 or 65 percent female, they do not have to worry about it, because they will not have to do their part if their country gets into a military conflict.

This kind of follows the pattern that men have had themselves involved in wars throughout history, when they ran across the countryside, and the women grabbed the children and tried to find a basement in which to hide. They did not know if they would have a place to sleep, but the soldier did. There was a kitchen for him when he finished combat that night, and a tent which would be waiting for him or which he could put up himself, but the lady who had been bombed out had nothing to do but to keep going and to beg someone down the road to give her something to eat and a place to sleep. But we do not have those kinds of wars any more in our part of the world. In other parts of the world unfortunately they do and women are subject to combat.

I will refer Senators to the country of Israel where they do draft women and they are subject to military service. I do not think many people in Israel are without complete and absolute pride in their country, as they should have. We had many women who fought in our Civil War, and many women were involved in the underground in World War II in every country in Europe. It is a good thing their Constitution did not exempt them, because maybe they would have gotten used to the idea while they were growing up that they did not have a basic responsibility to their Nation.

I can only say to you, Mr. President, with respect to this business of talking about irrational and arbitrary laws, what is irrational and what is arbitrary about the necessity, if it should happen, and God forbid, I hope it never does, that all people of this Nation have to defend it? Are we then to say that, because my four daughters happen to be daughters and not sons that they have no responsibility to defend their country?

Mr. President, would you really write into the Constitution that this provision would apply not only to the Federal Government, but also to any laws of the States? Imagine the situation if there was an invasion of the United States which came through Texas from Mexico, and all of a sudden we said, "Do not worry about the Federal Constitution, because the Texas constitution says that women do not have to enter into combat, so do not worry about it." We are not really trying to fight that constitutional question on the floor of the Senate. As a matter of fact, what we are really trying to do with simplistic and sound language is to do something that should have been done 200 years ago, and that is to provide that everybody in this Nation was created equal under the Constitution.

The Senator from Indiana and I have wondered for a long, long time about the laws we talked about in committee and the laws we talked about in earlier debate that a woman could not hold a job that required her to lift over 15 pounds. My wife is a pretty strong gal. She does not weigh a great deal, but she has raised five children and Mr. President, I will tell you that at a certain stage in life she lifted and carried around the house a whale of a lot more than 15 pounds. But we are going to protect her. That is what it says. We are trying to protect these women, because they do not want to do these things. Well, they have to do it every time they raise a child. According to some of the arguments we hear in the Senate we are supposed to preserve them for that right.

But what we are trying to say in this language is that there was a flaw [illegible] Constitution when it was written, a flaw that said, in fact, all men shall be created equal and that "men" meant everyone. But it has been interpreted they did not mean everyone, all of us, that it only meant men, us, and that was a defect and that defect has to be corrected. Anybody who lives in this Nation, in the freest nation in the world, under our constitutional form of government, shall not be discriminated against.

Use whatever term you want—whether for "Miss" or "Mrs." we have to use "Ms." which no longer becomes material—a constitutional form of government applies to everyone. If any of my daughters want to go to law school and graduate, it means that the large law firms in the United States cannot come to that school in the senior year and interview only the men. By the way, of the 717,000 veterans in the United States, all of whom happen to be in the category commonly referred to as females, as veterans, they do not receive the same benefits under the GI Bill of Rights as men. That is what we are talking about.

So I would suggest to remember what combat used to be like, but remember what it is like today.

Remember that combat may mean the availability to punch only one button, and that the one button to make that missile go somewhere to solve a problem to avoid a holocaust for this country may be a button that is going to be pushed by a woman, and if you are going to exclude her from combat, perhaps you have lost before you have started.

So I would only suggest that we have manyq dilatory amendments, but I referred at the beginning of my remarks to the fact that I am glad that Joan of Arc and Barbara Fritchie did not have an opportunity to be dilatory, that they were responsible citizens of their respective nations, that they understood the job and responsibility they had at that time and in that place in history, and that they took it. They assumed it and they did not ask anybody—they asked no man—to make one slightest difference, because they were women. One of them was willing to give up her life, and the other did, and they went down in history as pretty remarkable people in their countries.

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Mr. ERVIN. Mr. President, it is apparent that some of the opponents of this amendment do not understand what it says. It does not prohibit sending women into combat; it merely says that the power of the Congress either to send or to refuse to send women into combat shall not be destroyed by the equal rights amendment.

If my amendment were adopted and Joan of Arc and Barbara Fritchie could be resurrected from the tongueless silence of dreamless dust in which they now sleep, the Congress of the United States could pass a law providing that both Barbara Fritchie and Joan of Arc

could still be sent into combat.

All this amendment would do would merely be to say that Congress could be authorized to continue to legislate, in as intelligent a fashion as Congress is capable of legislating. It merely says that if Congress in its discretion refuses to send Joan of Arc and Barbara Fritchie, or their reincarnations, into combat, that power of Congress would not be stricken down by the equal rights amendment.

I do not know why my friends would want to put Congress in a straitjacket and compel it to send women into combat if there are plenty of men to make it unnecessary to send women into combat.

Furthermore, I do not know of any State in the Union that has a law which prohibits women from lifting more than 15 pounds. The Commonwealth of Massachusetts, to my recollection, once had such a law—I do not know whether it is still in force or not, but I submit if it is it would be invalidated by the equal protection clause of the 14th amendment.

My friend from Kentucky said that war is not quite as brutal as it used to be when men had nothing but sticks and rocks for weapons. It strikes me that war is far more brutal, because they have lethal weapons like poison gas that can consume a person's lungs and deprive them of the capacity to live. They have artillery that can blow their bodies into 50,000 pieces.

I would like to say the following words to every Senator who believes that Congress should be compelled in time of war to place the same obligations on women, as it does on men. Those who believe Congress ought not to have the power to wage war unless it sends the daughters of America into combat along with the boys of America, and who believes that women should suffer the same hazards as men, and who believe that Congress of the United States shall not have the power to exempt the daughters of America from being sent into battle to be slaughtered or maimed by bayonets, bombs, bullets, grenades, mines, napalm, poison gas, and shells of the enemy, ought to vote for this amendment, and then they ought to go around to the fathers and mothers of America and say that "I voted to compel Congress, when it sends American boys into battle, to send American girls alongside them, whether there is any necessity for so doing or not."

Mr. President, I believe the yeas and nays have already been ordered, and for that reason I yield the floor and am ready to vote.

Mr. BAYH. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER (Mr. TAFT). All remaining time having been yielded back, the question is on agreeing to the amendment No. 1066 of the Senator from North Carolina. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia (when his name was called). Mr. President, on this vote I have a pair with the distinguished Senator from Minnesota (Mr. HUMPHREY). If he were present and voting, he would vote "nay." If I were at liberty to vote, I would vote "yea." Therefore, I withhold my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Maine (Mr. MUSKIE), and the Senator from Alabama (Mr. SPARKMAN) are necessarily absent.

I further announce that, if present and voting the Senator from Washington (Mr. JACKSON), the Senator from Alabama (Mr. SPARKMAN), the Senator from Maine (Mr. MUSKIE), the Senator from New Hampshire (Mr. MCINTYRE), and the Senator from Washington (Mr. JACKSON) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Massachusetts (Mr. BROOKE) and the Senator from Arizona (Mr. GOLDWATER) are necessarily absent.

If present and voting, the Senator from Massachusetts (Mr. BROOKE) would vote "nay."

The result was announced—yeas 18, nays 71, as follows:

[No. 114 Leg.]

YEAS—18

Bennett	Fannin	Long
Buckley	Fong	Miller
Byrd, Va.	Gambrell	Saxbe
Cooper	Griffin	Stennis
Eastland	Hansen	Talmadge
Ervin	Hollings	Thurmond

NAYS—71

Aiken	Chiles	Hatfield
Allen	Church	Hruska
Allott	Cook	Hughes
Anderson	Cotton	Inouye
Baker	Cranston	Javits
Bayh	Curtis	Jordan, N.C.
Beall	Dole	Jordan, Idaho
Bellmon	Dominick	Kennedy
Bentsen	Eagleton	Magnuson
Bible	Ellender	Mansfield
Boggs	Fulbright	Mathias
Brock	Gravel	McGee
Burdick	Gurney	McGovern
Cannon	Harris	Metcalf
Case	Hart	Mondale
Montoya	Randolph	Stevenson
Moss	Ribicoff	Symington
Nelson	Roth	Taft
Packwood	Schweiker	Tower
Pastore	Scott	Tunney
Pearson	Smith	Weicker
Pell	Spong	Williams
Percy	Stafford	Young
Proxmire	Stevens	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Byrd of West Virginia, for.

NOT VOTING—10

Brooke	Jackson	Muskie
Goldwater	McClellan	Sparkman
Hartke	McIntyre	
Humphrey	Mundt	

So Mr. ERVIN's amendment (No. 1066) was rejected.

Mr. ERVIN. Mr. President, I am glad that most Senators are too old to be sent into combat.

AMENDMENT NO. 1067

Mr. President, I call up Amendment No. 1067 and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women.".

Mr. ERVIN. Mr. President, I ask for the yeas and nays on this amendment.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, there are 32,975,000 women of the age of 16 years and up in the United States who are either employed or seeking employment outside their homes. A very small percentage of these women are business and professional women.

I am told that this amendment is backed by business and professional women. From my association with women in North Carolina, I confess that I am of the opinion that only a relatively small percentage of business and professional women favor this amendment.

The Senator from North Carolina realizes that society imposes discrimination in employment upon many women, both in respect to the compensation they receive and their promotional opportunities. These discriminations which are imposed upon women in this respect by the traditional customs and usages of society are not discriminations created by law and, for this reason, the equal rights amendment will not abolish discriminations of that character.

All of us who are familiar with the legislative action of the Congress and of the States in recent years know that Congress and the States have enacted much enlightened legislation which puts an end, if such legislation is properly invoked and enforced, to many of the discriminations against women in employment.

Moreover, the President of the United States and every department and agency of the Federal Government, and many of the executive agencies and departments of many States, have issued regulations prohibiting discrimination against women in employment in Federal and State services.

There is one group of women, however, who need no laws and need no regulations to abolish legally imposed discriminations against them.

That group is composed of business and professional women. Insofar as the law itself is concerned, business and professional women have the absolute legal right at the present moment, and without the equal rights amendment, to compete with men in all of the business or commercial activities of life. I wish to say, as I said in my opening remarks, that the submission of the equal rights amendment by Congress to the States and the ratification of the equal rights amendment by 38 States will not add one jot or title to the position of business and professional women insofar as their legal rights to engage in business or commercial enterprises is concerned.

You know, Mr. President, the American people have a simplistic faith in law. Our great national delusion is based on the fact that we have a childlike faith that anything wrong in our civilization can be abolished by law and that all of life's problems lend themselves to legal solutions. It is doubtful whether many of the people who are in custody in institutions for the mentally ill in our land suffer under a greater delusion than that.

If this amendment is submitted by Congress to the States and is ratified by 38 States and made a part of the Constitution, all of the problems which life presents to women will remain. New problems will undoubtedly be presented to women from time to time by life. The chief effect of the equal rights amendment will be to handicap Congress and the legislatures of the 50 States in their efforts to solve the problems because the equal rights amendment says to the Congress and to the States that they must ignore the existence of sex when they attempt to solve the problems of women as well as when they undertake to solve the problems of men.

The most important fact in life is sex. No greater folly could be perpetrated than to place in the Constitution of the United States an amendment which says that Congress and the 50 States must absolutely ignore the existence of sex when they fashion the laws to solve the problems of men and women, all of whom belong to a sex.

As I stated in my opening remarks, borrowing the words of Omar Khayyam, the equal rights amendment will certainly shatter into bits what its militant supporters deem to be this sorry mess, this scheme of things in power, but it will not do anything to remold it nearer to their heart's desire.

One of the strange things about the solicitude which the proponents of the amendment profess to have for the vast majority of the 32,975,000 women who work or seek work outside of their homes, is that they seek to rob these women who do perform labor, other than intellectual labor, of all of the protections and all of the exemptions which those really concerned about them have fought for a century to secure for them.

A great many of these women belong to unions which are affiliated with the AFL-CIO. I hold in my hand a newspaper clipping from the Washington Star for August 31, 1970.

At that time the so-called equal rights amendment—which would be far better designated as the unequal wrongs amendment—was under consideration and was exciting much comment. This newspaper clipping states the following:

AFL-CIO President George Meany says the Labor Federation opposes the women's liberation movement for absolute equality because millions of women union members don't want to give up the job protections they have won in federal and state laws.

There are laws in some states that women cannot work in coal mines, Meany said. Most women don't want to win the right to mine coal or to do other dangerous work, he said. For that reason, Meany said, AFL-CIO won't support the amendment to give women equality which was passed by the House and is pending in the Senate.

This amendment has been flitting around the halls of Congress since 1923. Some years ago it came before the Senate. One of the wisest men that ever sat in this body, former Senator Carl Hayden, the distinguished Senator from Arizona, told me that he was sitting in the Senate when the equal rights amendment came up for consideration and that he thought of a law that they had in Arizona which forbade employers to employ women to descend into the bowels of the earth in the copper mines of Arizona and mine copper.

I think that most people, except some of the business and professional women who work in offices, think that was a pretty good law. But they think that law should be nullified by a constitutional amendment. And that is one of the objectives of the amendment, to nullify that law.

The significant thing in this connection is that the women who are protected by laws of this kind are opposed to this amendment. One of the most knowledgeable women in this field and one of the wisest women I have ever had the privilege of knowing is Mrs. Myra K. Wolfgang, one of the chief officers of the Hotel and Restaurant Employees Union.

Mrs. Wolfgang knows whereof she speaks. She is a citizen. She is a woman. She is a widow. She is a mother. She is a worker. And she is a union official. She is an adamant and implacable foe of the equal rights amendment.

When the amendment was under consideration in 1970, the New York Times in its issue of September 10, 1970, made some comments concerning Mrs. Wolfgang's views. These comments were as follows:

A representative of working-class women told Congress today that the proposed equal rights amendment to the Constitution would bring to women such as herself only "an equality of mistreatment" by employers.

Myra K. Wolfgang, vice president of the Hotel and Restaurant Employes and Bartenders International Union, made the statement before the Senate Judiciary Committee.

The committee opened hearings today on the amendment, which passed the House last month. The amendment would prohibit any government, Federal, State or local, from denying any right to any individual because

of sex. If the amendment were passed, Mrs. Wolfgang said, all state laws establishing maximum hours of work for women would be invalidated.

The result, she said, would be that many employers would force women to work longer hours than they wish to and longer hours than they are able to work while still taking care of their household responsibilities.

CONTRAST IN POSITIONS

Unrestricted hours of work "may be fine for lady lawyers" and other members of the National Federation of Business and Professional Women's Clubs, which is supporting the amendment, she said. "But it isn't fine for women working in the laundries, in the hotels and restaurants, on the assembly lines."

Mrs. Wolfgang argued that all overtime work should be optional for both men and women, as it is now under many union contracts.

But until it is, she said, hours-limitation laws for women "provide them with a shield against obligatory overtime to permit them to carry on their life at home as wives and mothers."

Mrs. Wolfgang cited case after case of women in Michigan who were forced against their will to work more than 60 hours a week during the three-month period in 1967-68 when that state's maximum hours law was declared invalid. She named names of specific companies where she said this had occurred including, in particular, the Chrysler Corporation.

President Nixon's advisory council on the status of women endorsed the equal rights amendment, Mrs. Wolfgang noted. She said the reason was that, unlike similar committees of the Johnson and Kennedy Administration, "it had no representation of working women but was made up of business and professional women. The Kennedy and Johnson groups opposed the amendment.

The members of Mr. Nixon's group, she said, "are totally unaware of what real working women and housewives of America really want."

"The business and professional women of America don't bake the bread for America, nor package the meat, nor clean the hotel rooms, nor wipe the noses, nor change the diapers, nor man the production lines, nor ring up your retail purchases," she said.

Prof. Paul A. Freund of the Harvard University Law School the day's other witness, argued that adoption of the amendment would bring about vast changes that Congress had not adequately considered.

For example, he noted that most of the amendment's advocates say that it would make women subject to being drafted if men were being drafted.

I digress to say so far as it lies within its powers the United States has done exactly that today, but I hope when Senators return to their home States they will tell the fathers and mothers of the daughters of America how they voted on that issue.

I continue to read from the article which appeared in the New York Times:

If Congress really wants to draft women, he said, it can pass a law that would do so.

The reference there is to Professor Freund.

I digress to say it does not need any congressional amendment to give it that power, but this constitutional amendment takes power away from Congress in respect of the recruitment of personnel of the Armed Forces. It places Congress in a straitjacket, where it cannot legislate on this subject unless it places both men and women draftees under exactly the same conditions and converts men and women both into combat soldiers.

I continue to read from the statement:

But a policy change of such importance "is customarily the subject of full and informed hearings before appropriate committees and is voted on after well-focused debate.

"It may or may not be a desirable change to make, but in other circumstances it would surely be thought irresponsible to impose such a reform almost without attention, as a half-hidden implication of a motto."

Professor Freund also expressed the view that adoption of the amendment could wipe out laws requiring men to support their wives and children.

"Can it be said that the favorable treatment everywhere accorded to wives in respect to support is a manifestation of male oppression or chauvinism or domination?" he asked.

He criticized the women's groups that have focused their energies on adoption of the equal rights amendment instead of bringing court cases under the 14th Amendment that, in his opinion, would have resulted in the invalidation of many discriminatory laws.

Old Supreme Court cases denying women the protections of the 14th Amendment are "museum pieces" and would not be decided that way today, he said.

He also challenged Congress to enact, as it could by simple majority vote, laws against discrimination against women in public educational institutions, in public accommodations and other fields.

Professor Freund had other things to say on this subject. He testified before the Committee on the Judiciary in September 1970, and he testified again before the Judiciary Committee of the House in February of this year, as I recall. He made some very wise observations concerning the effects of the so-called equal rights upon the social structure of this country and concerning the chaos which it will provoke in constitutional and legal fields.

I ask unanimous consent that the statement of Prof. Paul J. Freund, made in September 1970, before the Committee on the Judiciary and certain comments which I made thereon, at that time, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the CONGRESSIONAL RECORD, Proceedings and Debates of the 91st Congress, Second Session, Washington, Thursday, Sept. 10, 1970]

STATEMENT OF PROF. PAUL J. FREUND OF THE HARVARD LAW SCHOOL BEFORE THE SENATE JUDICIARY COMMITTEE IN OPPOSITION TO SENATE JOINT RESOLUTION 61, THE EQUAL RIGHTS FOR WOMEN AMENDMENT

Mr. ERVIN. Mr. President, there is no doubt that the equal rights for women amendment has been subjected to very little analysis. In fact, the House of Representatives did not hold any hearings on this proposal, and the Senate hearings made no attempt to investigate the effects of such a constitutional amendment on the myriad State and Federal laws which make distinctions between men and women. It is a very real testament to the lack of consideration given to this matter that the definitive critical legal statement was written in 1945—25 years ago—by Prof. Freund of the Harvard Law School. Not only was Professor Freund not asked to bring his statement up to date by the House or the Senate subcommittee considering this problem, but very few, if any, legal scholars were asked to comment on the matter by anyone.

In the hearings called this month by the Senate Judiciary Committee to look into the problems posed by this amendment, Professor Freund has been finally asked to bring his views on this matter up to date. I recommend Professor Freund's statement to all Senators. He is an outstanding constitutional scholar, and he has explored in detail for the committee the chaotic legal conditions which will exist if this amendment passes. He realizes the dangers of dealing with the complex legal relationships between men and women by the simplistic approach taken by the House-passed amendment. On this point Professor Freund said:

"The truth is that a motto of four words, however noble in purpose, is hopelessly inept to resolve all the diverse issues of classification by sex in the law. It is as if the Constitution declared "all power to the people," and left it at that."

The equal rights for women amendment is receiving in the Senate Judiciary Committee the first thorough analysis it has received in 25 years. It is no compliment to the concept of equal rights for women that the advocates of this amendment are demanding that it should pass without adequate consideration. If any Senator doubts the seriousness of the charges which the equal rights for women amendment would bring about and the need for adequate consideration, I suggest he read Professor Freund's statement to the Senate Judiciary Committee on September 9, 1970.

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Mr. ERVIN. Mr. President, the AFL–CIO's executive council has studied the equal rights amendment and has condemned it as repugnant to the best interests and the welfare of the working women of America.

I ask unanimous consent that a copy of the report of the executive council of the AFL–CIO on this point and certain comments I made thereon be printed at this point in the body of the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

[From the CONGRESSIONAL RECORD, Feb. 16, 1972]

AFL–CIO OPPOSES EQUAL RIGHTS FOR WOMEN AMENDMENT

Mr. ERVIN. Mr. President, the largest labor organization in the country, the AFL–CIO, has recommended that Congress not pass the equal rights amendment. In its resolution No. 122, the organization stated:

"We continue opposition to the so-called equal rights amendment as an unnecessary addition to the Constitution, ultimately more harmful than helpful to the legal rights of women."

Prior to the adoption of the resolution, the executive council of the AFL–CIO, in a report to its convention, said:

"We have opposed the equal rights amendment to the Constitution because of its potentially destructive impact on State labor legislation for women workers."

Before the Senate votes on this important measure, I hope each Senator will ponder these words of the AFL–CIO's report. It says:

"The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently. Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers."

So, Mr. President, all laws which treat men and women differently, no matter how reasonable, will be unconstitutional. I hope this

understood because it is the essence of my opposition to the amendment.

The AFL-CIO realized the significant impact the passage of the amendment could have when it mentioned that "laws which place primary responsibility for family support on husbands and fathers" will be held unconstitutional. Prof. Jonathan H. Pincus of the Yale University School of Medicine has called this aspect of the equal rights amendment the "Tonkin Gulf resolution of the American social structure."

Mr. President, I ask unanimous consent that the portion on the equal rights amendment of the AFL-CIO's executive council tion No. 122 be printed in the RECORD.

tion No. 122 be printed in the RECORD.

WOMEN WORKERS

Over the past two years the issue of discrimination on the basis of sex has come to the fore. Numerous women's groups have been formed to monitor and influence the enforcement of such anti-discrimination legislation as the Equal Pay Act and the sex discrimination provisions of the Equal Employment Opportunity section of the 1964 Civil Rights Act (Title VII), to seek elimination of sex discrimination by government contractors, to obtain the same coverage for women under general civil rights statutes as for racial, national and religious minorities, and to promote the so-called equal rights amendment to the Constitution.

The labor movement has traditionally supported measures to eliminate discrimination against women. But it has often disagreed with particular recommendations promoted by some non-labor groups. Especially, we have opposed the equal rights amendments to the Constitution because of its potentially destructive impact on state labor legislation for women workers.

Much of such state protective labor legislation has been eliminated or weakened by the federal courts and state legislatures on the ground that it interferes with equal opportunity for women to work. Experience, to date, shows that "equality" has been used to remove labor law protections for women, rather than to extend them or adapt them to men. The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently.

Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers.

Labor continues to voice its opposition to the proposed equal rights amendment. The 14th Amendment to the Constitution guarantees "equal protection" to citizens. There are federal statutes against discriminatory practices. The legal remedy against discriminatory practices lies in enforcement of existing statutes and in new legislation rather than by constitutional amendment.

COUNCIL RECOMMENDATION

The labor movement seeks to be increasingly responsive to the needs and wishes of its women members, within the context of overall trade union objectives. These include economic security for all workers, the extension of minimum wage and other labor standards legislation, provision of day care centers, maternity leave and benefits, access to education and training, equal pay for equal work, and elimination of discriminatory employment practices based on sex.

The AFL-CIO affirms its commitment to non-discrimination on the basis of sex. We seek to honor this commitment in collective bargaining agreements, in the conduct of union affairs, and in legislative enactments.

We continue opposition to the so-called equal rights amendment as an unnecessary addition to the Constitution, ultimately more harmful than helpful to the legal rights of women.

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Mr. ERVIN. While this amendment was pending before the 91st Congress, the representatives of many organizations representing working women and many individuals made a statement to the 91st Congress in opposition to this amendment. The statement was entitled "The 'Equal Rights' Amendment . . . An attractive slogan . . . but is it good law?"

Among those who endorsed the statement were the following:

Chauncey Alexander, Executive Director, National Association of Social Workers.

Joseph A. Beirne, President, Communications Workers of America.

Margaret Berry, Executive Director, National Federation of Settlements, and Neighborhood Centers.

Mary E. Callahan, Former Member, President's Commission on the Status of Women Citizens' Advisory Council on the Status of Women.

Cesar Chavez, Director, United Farm Workers Organizing Committee.

Patrick E. Gorman, Secretary-Treasurer, Amalgamated Meat Cutters and Butcher Workmen.

Dorothy Height, President, National Council of Negro Women.

Dolores Huerta, Vice President, United Farm Workers Organizing Committee.

Paul Jennings, President, International Union of Electrical Radio and Machine Workers.

Mary Dublin Keyserling, Former Director, Women's Bureau—U.S. Department of Labor.

Margaret Mealey, Executive Director, National Council of Catholic Women.

Ruth Miller, Former Chairman, California Advisory Commission on the Status of Women.

Sarah Newman, General Secretary, National Consumers League.

William Pollock, President, Textile Workers Unio of America.

Jacob S. Potofsky, President, Amagamated Clothing Workers of America.

Louis Stulberg, President, International Ladies' Garment Workers Union.

Mary E. Switzer, Former Administrator, Social and Rehabilitation Service, U.S. Department of Health, Education, and Welfare.

Dr. Cynthia Wedel, Formmer Member, President's Commission on the Status of Women.

Elizabeth Wickenden, Professor of Urban Studies, City University of New York; Former Member Citizens' Advisory Council on the Status of Women.

Myra Wolfgang, Vice President, Hotel and Restaurant Employees' and Bartenders' International Union.

This statement contains three separate assertions in addition to a few thoughtful questions which it asks and answers. The statement warns American women in these words:

Don't buy a gold brick!

Here is what the statement says under that heading:

America's women are increasingly expert consumers.

They've learned the hard way that you can't always trust the language on the label . . . or extravagant advertising claims.

That's true for legislation, too.

The Equal Rights Amendment to the Constitution, for instance, sounds great . . . like the end of sex discrimination.

Sounds easy. . . . But most sex discrimination is a matter of private practice, not of public law, and will not be affected by the Amendment.

And laws that treat women differently are not necessarily "discriminatory" or unfair.

That's why many women's organizations, trade unions and individuals with long experience in human and industrial relations problems, urge rejection of the Equal Rights Amendment.

Let's keep the good laws we've won and see that they're enforced. Let's repeal or amend the bad laws . . . . and go on from there to achieve real equality for every American.

I have said that the statement contains two general warnings in addition to a few thoughtful questions and their answers. One of these warnings is entitled "Some Real Worries." It states this under that heading:

Nobody knows for sure what results the Equal Rights Amendment would bring. But here are some "real worries" you ought to think about:

Many state laws enacted to prevent harsh industrial or commercial exploitation of working women are likely to go out the window—whether women want them to or not. The "equality" arguments can be turned right around by powerful employer interests who don't want *any* of their workers protected by labor laws—either men *or* women. If the courts don't throw out the women's labor laws right away, the legislatures can be pressured into quick repeal.

Divorced, separated, and deserted wives struggling to support themselves and their children through whatever work they can get may find their claims to support from the father even harder to enforce than they do right now.

For many American women, particularly those in the lower income brackets, that's a heavy price to pay for a theory of equality.

Wives and mothers who are not in the labor force—and they are a substantial majority—may find they can no longer choose to stay at home to care for their families.

Under the Equal Rights Amendment, they may become obligated for furnishing half the family support. The right of choice for these women should be protected.

I digress from the reading of the statement to say that I agree with that last statement, that the right of choice for these women should be protected, and that is precisely what I am trying to do in pointing out the hazards which the equal rights amendment poses for the social structure of America, and in offering amendments to preserve the protections and exemptions which Federal and State laws now give to women who work in fields which are not entirely intellectual in nature.

This statement, made on behalf of organizations representing the working women of America and many individuals such as Mrs. Mary Dublin Keyserling poses this general question:

What does equality mean under the Equal Rights Amendment?

Then it asks three thoughtful questions. Moreover, it gives answers to those three thoughtful questions.

The first question is this:

Does the Equal Rights amendment create new rights for women?

The answer is:

No, it does not. In fact, the amendment . . .

Does not require equal pay for equal work.

Does not require promotion of women to better or "decision-making" jobs.

Does not provide free 24-hour community-controlled children's day care centers for working mothers.

Does not elect more women to public office.

Does not abolish abortion laws or make available safe birth control devices.

Does not convince men they should help with the housework.

and, furthermore, does not put a woman astronaut into space!

The second of the thoughtful questions which the statement asks and answers is this:

Could the Equal Rights amendment destroy some important women's rights?

The answer:

Yes, it could destroy rights and cause new problems . . . by

Creating new obligations for women to support their husbands and children.

Weakening men's duty to support their wives and children.

Wiping out laws fixing such benefits as minimum wages, maximum hours, and safety standards for women, simply because many of these laws don't apply to men.

Drafting women into military service.

Weakening the legal presumption that a woman should keep custody of her children and should receive financial support in the event of a divorce.

Endangering the tax-exempt status of non-profit "women only" institutions, such as the YWCA and Girl Scouts.

Destroying laws that require separate rest rooms and dressing rooms for women workers.

Mr. President, I would like to emphasize that these representatives of working women and these individuals who joined in this statement stated that the equal rights amendment could destroy the laws that require separate restrooms and dressing rooms for women workers. Now, some of the proponents of the amendment claim that is not so. Well, these representatives of the working women and these individuals interested in their behalf think that it is so, and I agree with them. But whether they are right or whether I am right, or whether the proponents of this proposal are right, an abundance of caution on this point ought to inspire the proponents of this measure to accept an amendment which I shall offer later expressly providing that this article does not invalidate any laws of the United States or any State which secure privacy to men and women or boys and girls.

The proponents of this amendment are the first people I have encountered in my public life—which began when I was just a small boy in the North Carolina Legislature, and which has extended since that time to 18 years of service in the U.S. Senate—who are opposed to any amendment which would clarify and make certain what the proposal they are advocating would do.

The third thoughtful question asked by this statement is this:

Is this constitutional amendment really needed to achieve women's rights?

The answer:

No.

The answer is "No" because the statement asserts what the greatest legal luminaries in the United States have testified to be true—namely, that the Constitution already protects the rights of women, particularly under the fifth and 14th amendments.

The statement says that "no" is the answer for the additional reason that unfair or discriminatory laws can be repealed by legislatures or challenged in the courts under these amendments. That has already been done successfully in many cases.

Then it says that the answer to the third question is "no" for an additional reason—namely, that new rights and freedoms for women will come from enactment of new laws and the effective enforcement of existing ones, not from a new constitutional amendment.

What are the protections which existing laws throw around working women and which would be abolished by the equal rights amendment?

They are such laws as provide that an employer must furnish separate restrooms and separate dressing rooms for men and women employees.

They are laws which provide for minimum wages for women in States which have no other laws of that character for the protection of the economic interests of working women.

They are laws which provide maximum hours of employment for women who are obligated not only to earn livelihoods for themselves and their families but also to discharge the duties of mothers in their homes.

They are laws which place upon husbands the primary responsibility for furnishing reasonable support of wives and children.

They are laws which entitle a woman who is divorced by her husband to call upon her husband for alimony, not only to assist in her support but also in the support of the children which he has begotten upon her body.

I respectfully submit that in passing upon the amendment which is now pending before the Senate, Senators ought to pay heed to the representatives of the women and to the women who have studied this problem and to the women whose work is not entirely intellectual, rather than to a few business and professional women who already are absolutely free under the law to compete with men and who are not confronted by any of the problems which confront working women.

This equal rights amendment would practically destroy the social structure of America.

On previous occasions during this debate, I have referred to the article written by Prof. Thomas Emerson and three young Yale women law graduates.

The PRESIDING OFFICER. The 60 minutes of the Senator have expired.

Mr. ERVIN. I yield such additional time as I may use on the bill.

I am constrained to deduce that a very distinguished member of the medical faculty at Yale University read that article. After he did so, he wrote a letter to the editor of the New York Times which bore the heading "Rights Amendment: Is It Constructive?" This is the letter:

If family stability plays an important role in the well-being of our nation, it is hard to envision the Equal Rights amendment just passed by the House of Representatives as a constructive act. The bill seems not to have been discussed adequately or maturely but rather shouted through under pressure from a relatively small band of zealots. It seems to me that the removal of legal responsibility from a man for supporting a family, giving the family a name and protecting his daughters from the sort of influences the U.S. Army might have in store for them before marriage is likely to have some effect on the manner in which men relate to their wives and children and vice versa; those traditional ties will be weakened.

One must agree with women's liberation groups that the liberating effect of Equal Rights will apply to men as well as to women. What they are both being liberated from is nothing less than the restrictions of traditional roles in a family structure. One has the right, indeed the duty, to ask, "Is this good?" Marriage has received some rather bad publicity of late; it is considered a breeding ground of neurosis, a prelude to divorce in more than 30 of 100 cases and a burden to the free spirit seeking self-fulfillment. Day care, communal living arrangements and release of women and men from domestic duties are the modern vogue.

Despite this, and supported by my observations as a physician, I am convinced that that solid, happy family life is the foundation of mental health and happiness. Basic to a healthy family is the concept of role: husband and father, wife and mother, son or daughter. With the restrictions and discipline which stem from these roles, allowing for individual variations, one has the cement which binds a family for life.

Perhaps I am unduly cynical about the ability of people liberated from their responsibilities to make wise choices concerning the path to happiness and contentment; but I would predict that the Equal Rights amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and, possibly, sexual deviation. Conceivably this is merely a thoretical parade of horribles. There are genuine questions which should be asked and discussed before our Constitution is amended for the purpose of producing social change. There is no evidence that such deliberations have been made or planned. Is the Equal Rights amendment to be the Tonkin Gulf Resolution of the American social structure?

Mr. President, that is the question posed by Jonathan H. Pincus, associate professor, Neurology, Yale University School of Medicine.

As I say, I deduce that he wrote the letter to the Editor of the New York Times after he had read the article in

the Yale Law Journal which depicted the unhappy consequences which the equal rights amendment will produce in our society.

Mr. President, I yield the floor.

Mr. BAYH. Mr. President, I yield myself such time as I may require.

The amendment of my distinguished friend and colleague from North Carolina (Mr. ERVIN) which reads:

"This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women."

Is a well-intentioned addition to the Equal Rights Amendment.

I know that the Senator from North Carolina does not desire to discriminate against women, that he does desire to provide for their special protection. But the unfortunate fact of life is that many of these well-intentioned amendments which were originally designed in a bygone era to provide special protection for women now, indeed, instead, impose special penalties.

The best example of this is a statute which existed in the State of Michigan which that State thought would be beneficial to its women, which prohibited them from serving as bartenders, feeling that this would protect them from some of the atmosphere that might exist in a place where bartenders labor. Well, the practical effect of this was that women were denied the higher paying jobs as bartenders behind the bar, where they are protected by the hardware of the bar from whatever idiosyncrasies might exist among those who frequent bars; and yet the State law did not really provide for the protection of women as it denied the employment, insofar as serving alcoholic beverages was concerned, on the other side of the bar where the customers were in much closer proximity to the frail young things serving the alcoholic beverages.

The discriminatory impact of this legislation is obvious. The same is true of the 40-hour limitation, the weight limitation laws, and other similar laws. These are discussed in detail on pages 8 and 9 of the Senate committee report. We quote there the guidelines of the Equal Employment Opportunities Commission relative to sex discrimination:

The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect. Child support laws and alimony laws, and pensions for police widows, and the like will simply become non-sex discriminatory after the amendment. Individual restrooms are an entirely different matter—the justification for which is the right to privacy.

I have discussed these points at length earlier in the day, so that I see no reason further to impose my temperate logic on my colleagues. Therefore, Mr. President, I yield back the remainder of my time.

Mr. ERVIN. Mr. President, I would suggest to the distinguished Senator from Indiana, inasmuch as it is now 5 minutes after 5 p.m., that we enter into a unanimous-consent agreement at this time to vote on this particular amendment, without further debate, immediately after the end of the morning hour tomorrow.

The PRESIDING OFFICER (Mr. BENTSEN). Is there objection to the request of the Senator from North Carolina?

Mr. BAYH. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

All time having been yielded back, the question is on agreeing to the amendment No. 1067 of the Senator from North Carolina (Mr. ERVIN).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana, (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Maine (Mr. MUSKIE), the Senator from Alabama (Mr. SPARKMAN), and the Senator from Georgia (Mr. TALMADGE), are necessarily absent.

I further announce that, if present and voting, the Senator from Alabama (Mr. SPARKMAN), the Senator from Maine (Mr. MUSKIE), the Senator from Washington (Mr. JACKSON), and the Senator from Minnesota (Mr. HUMPHREY), would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Delaware (Mr. BOGGS), the Senator from Massachusetts (Mr. BROOKE), the Senator from Arizona (Mr. GOLDWATER) and the Senator from New York (Mr. JAVITS) are necessarily absent.

The Senator from Colorado (Mr. ALLOTT) is detained on official business, and if present and voting, would vote "nay."

If present and voting, the Senator from Delaware (Mr. BOGGS) and the Senator from Massachusetts (Mr. BROOKE) would each vote "nay."

The result was announced—yeas 11, nays 75, as follows:

[No. 115 Leg.]

YEAS—11

Bennett	Eastland	Hollings
Buckley	Ervin	Long
Byrd, Va.	Fannin	Stennis
Cooper	Hansen	

NAYS—75

Aiken	Fulbright	Packwood
Allen	Gambrell	Pastore
Anderson	Gravel	Pearson
Baker	Griffin	Pell
Bayh	Gurney	Percy
Beall	Harris	Proxmire
Bellmon	Hart	Randolph
Bentsen	Hatfield	Ribicoff
Bible	Hruska	Roth
Brock	Hughes	Saxbe
Brooke	Inouye	Schweiker
Byrd, W. Va.	Jordan, N.C.	Scott
Cannon	Jordan, Idaho	Smith
Case	Kennedy	Sparkman
Chiles	Magnuson	Stafford
Church	Mansfield	Stevens
Cook	Mathias	Stevenson
Cotton	McGee	Symington
Cranston	McGovern	Taft
Curtis	Metcalf	Thurmond
Dole	Miller	Tower
Dominick	Mondale	Tunney
Eagleton	Montoya	Weicker
Ellender	Moss	Williams
Fong	Nelson	Young

NOT VOTING—14

Allott	Humphrey	Mundt
Boggs	Jackson	Muskie
Brooke	Javits	Sparkman
Goldwater	McClellan	Talmadge
Hartke	McIntyre	

So Mr. ERVIN's amendment (No. 1067) was rejected.

The ACTING PRESIDENT pro tempore. The pending amendment is amendment No. 1068, offered by the Senator from North Carolina (Mr. ERVIN). Time is limited to 2 hours, equally divided between the proponent of the amendment and the manager of the bill. Who yields time?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time not be charged against either side.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. ERVIN. Mr. President, the pending amendment reads as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women.".

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Mr. President, in appraising the objectives of the militants, we are confronted by the question whether there is any rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

We find in chapter 1, verse 27, of the Book of Genesis this statement which all of us know to be true:

God created man in His own image. In the image of God, created He him. Male and female, created He them.

For this reason I share completely the recent observation of a legal scholar, Mr. Bernard Schwartz of the New York University Law School:

Use of the law, in an attempt to conjure away all the differences which do exist between the sexes, is both an insult to the law itself and a complete disregard of fact."

While I believe that any laws making unfair or unreasonable distinctions against women should be repealed by legislative bodies, or judicially annulled by courts under the provisions of the 14th and 15th amendments, I have an abiding conviction that the law should make such distinctions between men and women as are fairly or reasonably necessary for the protection of women and the existence and development of the race.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women. To justify their belief, they assert that women possess an intuitive power to distinguish between wisdom and folly, good and evil.

To say these things is to imply that either sex is superior to the other. It is simply to state the all-important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and makes its laws, is woefully lacking in rationality.

The common law and statutory law of the various States recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. To enable women to do these things and thereby make the existence and development of the race possible, these State laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these State laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the equal rights amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

The purpose of my amendment is to prevent the equal rights amendment from nullifying all existing laws and disabling Congress and the 50 State legislatures to enact future laws which grant protections to wives and mothers and widows.

As appears from pages 936 to 954 of the Yale Law Journal, the equal rights amendment is expresaly designed to nullify the State laws which give these economic and social protections to wives, mothers, and widows and to provide in their stead that the rights and responsibilities of men and women in the areas covered by these laws shall be absolutely coequal. To sustain the assertion which I have just made, I wish to read what the Yale Law Journal says on this subject:

Given the traditional social and economic view that woman's place was in the home, it is not surprising that laws affecting domestic relations have defined women's rights and duties with great specificity.

At common law, a woman who married became a legal non-person—a *femme couverte*. Upon marriage, she lost virtually all legal status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband. Statutory developments in the nineteenth and early twentieth centuries tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women. At the present time domestic relations law is based on a network of legal disabilities for women, supposedly compensated by a corresponding network of legal protections. The law in this area treats women, by turns, as mental incompetents and as more mature persons than men of the same age; as valuable domestic servants of their husbands and as economic incompetents; as needing protection from their husbands' economic selfishness and as needing no protection from their husbands' physical abusiveness. In many respects, such as name and domicile, the law continues overtly to subordinate a woman's identity to her husband's.

Mr. President, I digress to assert that none of these so-called disabilities are imposed upon the business or professional women who elect not to become wives or mothers. I also take the risk of saying that this paragraph which I have just read is written by young ladies who have never been married.

● ● ● ●

I resume reading:

This is not to say that the law does not play an important role in shaping and channeling these other forces, but rather to point out that a change in the law—insofar as the change leaves room for choice, as do the possibilities suggested below—will not result in immediate widespread change in what are essentially social customs. Furthermore, it is important to remember that the impact of the marriage and divorce laws varies according to the economic class of the family. In preparing this section, we have been limited by the dearth of academic research about the differential impact of domestic relations law according to economic class.

1. LAWS AFFECTING THE ACT OF MARRIAGE

The statutory requirements for a lawful marriage are generally very simple. They include in most states a valid license, a waiting period before issuance of the license, a medical certificate, proof of age, parental consent for parties below the age of consent, and a ceremony of solemnization. Of these, only age requirements for marriage with and without parental consent involve widespread discrimination on the basis of sex. A 1967 survey of state marriage laws by the United States Department of Labor showed that only ten states set the same minimum age for marriage (age below which marriage, even with parental consent, is prohibited) for men and women. Only eighteen states set the same age of consent (age at which marriage is permitted without parental consent) for both men and women. In every state with an age differential, the minimum age for men was one to three years higher than the minimum age for women.

Since the minimum marriage age in all

states is now well above the normal age of puberty, physical capacity to bear children can no longer justify a different statutory marriage age for men and women. Instead, there seem to be two current rationales for the higher marriage age for men. One is that, mentally and emotionally, women mature earlier than men. Maturity is such a relative and subjective concept that a court could never use it as a test for an inborn characteristic distinguishing all women from all men. Furthermore, mere estimates of emotional preparedness founded on impresions about the "normal" adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids. The other rationale for the age difference is that men should not be distracted during adolescence from education and other preparation for earning a living. This rationale is obviously untenable: the law should give as much encouragement to women to prepare themselves to earn a living as it gives to men.

Under the Equal Rights Amendment, a court challenge to the age differential would most likely be made by a man suing to require issuance of a license to him at the lower women's age. Faced with such a challenge to the state law a court would have to find, for the reasons just discussed, that the marriage age differential did not meet the strict criteria of the unique physical characteristics tests required by the Equal Rights Amendment. Once it had concluded that a state could not constitutionally set one marriage age for men, and one for women, a court would be able to increase the marriage age for women upward to match the age for men, on the theory that the state should be equally solicitous of a woman's training as a man's. Or a court might find that the legislature had pegged the age for men unreasonably high and revise the marriage age for men downward to correspond to the marriage age for women. A legislature reconsidering laws about the minimum age for marriage, either before or after a court challenge, would have to set a single age for men and women after weighing the policy considerations underlying the age limit. These considerations might indicate the higher age, the lower age, or an age in between the two.

I digress to observe that if this be a correct interpretation of the equal rights amendment, the courts are to have the powers to make laws rather than the power to interpret laws. I base that on the statement of the authors that under the equal rights amendment a court could lower the marriageable age of men down to the marriageable age of women, or raise the marriageable age of women up to the marriageable age of men. Personally, I think courts have enough jobs to do when they stick to their judicial knitting and leave the making of the laws to legislative bodies.

2 MERGER OF THE WOMEN'S LEGAL IDENTITY INTO HER HUSBAND'S

a Name Change. The requirement that a woman assume her husband's name at the time she marries him is based on long-standing American social custom. It is also firmly entrenched in statutory and case law. In some states statutes indicate that a married woman must not only take but keep her husband's name. Women who continue to use their maiden names after marriage may encounter resistance from the Internal Revenue Service, voting registrars, motor vehicles departments or any number of non-governmental sources.

I emphasize the following sentence:

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name change for the married woman would become legal nullities. A man and woman would still be free to adopt the same name, and most couples would probably do so for reasons of identification, social custom, personal preference, or consistency in naming children.

However, the legal barriers would have been removed for a woman who wanted to use a name that was not her husband's.

Some state legislatures might decide there was a governmental interest, such as identification, in requiring spouses to have the same last name. These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both.

I digress to say it would be a terrible thing if the husband and wife could not agree on the last name under the equal rights amendment. That is one cause of friction which does not exist now, but would arise under the equal rights amendment.

I resume reading:

Similarly, statutes which now permit the judge in a divorce case to use discretion in determining whether to allow a woman to resume her maiden name or to take a new name would be extended under the Equal Rights Amendment to cover all men, or at least men who had changed their names at marriage. Moreover, any state coercion regarding an individual's choice of name might still be open to attack under developing constitutional principles of due process and privacy.

In a state where both spouses were required to have the same last name, the children would simply take their parents' name. If the state had no requirement that husband and wife take the same name, it could either require that parents choose one of their names for their children, or it could decide to have no rule at all. The Amendment would only prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's.

4. SUMMARY

The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles for men and women with respect to family life. Changing social attitudes and economic experiences are already breaking down these rigid stereotypes. The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex.

I digress to observe that is a rather remarkable statement. The equal rights amendment would prohibit dictating different roles for men and women within the family on the basis of their sex.

I yield the floor.

Mr. BAYH. Mr. President, I yield myself as much time as might be required.

The Senator from Indiana will be brief, inasmuch as much of this subject matter was discussed at some length yesterday, and he sees no reason to belabor further the Senate with his counterargument to that of the Senator from North Carolina. I think the Senator raises a legitimate concern. I am convinced he is sincere in his beliefs, but I think the strong weight of opinion would prove that the effect of this amendment would be contrary to that which he has outlined.

Insofar as the protection of wives and mothers, as far as alimony and children and dower rights and all other rights are concerned, what we are suggesting is that, rather than wipe out all these rights, we are going to say to a woman and to a man that each will be treated equally under the law, both men and women; that both husband and wife will be treated equally; that if a father and husband has certain rights, a wife and mother should have the same rights; that if a husband or widower has certain rights, then the wife or widow should have them. It seems to me that is what equality is all about.

Mr. COOK. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. COOK. May I say I would like to be associated with the remarks of the Senator from Indiana. It bothers me that a woman can marry and have rights and responsibilities taken away from her, and then, if her husband dies and she becomes a widow, she immediately is emancipated, and then if she remarries, she goes back into the state she was in before.

It seems to me rather odd that, somehow or other, we should make a chattel out of a particular individual under a constitutional form of government.

It also bothers me, relative to the statement that the Creator made this great distinction between men and women, that, somehow or other, it seems to me what in effect has been said is that when the Creator made that distinction, God said to man, "You make all the laws and make them restrictive on woman."

All I can say is that is it not fortunate that woman did not take the ball first and legislate against us, because, if that were the case, we would be here now challenging all these things. We would be here trying to say that, under a constitutional form of government, we should be equal. But instead, today, we live within the framework of the great document and under, frankly, the freest system of society in the world, save as it applies to one particular segment of our society, 53 percent of our society, the female individual in this Nation.

I yield back the remainder of my time.

Mr. President, have the yeas and nays been requested?

The PRESIDING OFFICER. No; they have not.

Mr. COOK. Mr. President, we yield back our time.

Mr. ERVIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAYH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were not ordered.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I yield myself whatever time I may need, pending the arrival of one of our brethren.

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER (Mr. TUNNEY). The question is on agreeing to the amendment (No. 1068) of the Senator from North Carolina (Mr. ERVIN). On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 14, nays 77, as follows:

[No. 116 Leg.]

YEAS—14

Buckley	Eastland	Hollings
Byrd, Va.	Ervin	Long
Cannon	Fannin	Miller
Cooper	Goldwater	Stennis
Cotton	Hansen	

NAYS—77

Aiken	Fulbright	Pearson
Allen	Gambrell	Pell
Allott	Gravel	Percy
Anderson	Griffin	Proxmire
Baker	Gurney	Randolph
Bayh	Harris	Ribicoff
Beall	Hart	Roth
Bellmon	Hatfield	Saxbe
Bennett	Hruska	Schweiker
Bentsen	Hughes	Scott
Bible	Inouye	Smith
Boggs	Javits	Sparkman
Brock	Jordan, N.C.	Spong
Brooke	Jordan, Idaho	Stafford
Burdick	Kennedy	Stevens
Byrd, W. Va.	Magnuson	Stevenson
Case	Mansfield	Symington
Church	Mathias	Taft
Cook	McGee	Talmadge
Cranston	Metcalf	Thurmond
Curtis	Mondale	Tower
Dole	Montoya	Tunney
Dominick	Moss	Weicker
Eagleton	Muskie	Williams
Ellender	Nelson	Young
Fong	Pastore	

NOT VOTING—9

Chiles	Jackson	McIntyre
Hartke	McClellan	Mundt
Humphrey	McGovern	Packwood

So Mr. ERVIN's amendment (No. 1068) was rejected.

AMENDMENT NO. 1069

Mr. ERVIN. Mr. President, I call up my amendment No. 1069 and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read the amendment as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers responsibility for the support of their children.".

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, I now yield to the Senator from New Hampshire (Mr. COTTON) such time as he may need.

Mr. COTTON. I shall only speak for 3 minutes.

Mr. BYRD of West Virginia. Would the distinguished Senator from North Carolina indicate, as there are several Senators in the Chamber at this moment, whether we might expect a vote on this amendment within the next 30 minutes?

Mr. ERVIN. The Senator from New Hampshire would be the better Senator to inform the Senator from West Virginia on that, as he has the time to speak. I shall only require two or three sentences for my statement.

Mr. COTTON. I see no reason why we could not vote within 10 minutes. I shall not take much time.

Mr. BYRD of West Virginia. Would the Senator then agree to a time limitation?

Mr. ERVIN. I shall have only two or three sentences to say. It would be up to the Senator from New Hampshire.

Mr. COTTON. Mr. President, this is the only amendment that the Senator from New Hampshire is really interested in. It is one which I have always supported in the past whenever the question of a constitutional amendment on the rights of women has been considered.

For years, the Senator from New Hampshire has frankly informed constituents who write to him from time to time that he is perfectly willing that there shall be written into the Constitution of the United States an amendment guaranteeing equal rights for women. But, Mr. President, he has also said that he will never vote—and that goes for today—for a constitutional amendment that would release fathers from the obligation to contribute to the support of their minor children. That is why I urge the adoption of this brief and simple amendment. If it is adopted, I can vote for the constitutional amendment. If it is not adopted, I shall be compelled to vote against it. If the laws of our States requiring men to contribute to the support of the children they beget, whether legitimate or illegitimate, are to be nullified by the proposed amendment, it should be known not as the women's lib amendment but as the men's lib amendment for an amendment which does not clearly permit States by their laws to make men fulfill their responsibilities relieves men and takes away the rights of women.

But, even worse, it takes away the rights of small, infant children. No one in his senses could look forward to a generation in which small children would be placed in foster homes or in institutions because we have written into the Constitution an amendment that makes it impossible for the mother to receive contributions from the father of her children in order that she can be with them and they may have the benefit of a mother's love and care.

Mr. President, this amendment is so simple and yet so necessary and merely provides that—

This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers responsibility for the support of their children.

Mr. President, the Senator from New Hampshire feels strongly on this because he served for 9 years as a county prosecuting attorney. It is largely a rural county. The women in that county were not the kind of women who cry out for this amendment and whom it is supposed to benefit. They were mostly like my own mother—country housewives and mothers who knew from time to time the pinch of poverty. They were not the socially elite, the highly educated, or the politically active.

Mr. President, in the 9 years I served as county attorney, it seemed to me that I spent 25 percent of my time trying to make the men who had deserted their wives with four or five small children, contribute to the support of those children.

That is why, Mr. President, I cannot vote for this proposed constitutional amendment unless it is safeguarded by the amendment now offered to it. Mr. President, I am now glad to yield to my good friend from Wyoming.

Mr. HANSEN. Mr. President, I thank my distinguished colleague from New Hampshire for yielding to me at this time.

Mr. President, what the Senator from New Hampshire is saying is most important. The Finance Committee, of which I am a member, has been holding hearings on H.R. 1. We have heard testimony from individuals, including county prosecuting attorneys testifying to the effect that if they were able to go across State lines, if they had the support of State departments of public welfare, and the support of the Department of Health, Education, and Welfare, in the opinion of one county attorney from the State of Arkansas who estimated that he could reduce the burden of welfare brought about by aid to families with dependent children by as much as 20 percent.

I shall certainly support the pending amendment. It seems ridiculous to me that we should pass a constitutional amendment which wipes out and obliterates all distinctions between the sexes. And I say that as one Senator who has cosponsored the amendment and as one who has told the people of the State of Wyoming that I would support the amendment. However, that was before I listened to some of the more learned Members of the Senate who had delved more deeply than I had at that time into the ramifications of the amendment.

This is an amendment which should be adopted if we are concerned about the rights of those on welfare, if we are concerned about the breaking up of families, and if we are concerned about the fathers who do not seek to fulfill their responsibility but pull out and leave their wives and their families unattended.

I appreciate very much the very important observations made by my good friend, the Senator from New Hampshire. I shall support the amendment.

Mr. COTTON. Mr. President, I thank the Senator from Wyoming. I yield to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. COOPER. Mr. President, I, too, urge the Senate to support the pending amendment. I speak as one who served as county judge and as circuit judge for 9 years.

The problem arises from two situations. The problem arises from legitimate children born in wedlock where, many times, there is a divorce or separation and a judgment for alimony and child support.

I have seen again and again where the father would fail to meet the orders of the court and would be hailed into court, cited for contempt, and placed in jail for a time. Then he would finally be released upon his agreement to resume the payment to his infant children. After that time, he would again fail to keep those promises.

Many times a father moves into another State where our State law could not reach the father because usually the Governors of other States would not permit extradition in such cases.

The situation also arises in the case of illegitimate children, in which the man is charged with being the father of the child and is brought into court. The case is tried, and the jury determines that the man is the father of the child. The court orders that he make payments for the maintenance of that child. As I recall, that would be until the age of 18 years.

It is against the impulse of a man to do this unless he is an honorable man. In most of these cases the burden would fall upon the mother and eventually upon the State, as many of the mothers in most cases would not be able to maintain the child.

It is a serious question. I believe that there are thousands—perhaps hundreds of thousands—of children in our country today who are in this situation. I noticed in the newspaper the other day that in the District of Columbia it is believed that this year 50 percent of all children born in the District of Columbia would be illegitimate. As I have just noted, most of the times there is not the slightest responsibility on the part of the father to provide for the child.

Mr. PASTORE. Mr. President, will the Senator from New Hampshire yield for a question?

Mr. COTTON. I yield to the Senator from Rhode Island.

Mr. PASTORE. Mr. President, will the Senator point out—because I am very interested in the dialog that has transpired on the floor—wherein the equal rights amendment without this particular amendment would absolve the fathers of children from the responsibility to support those children. Where

S 4539, 41

does the Senator get that? It is common law that, if one is decreed to be the father in the case of an illegitimate child, he contribute to the support of that child. There is nothing in the equal rights amendment that denies the right to impose responsibility upon that parent.

I did not think that the equal rights amendment has anything at all to do with the matter at hand.

Mr. COTTON. Mr. President, I believe there is grave danger that, if the amendment in its present form becomes a part of the Constitution, courts would be compelled to impose exactly the same obligations for support of minor children upon the mother and the father. If the father leaves the jurisdiction, as is often the case, the whole obligation would fall upon the mother, for she is accessible many times when the father is not.

This would serve to obliterate the family concept that has always been the cornerstone of our society—that the father is principally the breadwinner and the mother provides the loving care so necessary to infants and young children. Mr. President, I am not so much worried about the strain put upon public welfare referred to by the distinguished Senator from Wyoming, but I am concerned that mothers should be able to be at home and that children attain a certain age because there is a period to my mind from which the children will never recover and their entire lives may be affected by the lack of constant care and supervision of a mother who loves the child.

Mr. PASTORE. Is the Senator actually saying, should the equal rights amendment pass without this particular amendment, that where a mother goes before a court for an order for child support, the court would be obligated to say, "You go out and get a job and support the child because the Constitution says that it is your responsibility as much as your husband's responsibility?" Is that what the Senator is saying?

Mr. COTTON. That is almost what I am saying, but not quite. I am saying that the court would be obligated to make an order that the mother share in that support, because they would have to be treated exactly alike. There is also grave danger that it will be held that they would have to be treated exactly alike in any order that would issue. The mother would have to pay half and the father would have to pay half of the support.

Mr. PASTORE. Mr. President, I am interested in hearing the position of the opposition to the amendment.

Mr. COTTON. Before I surrender the floor, I wish to utter some final words. It is because of my own vivid experience during 9 years and the evidence I had of the disposition of men to beget children and then walk out on their responsibilities that I see danger in a constitutional amendment that does not make it clear that this is a reservation. Perhaps the amendment is safe without the adoption of this provision. There are distinguished lawyers in this body who appear to think so, but there are also many legal authorities of the highest repute that have indicated their fear that a bald, all-encompassing constitutional amendment would strike down the power of the States to place the responsibility of financial support of young children upon the father.

I hope that the Senator from Rhode Island is correct in his interpretation, but if he should be wrong and the present proposed language is not added, the results would be tragic.

I cannot bear to visualize my country in a situation where children bereft of a father's support and a mother's care grow up in day care centers or institutions. I fear that more than anything in the world, and I cannot bring myself to vote for a constitutional amendment that for lack of safeguarding language might bring this to pass.

Mr. President, I yield the floor.

Mr. PASTORE. Mr. President, I do not want my position to be misunderstood. I was Governor of my State before I came to the Senate 22 years ago. No one worked harder to clear up the social welfare rolls than I did. I had the director of public welfare in my office every other day to make sure that every father was made responsible for supporting his children. I did not care where the father was. I said, "Go and get him, even if it costs twice as much as it would to support the child, because we have to set an example."

I am afraid that the Senator is reading something into this amendment that is not the case. That is what disturbs me.

Mr. ERVIN and Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina has the floor.

Mr. ERVIN. Mr. President, I am sorry that the distinguished Senator from Rhode Island was not in the Chamber this morning when I read into the record the article from the Yale Law Journal for April 1971. This article was written by a constitutional scholar, Prof. Thomas Emerson, of the Yale Law School, and by three highly educated young lady lawyers.

It states specifically that under the laws in all the States the husbands are primarily liable for the support of their wives and children. It stated expressly that where the State law imposed on the husband primary responsibility for support of the child that that law would be unconstitutional under the equal rights amendment because it makes a legal distinction between the legal responsibility of the husband and the wife. That is an inescapable conclusion.

Why in the world they want to rob little children of the right that they be primarily supported by their fathers is something the Senator from North Carolina is incapable of conceiving.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. ERVIN. I yield.

Mr. PASTORE. I am looking now at the report filed by the committee, page 17. I guess this amendment came up in committee. I assume so.

Mr. ERVIN. I do not recall.

Mr. PASTORE. At any rate the report of the committee states that the report of the Association of the Bar of the City of New York accurately describes the amendment's effect in this area.

> The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. 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.
>
> Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.

The Senator from North Carolina says that this gentleman from Yale disputes this?

Mr. ERVIN. Yes. He said that the child support sections of criminal nonsupport laws could not be sustained where only the male is liable for support.

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Mr. BAYH. Mr. President, again I think this is a legitimate concern, but I just reemphasize what I said a moment ago. I read for the RECORD and the consideration of those present section 230.5 of the Model Penal Code, which I think suggests the way this particular subject would be handled.

Mr. ERVIN. Which is not the law anywhere in the United States.

Mr. BAYH. But it is a well-taken and well-respected document, I think, and it can be taken as a point of reference for what could be and probably would be the law of the land if this amendment were passed.

The section entitled "Persistent Nonsupport" reads as follows:

> A person commits a misdemeanor if he or she persistently fails to provide support which he or she can provide and which he or she knows he is legally obliged to provide to a spouse, child, or other dependent.

There is no reason why either spouse should not be responsible for the support of the child, depending on which one has the income and earning capacity. I come back again to the best case I could find, no longer ago than yesterday morning, where a woman making $42,000 was required to provide greater support for a child than her husband making $18,000.

In most of the cases in the courts today, in accordance with tradition, it will be the other way around, and what will happen is, it will be found that the man is making $42,000, and the woman is not making anything in the way of income, but is doing all the work at home and making it possible for the father to go out and pursue his profession.

That is the way it is in most cases today, and no doubt will be tomorrow, and

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it results in the father being the sole support of the child because he, throughout the marriage relationship, is the one who has developed the capacity to earn and provide the children with maintenance.

Mr. PASTORE. That is the situation now, without the equal rights amendment. But my experience in the courts has been that when the court, in any separation or divorce case, states the amount of alimony to be paid or the amount to be given to the children, he usually takes into account what the financial status of the woman is as well. We do not need an equal rights amendment to the Constitution to do that. That has historically been the case: If the woman makes twice as much as the man, and the man is required to contribute to the support of the children, usually, in assessing the amount, the judge should be able not only to take into account the ability to pay, but also the financial status of the woman. That has always been the case.

I am just wondering if we change that. If we do not change it, we have no trouble. But the argument has been made here that we would, and that is the reason we have conducted this little debate, so we will not have any misunderstanding that this is going to be an escape hatch for wayward fathers.

Mr. BAYH. Quite the contrary. The Senator from North Carolina seeks to change this by suggesting that this is not the case, and that the whole responsibility ought to rest on the fathers. The Senator from Indiana respectfully dissents from that opinion.

Mr. ERVIN. Well, the Senator from North Carolina regrets that he was unable to make a statement which would enlightened the Senator from Indiana as to his position.

The Senator from North Carolina stated that under the laws of 47 of the 50 States of this Union, the father is primarily responsible for the support of his children, and that there are only three States in the Union which have laws which place an equal obligation to support on the father and the mother.

If the equal rights amendment is passed, the laws of 47 States will immediately be stricken down, and there will be no laws until some subsequent laws are enacted.

Now, under the present system, if a prosecuting attorney bringing a criminal action or a next friend bringing a civil action proceeds against the father for the support of a child, all he has to do is show two things: first, that the defendant is the child's father, and, second, that the defendant has failed to support his child. That is all there is to it. Those are matters which can be litigated very quickly. This is an extremely important advantage over what would happen if the equal rights amendment is passed.

If the equal rights amendment is passed, the father, who is called on by the court, by the prosecuting attorney, or by a next friend to support his child, can say:

I have a defense to this accusation. My wife is a better worker than I am. My wife has more property than I have, and my wife is the one who has to be called upon to support.

I say that this amendment ought to be voted for by every Senator who believes that the Scripture speaks correctly when it says that it is better that a man should have a great millstone tied about his neck and should be drowned in the depths of the sea than to have him wrong a little child.

I am ready to vote.

Mr. BAYH. I yield back the remainder of my time.

The PRESIDING OFFICER. All time on the amendment has been yielded back.

The question is on agreeing to the amendment of the Senator from North Carolina. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting the Senator from South Dakota (Mr. MCGOVERN), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Washington (Mr. JACKSON), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Florida (Mr. CHILES), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Colorado (Mr. DOMINICK) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 17, nays 72, as follows:

[No. 117 Leg.]

YEAS—17

Bennett	Cotton	Hollings
Buckley	Eastland	Jordan, Idaho
Byrd, Va.	Ervin	Long
Byrd, W. Va.	Fannin	Pastore
Cannon	Goldwater	Stennis
Cooper	Hansen	

NAYS—72

Aiken	Cambrell	Pell
Allen	Gravel	Percy
Allott	Griffin	Proxmire
Anderson	Gurney	Randolph
Baker	Harris	Ribicoff
Bayh	Hart	Roth
Beall	Hatfield	Saxbe
Bellmon	Hruska	Schweiker
Bentsen	Hughes	Scott
Bible	Inouye	Smith
Bogga	Javits	Sparkman
Brock	Jordan, N.C.	Spong
Brooke	Magnuson	Stafford
Burdick	Mansfield	Stevens
Case	Mathias	Stevenson
Church	McGee	Symington
Cook	Metcalf	Taft
Cranston	Miller	Talmadge
Curtis	Mondale	Thurmond
Dole	Montoya	Tower
Eagleton	Moss	Tunney
Ellender	Muskie	Weicker
Fong	Nelson	Williams
Fulbright	Pearson	Young

NOT VOTING—11

Chiles	Jackson	McIntyre
Dominick	Kennedy	Mundt
Hartke	McClellan	Packwood
Humphrey	McGovern	

So Mr. ERVIN's amendment (No. 1069) was rejected.

AMENDMENT NO. 1070

Mr. ERVIN. Mr. President, I call up my amendment No. 1070 and ask that it be stated.

The PRESIDING OFFICER (Mr. STEVENSON). The amendment will be stated.

The assistant legislative clerk read the amendment as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, or boys or girls.".

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. BYRD of West Virginia. Mr. President, will the distinguished Senator from North Carolina yield for a question?

Mr. ERVIN. I am delighted to yield to the Senator from West Virginia for a question.

Mr. BYRD of West Virginia. Would the distinguished Senator from North Carolina be willing to agree to a unanimous consent agreement cutting the time in half on amendments? In other words, reducing the time from 2 hours to 1 hour, to be equally divided, as in the previous order?

Mr. ERVIN. That will be entirely satisfactory to me.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the time on any amendment to the pending measure be limited to one hour to be equally divided and controlled as heretofore agreed upon.

The PRESIDING OFFICER. Is there objection to the request of the Senator from West Virginia? The Chair hears none, and it is so ordered.

Mr. BYRD of West Virginia. I thank the distinguished Senator from North Carolina.

Mr. ERVIN. Mr. President, there are statutes on the Federal statute books and on the statute books of all the States which secure the right of privacy to men and women and to boys and girls.

The statute that illustrates statutes of this character is section No. 95-48 of the General Statutes of North Carolina which provides:

§ 95-48. *Separate toilets required.*—In the interest of public health and in compliance with G. S. 130-160 and 143-138, adequate, well-lighted and ventilated toilet facilities plainly lettered and marked, for each sex shall be provided and maintained in a sanitary condition by all persons and corporations employing both males and females. Such toilet facilities shall be separated by full and substantial walls. (1913, c. 83, s. 1; C. S., s. 6569; 1963, c. 1114, s. 1.)

In addition to that, there are statutes which require separate toilet facilities for boys and girls in public schools. There are statutes that require separate toilet facilities for men and women in public buildings and in buildings used for the interstate transportation of passengers. In addition to that there are statutes in every State and there are statutes upon the Federal statute books which require that men and women prisoners serving sentences under court order shall be confined in separate cells and, in many cases, in separate prisons.

Virtually, every State in this Union has laws establishing reformatories for boys and girls who transgress the laws of the States. Those laws require that the reformatories for boys and girls be separate.

Then there are many statutes which provide, as in the case of section 148-44 of the General Statutes of North Carolina, that the Department of Prisons shall provide quarters for female prisoners separate from those of male prisoners; and shall provide for separate facilities for youthful offenders, as required by sections 15-210 to 15-215.

The question raised by this amendment is what will be the effect of the Equal Rights amendments on laws which establish privacy of this nature and which require that the sexes be separated in restrooms and reformatories and prisons. I have read what might be called the bible of what some people designate as the women's lib, the Yale Law Journal article which appeared in the issue for April 1971.

Here is what it says, summing up its comments, reading from page 901 to 902:

It is impossible to spell out in advance the precise boundaries that the courts will eventually fix in accommodating the Equal Rights Amendment and the right of privacy. In general it can be said, however, that the privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex. The great concern over these matters expressed by opponents of the Equal Rights Amendment seems not only to have been magnified beyond all proportion but to have failed to take into account the impact of the young, but fully recognized, constitutional right of privacy.

It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event the impact of the right of privacy would change too.

In other words, the opponents of the equal rights amendment say that they cannot spell out in advance the boundaries that the courts will eventually fix in accommodating the equal rights amendment to the right of privacy.

They also say that the effect on the amendment of the right of privacy is not only uncertain at present, but that it may fluctuate or change one way or the other in the future.

That is not the opinion of persons who are experts in the field of constitutional law and the interpretation of statutes.

The distinguished Senator from Indiana wrote a letter to Fred Buzhardt, General Counsel of the Defense Department, in which some comment was made on this point. As the Senator from North Carolina interprets the letter from the General Counsel of the Department of Defense, the General Counsel expressed the opinion that even though in the military it would be possible to arrange separate facilities for men and women while they were at some established posts, he pointed out that under this amendment the men and women would be sent into combat the perform exactly the same service, and after doing this, he pointed out the obvious:

Even if segregation in living quarters at facilities were allowed under the amendment, during combat duty in the field, there are often, in effect, no facilities at all. The privacy for both sexes might be impossible to provide or enforce.

Let us see what the effect of the equal rights amendment on the right of privacy of men and women and boys and girls who are not affiliated with the military is.

Professor Freund, of the Harvard Law School, testified about this matter before the Senate Judiciary Committee in 1970. After stating that the amendment would be absolute, Professor Freund stated that it would follow that the equal rights amendment "would require that there be no segregation of the sexes in prisons, reform schools, public restrooms, and other public facilities."

Prof. Philip Kurland, editor of the Supreme Court Review and professor of law at the University of Chicago Law School, is one of this Nation's greatest constitutional scholars. He testified in response to questions put to him by me at the hearings on the equal rights amendment before the Senate Committee on the Judiciary as follows:

Senator ERVIN. . . . the law which exists in North Carolina and in virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Senator ERVIN. And the laws of the states and the regulations of the Federal government which require separate restrooms for men and women in public buildings would also be nullified, would it not?

Professor KURLAND. My answer would be the same.

Many women are compelled by necessity rather than by choice to work in industrial plants. Under the laws of virtually every State in the Union, industrial plants and other facilities are required to provide separate restrooms and separate dressing rooms for women in instances where those men are required to change their wearing apparel.

Yesterday I placed in the Record and read to the Senate a statement made by representatives of most of the working women of America who belong to the union, in opposition to the equal rights amendment. In this statement the representatives of these working women gave many reasons why Congress should not submit the equal rights amendment to the States and many reasons why the States should not ratify such amendment if Congress should be foolish enough to submit to them. They gave as one of the reasons that the equal rights amendment would destroy rights cause new problems by destroying laws "that require restrooms and dressing rooms for women workers."

I do not care to elaborate this point. I merely suggest that those Members of the Senate who believe that government should not have the power to segregate men and women and boys and girls in restrooms or to segregate male and female prisoners in institutions of correction and prisons ought to vote against my amendment. But those Senators who believe that the right of privacy of men and women and boys and girls ought to

be preserved against obstruction by the equal rights amendment ought to vote for my amendment.

It is clear as the noonday sun in a cloudless sky that the only reason that this Nation has separate restrooms for men and women and boys and girls and separate prisons for men and women prisoners is sex. Consequently, being a distinction based on sex, the equal rights amendment would abolish the power of the Federal Government and the power of the 50 States to require separate facilities of this nature for persons of different sexes.

I am ready to yield back the remainder of my time on the amendment.

Mr. COOK. Mr. President, this is the amendment my staff in reviewing it affectionately referred to as the "potty amendment."

What I do not understand, if the logic of the Senator from North Carolina is correct, is this. He said if I had all of these constitutional rights up to now as a man, and a woman has not, that I had the right to go into a lady's restroom. But as a matter of fact today if a man goes to a lady's restroom he gets arrested. We do not have that right.

If the theory of the Senator is correct that it is as clear as the sun in a cloudless sky with respect to what we are talking about, it must be a rainy day, such as today, when we cannot see the sun. It is said I have had these rights all along and we are giving equal rights under the Constitution which, in essence, means we have not been doing it up to now.

If I had more rights than the feminine sex, and my rights were equal with my brethren, and equal to the rights of women, then I had the right to utilize both of those facilities, but she only had the right to use one facility. Obviously, this is not the case.

I get the notion that we are being told there is a statute in every State of the Union, and I expect that we could be told, if time had not expired, that all those statutes are going to be eliminated; but, if I had all those rights and I could go to both, I would be arrested if I went to the other. So I think this is, although I hate to use the word, a specious argument. I do not think it can stand the march of legal opinion. It cannot stand up against the Griswold case, because the constitutional right of privacy can be used to sanction separate male and female facilities for activities which involve disrobing, sleeping, and personal bodily functions. It cannot stand the march of logic. I do not think it has anything to do with the argument of constitutionality and that it would do a great injustice to the intelligence of the American people if the amendment were attached to the constitutional amendment, because the equal rights amendment does not prohibit the separation of the sexes where the right of privacy is involved.

I yield back my time.

Mr. ERVIN. Mr. President, if I could reacquire some of the time I have yielded back——

Mr. COOK. Mr. President, I have no objection.

Mr. ERVIN. The distinguished Senator from Kentucky may think this is specious, but two of the greatest constitutional lawyers in the United States do not think it is specious. I have read into the RECORD the testimony of Prof. Paul Freund, of the Harvard Law School, and the testimony of Phil Kurland, professor of law at the University of Chicago Law School. I do not think anything could be more plainly demonstrated than the fact that the equal rights amendment will prohibit separate restrooms for men and women.

We have a law passed that says a certain restroom must be marked as being usable for women and another as being usable for men.

The present law provides that a person of neither sex can use a restroom marked for the other sex. That distinction is the most obvious distinction based on sex. The only reason we have separate restrooms is on account of sex, and the equal rights amendment will render unconstitutional every distinction based on sex and it will clearly render unconstitutional every Federal and State law requiring separate restrooms for the two sexes and every Federal and State law requiring that men and women prisoners be detained in different cells or in different prisons.

Mr. BAYH. Mr. President, I yield back my time.

Mr. ERVIN. Mr. President, I do the same.

The PRESIDING OFFICER. All time on the amendment has been yielded back.

The question is on agreeing to the amendment of the Senator from North Carolina. The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Vermont (Mr. STAFFORD) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 11, nays 79, as follows:

[No. 118 Leg.]

YEAS—11

Bennett	Ervin	Long
Byrd, Va.	Fannin	Stennis
Cooper	Hansen	Talmadge
Eastland	Hollings	

NAYS—79

Aiken	Fong	Nelson
Allen	Fulbright	Pastore
Allott	Gambrell	Pearson
Anderson	Goldwater	Pell
Baker	Gravel	Percy
Bayh	Griffin	Proxmire
Beall	Gurney	Randolph
Bellmon	Harris	Ribicoff
Bentsen	Hart	Roth
Bible	Hatfield	Saxbe
Boggs	Hruska	Schweiker
Brock	Hughes	Scott
Brooke	Inouye	Smith
Buckley	Javits	Sparkman
Burdick	Jordan, N.C.	Spong
Byrd, W. Va.	Jordan, Idaho	Stevens
Cannon	Kennedy	Stevenson
Case	Magnuson	Symington
Church	Mansfield	Taft
Cook	Mathias	Thurmond
Cotton	McGee	Tower
Cranston	Metcalf	Tunney
Curtis	Miller	Weicker
Dole	Mondale	Williams
Dominick	Montoya	Young
Eagleton	Moss	
Ellender	Muskie	

NOT VOTING—10

Chiles	McClellan	Packwood
Hartke	McGovern	Stafford
Humphrey	McIntyre	
Jackson	Mundt	

So Mr. ERVIN's amendment (No. 1070) was rejected.

The PRESIDING OFFICER. The bill is open to further amendment.

AMENDMENT NO. 1071

Mr. ERVIN. Mr. President, I call up my amendment No. 1071, and ask for its immediate consideration.

Mr. BYRD of West Virginia. Mr. President, may we have order?

The PRESIDING OFFICER. The Senate will be in order.

The amendment will be stated.

The legislative clerk read as follows:

At the end of section 1 add the following sentence:

This article shall not impair the validity however of any laws of the United States or any State which make punishable as crimes sexual offenses.

Mr. BAYH. Will the Senator request the yeas and nays?

Mr. ERVIN. Mr. President, I ask for the yeas and nays on this amendment.

The yeas and the nays were ordered.

Mr. ERVIN. Mr. President, virtually every State in this Union has certain criminal statutes which prohibit the use of obscene language to female telephone operators, or prohibit the use of obscene language in the presence of women, or which make it a criminal offense for a man to seduce an innocent and virtuous woman under the promise of marriage, or which make it a crime for a man to have carnal knowledge of an immature girl under the age of consent. These laws will be stricken down by the equal rights amendment.

There is another law which we have known in popular parlance as the Mann White Slavery Act. This law makes it a crime for men to transport women in interstate or foreign commerce for immoral purposes or for the purposes of debauchery or for the purposes of prostitution. This law will also be stricken down as unconstitutional by the equal rights amendment.

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Mr. President, my amendment is merely designed to make it certain that the equal rights amendment will not impair the validity of any laws of the United States or of any State which makes sex offenses punishable as a crime.

Mr. President, I sincerely trust that the Senate will adopt this amendment.

Mr. BAYH. Mr. President, I yield myself such time as I may need. I shall be brief, inasmuch as the distinguished Senator from North Carolina and I had a rather detailed discussion about this matter on yesterday, and anyone who cares to examine it in further detail will find my remarks in yesterday's RECORD.

I certainly think that the Senator from North Carolina has made a significant contribution to this debate by bringing this issue into focus.

None of us who support the equal rights amendment—perhaps I should not say none, but at least, including myself, I should say most of us who are supporting the equal rights amendment—have no desire at all that it have the effect attributed to it by the Senator from North Carolina.

Perhaps the best place to start in this brief rebuttal would be to read from the committee report which states as a general rule particularly relative to the question of rape and statutory rape:

The Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in the way that they are uniformly distinct from men.

None of the items the Senator from North Carolina is concerned about would be stricken by the equal rights amendment. Rather, because of their sexual bias, in the judgment of the Senator from Indiana and the majority of the Judiciary Committee, such laws will be sustained. They will not be stricken down as unconstitutional, because the distinction between the laws as to their application to men and women is not based simply on their sex, but on their unique physical characteristics—their distinct physical differences. Indeed, men and women do have unique physical characteristics and that is why we need unique, distinct and different laws relating to various sex crimes. To determine whether the law is based on unique physical characteristics, the Senator from Indiana suggests that one must look at both the group protected by the law and the group which might be punished. Again let us use the rape law in question. Rape laws, under this analysis, are perfectly constitutional, for both the groups which is protected; namely, women, and the group which can be punished; namely, men, have unique physical characteristics which are directly related to the crime, to the act for which an individual is punished.

With respect to statutory rape, the same analysis can be drawn, I suggest most respectfully. Only men can physically commit the crime of statutory rape and only women can physically be the victims of the crime.

The PRESIDING OFFICER (Mr. TOWER). Who yields time?

Mr. BAYH. Mr. President, I yield back the remainder of my time.

Mr. ERVIN. Mr. President, the Senator from Indiana mentioned the fact that men and women have unique physical characteristics which are distinguishable from each other. That is true. That is exactly what makes the distinction between men and women and makes them members of different sexes. This equal rights amendment is designed to outlaw every law which is based on the distinction of sex. So, it is impossible to maintain the position of my good friend, the Senator from Indiana. The whole equal rights amendment recognizes that men are men and women are women, because they have different unique physical characteristics which divide them into two sexes. And manifestly, a constitutional amendment which says that we cannot have a law based upon distinction between sexes would invalidate any law based upon this distinction.

Mr. President, I am willing to yield back the remainder of my time.

Mr. BAYH. Mr. President, I yield myself a couple of minutes under the bill.

The PRESIDING OFFICER (Mr. ROTH). The Senator from Indiana is recognized.

Mr. BAYH. Mr. President, the Senator from Indiana has not contended in debate with the Senator from North Carolina throughout these many hours and many days that men and women did not have distinct characteristics that made them different. It has been quite to the contrary.

There is no way we can pass a constitutional amendment to change this. However, by definition the crime of, let us say, rape, can apply to only one group who are the victims and one group who are the perpetrators of this crime. This is based on the unique physical characteristics of the sexes.

Thus, in the judgment of the Senator from Indiana and, indeed, even in the judgment of the Yale Law Review article which I quote with some reluctance, because of the different interpretations the Senator from North Carolina and I have put upon it, that is one area in which I have agreement with the scholars who wrote that article when they said that rape laws would continue to be valid after ratification of the equal rights amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from North Carolina. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Minnesota (Mr. HUMPHREY), and the Senator from Washington (Mr. JACKSON) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Colorado (Mr. ALLOTT) and the Senator from Kentucky (Mr. COOPER) are detained on official business.

Also, the Senator from Tennessee (Mr. BAKER) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 17, nays 71, as follows:

[No. 119 Leg.]

YEAS—17

Bennett	Dominick	Hollings
Buckley	Eastland	Long
Byrd, Va.	Ervin	Miller
Byrd, W. Va.	Fannin	Stennis
Cannon	Goldwater	Talmadge
Cotton	Hansen	

NAYS—71

Aiken	Fulbright	Montoya
Allen	Gambrell	Moss
Anderson	Gravel	Muskie
Bayh	Griffin	Nelson
Beall	Gurney	Pastore

Bellmon	Harris	Pearson
Bentsen	Hart	Pell
Bible	Hatfield	Percy
Boggs	Hruska	Proxmire
Brock	Hughes	Randolph
Brooke	Inouye	Ribicoff
Burdick	Javits	Roth
Case	Jordan, N.C.	Saxbe
Church	Jordan, Idaho	Schweiker
Cook	Kennedy	Scott
Cranston	Magnuson	Smith
Curtis	Mansfield	Sparkman
Dole	Mathias	Spong
Eagleton	McGee	Stafford
Ellender	Metcalf	Stevens
Fong	Mondale	Stevenson
Symington	Tower	Williams
Taft	Tunney	Young
Thurmond	Weicker	

NOT VOTING—12

Allott	Hartke	McGovern
Baker	Humphrey	McIntyre
Dhles	Jackson	Mundt
Cooper	McClellan	Packwood

So Mr ERVIN's amendment (No. 1071) was rejected.

S 4551-

AMENDMENT NO. 472

Mr. ERVIN. Mr. President, the first of these amendments in amendment No. 472. I wish to modify that amendment so that it will conform to the amendment I now send to the desk, and I ask that it be stated as set forth in the amendment.

The PRESIDING OFFICER. The amendment will be stated.

The amendment, as modified, was read as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

"ARTICLE—

"SECTION 1. Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them.

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

Mr. ERVIN. Mr. President, I ask for the yeas and nays on the amendment.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, this amendment is very simple. It is a substitute for the equal rights amendment. It would invalidate every Federal and every State law which makes any distinction between the legal rights of men and women unless that distinction is based upon physiological or functional differences between them.

In other words, I think most of the laws which now make the distinction between men and women are based on physiological and functional differences. The criminal laws are based on physiological differences, and the laws relating to labor and the rights of wives, mothers, and widows are based on functional differences between men and women.

I ask the Senate to repent of the evil course of conduct it has been following since these repentant amendments have been called up by adopting this amendment. The amendment would abolish the laws on the important relations between men and women, but still leave Congress with power to make reasonable distinctions between them.

I yield back the remainder of my time.

Mr. BAYH. Mr. President, once again we discuss basic philosophical differences that exist between the Senator from Indiana and the Senator from North Carolina. Suffice it to say that if this amendment is adopted, we might as well lock up shop and go home. We would have destroyed all the efforts we have been making to try, at long last, to provide equal opportunity—not special privilege, but equal opportunity—for women.

Let us be brutally frank as we take a look at various State laws in the country. These law were not passed and they are not administered in a way which admittedly discriminates against women. No State legislature has courage enough to pass a bill and say the reason for passage is that it is trying to deny equal pay for equal work, or limit the admissions of women to State university to keep women out of work by requiring her to get a court order before she can go into business. These are specific laws which now exist. No, the reason why a woman must go into court and get a court order is that we are trying to protect her because of her physiological and functional differences is what is said by those who pass such laws. That is the basis which permits the discrimination to exist.

I know the Senator from North Carolina does not have that motive in mind, but that is the impact which the statutes that exist in the States of the Union often have.

Mr. COOK. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. COOK. We have debated this substitute in committee on many occasions. If this substitute should prevail, we would have to send the amendment to the Senate-House conference where it will die. And then we would not have this volume of hearings of 800 pages and the other volumes of hearings, that go with this, to explain the meaning of the amendment. Is that not true?

Mr. BAYH. That is correct.

Mr. COOK. All the work of 49 years would be for naught. Agreeing to such proposals now would mean that we would have to introduce the original amendment again next year, and we would start on its 50th year. Is that correct?

Mr. BAYH. Yes.

Mr. COOK. As a matter of fact, if this is adopted, it would not be up to this body's interpretation of whether or not it applies to the laws as passed and for the purpose for which the substitute is submitted, but it would be for every State legislature, for every city council, for every legislative body, at any level, to make a determination of what they thought, within their wisdom, was the basis for which they could make a distinction. Is that not true?

Mr. BAYH. That is accurate. Permit me to cite two specific examples. A State legislature in State X could come to the conclusion that women generally, as a whole, as a group, are not able to defend themselves against attack at night. Thus, on that basis, the legislature could, under the wording of the present amendment, deny women the right of being employed at night because of the distinction that exists between them and men.

Mr. COOK. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. COOK. Let me give the Senator another example. If a State held that physiologically it was not wrong for a woman to work 40 hours, or even 60 hours, or more, and that it was not wrong for a woman to work overtime, then she would have that privilege in one State but might be denied that in another.

Mr. BAYH. Yes.

Mr. COOK. Because the concept of the distinction could be settled differently in 50 different jurisdictions, as far as the States are concerned, and all the distinctions that any legislative body anywhere in the country could make. Is that correct?

Mr. BAYH. That is correct.

I yield back my time.

Mr. ERVIN. Mr. President. I yield back my time.

The PRESIDING OFFICER. All time on the amendment has been yielded back. The yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Indiana (Mr. HARTKE), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. FULBRIGHT), and the Senator from Florida (Mr. CHILES) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Alaska (Mr. STEVENS) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 12, nays 78, as follows:

[No. 120 Leg.]

YEAS—12

Bennett	Ervin	Hollings
Buckley	Fannin	Long
Byrd, Va.	Goldwater	Stafford
Eastland	Hansen	Stennis

NAYS—78

Aiken	Burdick	Ellender
Allen	Byrd, W. Va.	Fong
Allott	Cannon	Gambrell
Anderson	Case	Gravel
Baker	Church	Griffin
Bayh	Cook	Gurney
Beall	Cooper	Harris
Bellmon	Cotton	Hart
Bentsen	Cranston	Hatfield
Bible	Curtis	Hruska
Boggs	Dole	Hughes
Brock	Dominick	Humphrey
Brooke	Eagleton	Inouye
Javits	Muskie	Smith
Jordan, N.C.	Nelson	Sparkman
Jordan, Idaho	Pastore	Spong
Kennedy	Pearson	Stevenson
Magnuson	Pell	Symington
Mansfield	Percy	Taft
Mathias	Proxmire	Talmadge
McGee	Randolph	Thurmond
Metcalf	Ribicoff	Tower
Miller	Roth	Tunney
Mondale	Saxbe	Weicker
Montoya	Schweiker	Williams
Moss	Scott	Young

NOT VOTING—10

Chiles	McClellan	Packwood
Fulbright	McGovern	Stevens
Hartke	McIntyre	
Jackson	Mundt	

So Mr. ERVIN's amendment (No. 472) as modified, was rejected.

AMENDMENT NO. 1044

Mr. ERVIN. Mr. President, I call up my amendment 1044.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk proceeded to read the amendment.

Mr. ERVIN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the RECORD.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That the two articles set forth in sections 2 and 3 of this resolution are proposed in the alternative as amendments to the Constitution of the United States, one of which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within a period of seven years after the date of their admission by the Congress to the States. Upon the ratification of one such proposed amendment within that period, the other such proposed amendment shall have no further force or effect.

SEC. 2. The first article of amendment so proposed is the following:

"ARTICLE—

"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.

"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.".

SEC. 3. The second article of amendment so proposed is the following:

"ARTICLE—

"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. The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.

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

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

Mr. ERVIN. Mr. President, this amendment is very simple. It is based on the realization that the people of the States have an interest in constitutional amendments just as much as Congress has.

This amendment provides that two proposed amendments to the Constitution shall be submitted to the States in the alternative, that one of these amendments shall be the equal rights amendment as set forth in House Joint Resolution 208, and that the second of these amendments shall embody provisions of the various separate amendments which I have heretofore submitted and upon which votes have heretofore been cast. In other words, it submits these amendments to the States, in the alternative, to allow them to take their choice between the two amendments—the equal rights amendment, as set out in House Joint Resolution 208, and an amendment embodying the separate amendments I have heretofore proposed, reading as follows:

The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.

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

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

In other words, it just submits two amendments in the alternative to the States and allows the States to take their choice between the two amendments and to ratify the one of which they may approve.

I do not recall whether I have asked for the yeas and nays, but I do so now.

The yeas and nays were ordered.

Mr. BAYH. Mr. President, the Senator from North Carolina is one of the most, if not the most, tenacious, and dedicated adversaries one can possibly have in debating a measure on the floor of the Senate.

The proposal he asks us to accept now would permit the various State legislatures to go on a fishing expedition to determine whether they thought the equal rights amendment as embodied in the pending order of business was their preference or the so-called equal rights amendment as embodied in the amendment of the Senator from North Carolina was their preference.

In my judgment, in the constitutional amendment process, Congress has to stand up and be counted. In this day and age particularly, let us not waffle. We are either for this amendment, the equal rights amendment, which has been the product of study and deliberation for 50 years, or we are against it. If we do not think it is good, let us not send it out to the State legislatures and shift the buck onto them. Let us make that determination for ourselves.

I should add that we have had five rollcall votes today and two or three yesterday, and each of the individual parts that is now embodied in the whole by the amendment of the Senator from North Carolina already has been decided; and the Senate, by a 70-some vote to a handful, has voted "no" on each of the parts. I respectfully suggest that the whole is no more acceptable.

Mr. COOK. Mr. President, will the Senator yield for a question?

Mr. BAYH. I yield.

Mr. COOK. Would this not, in effect, say that the States could not exercise responsibility toward acquiring a constitutional amendment in this field, because particular States could decide to accept first article and reject the second one and the next State could accept second article and reject the first one? In fact, we would have to have a tabulator, when we got all through, to find out where we stood, to be sure of coming to a conclusion, because part of it could be accepted and part rejected. Or would we have to see all 50 legislatures get together and see which one they were going to accept and which one to reject?

Mr. ERVIN. Only 38.

Mr. COOK. It would be difficult to get even 38 out of such a conglomeration as we have in front of us today.

Is that not correct?

Mr. BAYH. The Senator from Indiana said earlier that the best way to defeat the equal rights amendment was to divide our shots and then let each State legislator go back to his constituency and say, "I voted for the equal rights amendment when it was in my legislature." But you would never get three-quarters in agreement on anything. Just as Members of this body would like to add a word or a sentence, we are never going to get two-thirds in agreement until we recognize that this is as good a measure as we can have.

Let us vote this matter down so that we can, in short order, send to the State legislatures the one measure on which there is great support in the Senate and in the House and throughout the country.

Mr. MAGNUSON. Before we come to final passage, this may be a good time to put a query to the Senator from Indiana or any other Senator who can answer it.

Some concern has been expressed in my State and the other States that have had community property laws for a long time. I recall that last year or the year before, we had a long colloquy on the floor, the Senator from Indiana and I, as to how the amendment might affect the community property law system which is in effect in some States of the Union. It is a law which, I am sure, both men and women in my State would not like to see jeopardized or in any way to be modified or watered down. The community property laws offer great protection for women in many cases, particularly in cases of divorce suits and estates. I do not think there would be any sentiment for this amendment in my State legislature if it touched the traditional community property laws which are based on the old Spanish laws which have been in existence in my State ever since it was a territory. So I wonder whether the Senator from Indiana could briefly comment on that.

Mr. BAYH. That is a good point raised by the Senator from Washington. The equal rights amendment will in no way affect the disposition of community property under a community property law settlement. The State of Washington and particularly the State of Texas would not be affected at all because both the State of Washington and more recently the State of Texas have changed the provisions which existed in a handful of States which would permit, after an equal division, the husband to maintain sole managerial capacity in those few——

Mr. MAGNUSON. That used to be the law in the State of Washington.

Mr. BAYH. Yes; but it is not now.

Mr. MAGNUSON. It is not now.

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Mr. BAYH. Texas recently revised its statute; so that the equal rights amendment will not affect the community property law one iota as written in the State of Washington.

Mr. MAGNUSON. My last question—and I shall be brief—is, when we come to the question of estates, basically the community property law is a matter of a 50-percent automatic division in a community estate which is set aside if the wife is the survivor. That is not necessarily true the other way. She can

her separate property, but
been some decisions that have
in our State that if the husban
sole survivor, he may not be able
her 50 percent. How would thi
estates? Leave the law as it is?

Mr. BAYH. The equal rights
ment would leave the statute as
But the courts could not give
widow rights in the estate of her
which it would not give a widow
estate of his wife.

Mr. MAGNUSON. As to the
Mr. BAYH. Yes—equal disp
Mr. MAGNUSON. That has t
crystal clear when it gets out
community property States.

Mr. BAYH. I appreciate th
from Washington bringing th
our attention.

Mr. ERVIN. Mr. President
make one or two observatio
point. The community prope
allow the husband to be th
of the property and to contro
erty, so that the equal righ
ment would invalidate the
property law in every State
husband is allowed to mana
the property. There is no qu
that. It depends on what
particular State is on that
community property laws
validated by the equal
ment because it wou
against women by giving
agement and control of co
erty.

The PRESIDING OF
ROTH). All time on this am
now been yielded back.

The question is on agr
(No. 1044) of
ator from Nor

tion the yeas and
d, and the clerk will cal

clerk called the roll.

West Virginia. I an-
the Senator from Florida
(Mr. CHILES), the Senator from Michigan (Mr. HART), the Senator from Indiana (Mr. HARTKE), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Washington (Mr. JACKSON), the Senator from Michigan (Mr. HART), and the Senator from Florida (Mr. CHILES) would each vote "nay."

Mr. GRIFFIN. I announce that the
tor from Oregon (Mr. PACKWOOD) is
sarily absent.

e Senator from South Dakota (Mr.
T) is absent because of illness.

resent and voting, the Senator from
n (Mr. PACKWOOD) would vote
."

he result was announced—yeas 9,
82, as follows:

[No. 121 Leg.]

YEAS—9

Bennett	Ervin	Hollings
Byrd, Va.	Fannin	Long
Eastland	Hansen	Stennis

NAYS—82

Aiken	Fong	Pastore
Allen	Fulbright	Pearson
Allott	Gambrell	Pell
Anderson	Goldwater	Percy
Baker	Gravel	Proxmire
Bayh	Griffin	Randolph
Beall	Gurney	Ribicoff
Bellmon	Harris	Roth
Bentsen	Hatfield	Saxbe
Bible	Hruska	Schweiker
Boggs	Hughes	Scott
Brock	Humphrey	Smith
Brooke	Inouye	Sparkman
Buckley	Javits	Spong
Burdick	Jordan, N.C.	Stafford
Byrd, W. Va.	Jordan, Idaho	Stevens
Cannon	Kennedy	Stevenson
Case	Magnuson	Symington
Church	Mansfield	Taft
Cook	Mathias	Talmadge
Cooper	McGee	Thurmond
Cotton	Metcalf	Tower
Cranston	Miller	Tunney
Curtis	Mondale	Weicker
Dole	Montoya	Williams
Dominick	Moss	Young
Eagleton	Muskie	
Ellender	Nelson	

NOT VOTING—9

Chiles	Jackson	McIntyre
Hart	McClellan	Mundt
Hartke	McGovern	Packwood

So Mr. ERVIN's amendment (No. 1044) was rejected.

Mr. BAYH. Mr. President, I ask unanimous consent that excerpts from the majority report of the Senate Judiciary Committee, explaining in significant detail some of the issues which have been discussed here today be printed in the RECORD, so that the State legislatures of the 50 States may have the benefit of that information.

There being no objection, the excerpts were ordered to be printed in the RECORD, as follows:

[Excerpts from the majority report of the Committee on the Judiciary on the Equal Rights Amendment—submitted by Mr. BAYH]

STATEMENT

The proposed Equal Rights Amendment reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"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.

"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."

The history of the proposal, the need for an Equal Rights Amendment, and the effect of the Amendment are discussed in detail in later sections of this 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 of women. The Amendment thus recognizes the fundamental dignity and individuality of each human being. The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected. And the Amendment only requires equal treatment of individuals; it does not require any State or the federal government to establish quotas of men or women in, for example, admission to State supported schools.

Both major political parties have repeatedly supported this proposal in their national party platforms. It has received the endorsement of Presidents Eisenhower, Kennedy, Johnson and Nixon. Both the Citizens' Advisory Council on the Status of Women, created by President Kennedy, and the President's Task Force on Women's Rights and Responsibilities, created by President Nixon, have recommended in strongest terms approval of the Amendment. At least eleven states (California, Connecticut, Delaware, Florida, Louisiana, Maryland, Minnesota, Nebraska, New York, North Dakota, Pennsylvania) have taken official action in support of the Amendment. The House of Representatives on October 12, 1971 approved the Amendment 354 to 23. And S.J. Res. 8, which is identical to H.J. Res. 208, is cosponsored by over half the Senate.

Moreover, an impressive list of organizations have recorded their support of the Equal Rights Amendment. Among them are the following:

American Association of College Deans.
American Association of University Women.
American Association of Women Deans and Counselors.
American Association of Women Ministers.
American Civil Liberties Union.
American Federation of Soroptimist Clubs.
American Home Economics Association.
American Jewish Congress.
American Medical Women's Association.
American Newspaper Guild.
American Nurses Association.
American Society of Microbiology.
American Society of Women Accountants.
American Society of Women Certified Public Accountants.
American Women in Radio and Television.
Association of American Women Dentists.
B'nai B'rith Women.
Church Women United.
Common Cause.
Council for Christian Social Action, United Church of Christ.
Council for Women's Rights.
Ecumenical Task Force on Women and Religion (Catholic Caucus).
Federally Employed Women.
General Federation of Women's Clubs.
Intercollegiate Association of Women Students.
International Association of Human Rights Agencies.
International Brotherhood of Painters and Allied Trades.
International Brotherhood of Teamsters.
International Union of United Automobile, Aerospace & Agricultural Implement Workers UAW.
Interstate Association of Commissions on the Status of Women.
Ladies Auxiliary of Veterans of Foreign Wars.
League of American Working Women.
National Association of Colored Women.
National Association of Negro Business and Professional Women's Clubs.
National Association of Railway Business Women.
National Association of Women Lawyers.
National Coalition of American Nuns.
National Education Association.
National Federation of Business and Professional Women's Clubs.
National Organization for Women.
National Welfare Rights Organization.
National Woman's Party.
National Women's Political Caucus.
Professional Women's Conference.
St. Joan's Alliance of Catholic Women.
Unitarian Universalist Women's Federation.
United Automobile Workers.
United Methodist Church—Women's Division.
Women's Equity Action League.
Women's International League for Peace and Freedom.
Women's Joint Legislative Committee for Equal Rights.
Women United.

Finally, a number of distinguished constitutional scholars have testified in support of the Equal Rights Amendment, including Professor Norman Dorsen of New York University, Professor Thomas I. Emerson, Lines Professor of Law at Yale Law School, and Leo Kanowitz, Professor of Law at the University of New Mexico. Moreover, the Association of the Bar of the City of New York, through its Committee on Civil Rights and Special Committee on Sex and Law has urged "adoption of the [Equal Rights] Amendment as the best means of establishing equality before the law." And the American Bar Association recently adopted a resolution which "supports constitutional equality for women, and 'urges extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

In sum, the Committee was impressed with the broad base of political, public and scholarly opinion in favor of the Equal Rights Amendment, and recommends that it be approved.

I. LEGISLATIVE HISTORY

Proposed constitutional amendment providing for equal rights for men and women have been introduced in nearly every Congress since 1923, shortly after the ratification of the 19th Amendment extended the right to vote to women. Resolutions were reported favorably by the Subcommittee on Constitutional Amendments in the 88th, 89th and 90th Congresses, as well as a number of earlier Congresses. Resolutions were reported favorably by the Committee on the Judiciary in the 80th, 81st, 82nd, 83rd, 84th, 86th, 87th and 88th Congresses.

In the 81st Congress, and again in the 83rd Congress, resolutions passed the Senate with a floor amendment. This floor amendment provided that the Amendment "shall not be construed to impair any rights, benefits or exemptions now or hereafter conferred by law upon members of the female sex." In both instances, the House of Representatives failed to act. The same floor amendment was added to an equal rights resolution during Senate consideration in the 86th Congress. The proponents of the amendment objected to this addition because it diluted the equality of rights and responsibilities among men and women, which is the Amendment's goal. Accordingly, the resolution's principle sponsors moved to recommit it to the Judiciary Committee, and that motion was passed.

On May 5, 6, and 7, 1970, the Subcommittee on Constitutional Amendments held hearings on the Equal Rights Amendment. It received testimony from 42 witnesses, received 75 additional insertions of material, and compiled a hearing record of almost 800 pages. *The Equal Rights Amendment*, Hearings Before the Senate Subcommittee on Constitutional Amendments, 91st Cong., 2d Sess. (1970). The Subcommittee met and reported the Amendment to the full Committee on August 10, 1970. Soon thereafter the full Committee held a further series of hearings on the Amendment, on September 9, 10, 11, and 15, 1970. It listened to 25 witnesses and compiled a 430 page record of hearings. *Equal Rights 1970*, Hearings Before the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

In the meantime, the House of Representatives voted to discharge its Judiciary Committee from further consideration of the Equal Rights Amendment and, on August 10, 1970, by a vote of 350 to 15, approved the Amendment (H.J. Res. 264).

The House-passed joint resolution was not referred to the Senate Judiciary Committee but was placed directly on the Calendar pursuant to the request of the Senate leadership. H.J. Res. 264 became the pending Senate business on October 6, 1970. After several days of debate, on October 13, 1970, the Senate adopted by a vote of 38 yeas to 33 nays Amendment No. 1049, which added a second sentence to the first section of the joint resolution, as follows: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service." Amendment 1049 also imposed a seven-year time limit on the ratification process and made the joint resolution effective two years—instead of one year—after ratification. Thereafter, the Senate also adopted, 50 yeas to 20 nays, Amendment No. 1048, which added to the pending joint resolution a second section proposing an additional constitutional amendment relating

to prayers in public buildings. After further debate the Senate laid aside the joint resolution, as amended, on November 19, 1970, and proceeded to the consideration of other business. No further action was taken in the 91st Congress.

In the 92d Congress, Subcommittee No. 4 of the House Judiciary Committee held hearings on H.J. Res. 208—which is identical to S.J. Res. 8 and 9 in the 92d Congress—on March 24, 25, and 31, and April 1, 2, and 5, 1971, hearing testimony from 35 witnesses. *Equal Rights for Men and Women*, Hearings Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. (1971). On April 29, 1971 the Subcommittee by a voice vote ordered the measure reported to the House Judiciary Committee. The full Committee amended the joint resolution on June 22, 1971 by a vote of 19 to 16 by adding a section which provided that the Amendment would "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." It then, by vote of 38 to 2, ordered the joint resolution reported favorably. The Committee Report, H.R. Rep. 92-359, was filed on July 14, 1971. Separate views were filed by 14 Representatives; Minority views were filed by 3.

On October 12, 1971 the House rejected by vote of 104 to 254 the Committee amendment to H. J. Res. 208. After further debate, it approved the resolution in its original form by vote of 354 to 23. (117 Cong. Rec. H. 9392 (Daily ed. Oct. 12, 1971)).

In the Senate, the Subcommittee on Constitutional Amendments met on November 22, 1971, and adopted by vote of 6 to 4 a motion to substitute the following language for sections 1 and 2 of S.J. Res. 8, and S.J. Res. 9, and H.J. Res. 208:

"SECTION 1. Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them.

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

The subcommittee then voted unanimously to report all three joint resolutions, as amended, to the full Judiciary Committee.

By vote of 15 to 1 on February 29, 1972, the Senate Judiciary Committee ordered S.J. Res. 8, S.J. Res. 9 and H.J. Res. 208 reported favorably to the floor unamended. Prior to ordering the Equal Rights Amendment reported favorably and unamended, the Committee took the following actions:

(1) Rejected by roll call vote of 1 to 15 a motion to substitute for sections 1 and 2 of the Equal Rights Amendment the language (printed above) recommended by the Subcommittee on Constitutional Amendments (see Part IV, *infra*);

(2) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes, rape, seduction, or other sexual offenses," (see Part IV, *infra*);

(3) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "Nothing contained in this article shall be construed to deprive the United States and the several States of the legislative power to extend to female persons any right or protection sanctioned by the fifth or fourteenth articles of amendment";

(4) Rejected by roll call vote of 2 to 14 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service or service in combat units of the Armed Forces", (see Part III (B), *infra*);

(5) Rejected by roll call vote of 3 to 13 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service," (see Part III(B), *infra*);

(6) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "No Federal law shall prohibit an institution of higher education from enrolling only male or female students or students of both sexes. If any such institution of higher education enrolls both male and female students, such institution shall not be allowed to accept only a certain percentage of individuals of either sex," (see Part III(E), *infra*).

II. THE NEED FOR THE EQUAL RIGHTS AMENDMENT

A. Discrimination against women

While there has been some progress toward the goal of equal rights and responsibilities for men and women in recent years, there is overwhelming evidence that persistent patterns of sex discrimination permeate our social, cultural and economic life. The magnitude of sex discrimination in the country today can be gauged by the simple and eloquent statement of Congresswoman Shirley Chisholm when she testified before the Subcommittee on Constitutional Amendments in May 1970: "I have been far oftener discriminated against because I am a woman than because I am black."

Some legislative progress has been made toward equal rights, but not enough to wipe out all discrimination against women in State and Federal law. Congress approved Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment unless sex is a "bona fide occupational qualification." And Congress approved the Equal Pay Act which assures that many persons who do equal work receive equal pay regardless of sex. But these laws fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly.

The Supreme Court has been slow to move too: recently, for the first time, it did invalidate a state law which discriminated against women, but it did so in a way which left the burden of proof on each woman plaintiff to show that the law is unreasonable. The Court has consistently refused to apply the Fourteenth Amendment to discrimination based on sex with the same vigor it applies the Amendment to distinctions based on race.

In the States, progress has been mixed. Some States have made diligent efforts to revise outmoded and discriminatory laws, and three States—Illinois, Pennsylvania and Virginia—have recently approved State constitutional provisions banning sex discrimination. But in other States, there has been no progress at all.

On the whole, sex discrimination is still much more the rule than the exception. Much of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty.

Specific examples of sex discrimination are legion, and have been brought to the attention of Congress many times, through hearings on the Equal Rights Amendment and on other legislation (for example, *Discrimination Against Women*, Hearings Before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)). In assessing the need for the Equal Rights Amendment, it is useful to review a few of the best known and most far reaching cases of invidious sex discrimination.

1. Criminal Liability and Civil Responsibility

Difficult as it is to believe, the record shows that women are sometimes denied even the basic rights and responsibilities of citizenship in the United States today. Until 1966, for example, three States excluded women from juries altogether. And today there is still at least one State which requires women, but not men, to register specially to be eligible to serve on juries.

There is also invidious discrimination against women in the criminal laws of some States. One State has a statute allowing women to be jailed for three years for habitual drunkenness, while a man can receive only 30 days for the same offense. In two States, the defense of "passion killing" is allowed to the wronged husband, but not to the deceived wife. And in another State, female juvenile offenders can be declared "persons in need of supervision" for noncriminal acts until they are 18, while males are covered by the statute only until age 16.

2. Education

Governmental action also contributes significantly to sex discrimination in education. Approximately 75 percent of the college students in the country attend publicly supported institutions. These colleges and universities have a crucial role in determining employment opportunities for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country. As an independent report prepared for the Department of Health, Education and Welfare this year stated: "Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."

Discrimination in admission to college is widespread. In 1968, only 18 per cent of the men entering public four-year colleges had a high school grade average of B+ or better. But 41 per cent of the freshman women had attained such grades. In 1969 one State university published an admissions brochure which stated that "admission of women on the freshman level will be restricted to those who are especially well qualified." Another State university admitted women only for summer school sessions, and never to the regular academic curriculum, unless they are related to employees or students and wish to pursue a course of study otherwise unavailable. In 1970, the percentage of the female population enrolled in college was markedly lower than the percentage of the male population. Over 40 percent of the males between the ages of 18 and 21, and over 20 percent of the males between 23 and 24 were enrolled in college. But the comparable figures for females were 29 percent and 9 percent respectively.

Discrimination in admission to graduate schools is, if anything, even more widespread, despite the fact that women's undergraduate grade point averages are higher than men's. Testimony before the House Special Subcommittee on Education in 1970 revealed, for example, that the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929–30 and 1965–66 (while male applications increased by only 29 percent). The percentage of women applicants who were accepted actually declined during the same period. And while women received 55 percent of the Bachelors degrees awarded in all fields in 1968–69, women received only 37 percent of the Masters degrees, only 13 percent of the Doctorates, and only 4 percent of the professional degrees.

Discrimination against women does not end with admission; it pervades every level of the teaching profession. While 75 percent of the teachers in public elementary and secondary schools are women, only 22 percent of the elementary school principals and only 4 percent of the high school principals are women. At the college level, statistics show that while almost half of the male teachers become full professors only 10 percent of the female teachers are granted that status. And according to a recent survey of 36 prominent law schools, to take a final example, only 2.1 percent of the faculty members are women, and a quarter of those are classified as Librarians.

3. Business and labor

The business and labor laws of some States discriminate invidiously against women. Some States place special restrictions on the right of married women, but not married men, to contract or to establish independent businesses or to become a guarantor or a surety. Perhaps even more astounding, the Committee discovered at the hearings in 1970 that twenty-six States then had laws or regulations which prohibited the employment of adult women in specified occupations or industries which were open to adult men.

Most States have enacted so-called "protective" labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a women can lift or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. Speaking of such restrictive laws as a whole, the Equal Employment Opportunities Commission states in its guidelines on sex discrimination:

"The Commission believes that [state laws which restrict or limit the employment or conditions of employment of females] although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect."

Partially because of these laws, and also because of other sorts of sex discrimination, working women are at a great disadvantage in the private sector. The median salary income for women is only 59.5 percent of that earned by men—and in recent years the gap between male and female median incomes has been widening. In 1969, less than 5 percent of all fulltime female workers earned over $10,000 per year, compared with 35 percent of all male workers. At the other end of the scale, 14.4 percent of women, but only 5.7 percent of men, earned less than $3,000. Indeed, sex discrimination is so pervasive that women with four years of college education made only slightly more than men with an eighth grade education. And while women account for more than 40 percent of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs.

Sex discrimination is clearly present even in government employment, which in total accounts for more than 20 percent of the labor force. For example, although women constituted 34 percent of all full-time white collar Federal Civil Service Employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four highest grades. And sex discrimination in government has an effect even greater than the numbers involved, for private employers often look to government as a model for employment practices.

B. Inadequacy of legislative or judicial relief

It is sometimes argued that all of the discriminatory laws and practices which exist could be eliminated without a constitutional amendment. If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding state interest", then part of the reason for the Amendment would disappear. But the Court has persistently refused so to hold. Indeed, the Court has upheld many laws which plainly discriminate against women.

Its first significant case involving sex discrimination was *Bradwell* v. *Illinois*, 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. The Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, to uphold the law. Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in *Minor* v. *Happersett*, 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

Later, the Court began to apply a standard of "reasonableness" to laws which discriminated on the basis of sex. This test was employed to uphold against constitutional attack labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart* v. *Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied.

More recently, in *Hoyt* v. *Florida*, 386 U.S. 57 (1967), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment, since it was reasonable for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."

Last year the Supreme Court for the first time struck down a law which discriminated against women. In *Reed* v. *Reed*, ———— U.S. ————, 40 U.S.L.W. 4013, (1971, the Court invalidated a State law which arbitrarily favored men over women as administrators of estates. But the Court did not overrule such cases as *Goesart* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the Fourteenth Amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable." And that is a difficult burden to carry, indeed. As the Association of the Bar of the City of New York pointed out in its recent report "[t]he 1971 *Reed* case indicated no substantial change in judicial attitude." Passage of the Equal Rights Amendment will make it clear that the burden is *not* on each woman plaintiff to show sex discrimination is "unreasonable"; the Amendment will, instead, assure all men and women the right to be free from discrimination based on sex.

Of course, it would theoretically be possible for Congress and each State to revise their laws and eliminate those which discriminate against women. But without the impetus of the Equal Rights Amendment, that process would be far too haphazard and much too slow to be acceptable. We cannot afford to wait any longer for Congress and each of the 50 State legislatures to find the time to debate and revise their laws. As in other areas where the Constitution has been amended, there is an imperative for immediate action. The Nation has waited too long already—it has been 49 years since the Equal Rights Amendment was first introduced. Only a constitutional amendment can provide the legal and practical basis for the necessary changes.

Finally, we cannot overlook the immense symbolic importance of the Equal Rights Amendment. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land.

The Committee concludes that because of the pervasive legal sex discrimination which now exists, and because of the inadequacy of legislative and judicial remedies, there is a clear and undeniable need for the Equal Rights Amendment.

III. THE EFFECT OF THE EQUAL RIGHTS AMENDMENT

A. General principles

The general principles on which the Equal Rights Amendment rests are simple and well-understood. Essentially, the Amendment requires that the federal government and all state and local governments treat each person, male and female, as an individual.

It does not require that any level of government establish quotas for men or for women in any of its activities; rather, it simply prohibits discrimination on the basis of a person's sex. The Amendment applies only to governmental action; it does not affect private action or the purely social relationships between men and women.

The Separate Views of Congressman Edwards and 13 other members of the House Judiciary Committee in the House Report on the equal rights amendment, H.R. Rep. 92–359, state concisely and accurately the understanding of the proponents of the Amendment:

"The basic premise of House Joint Resolution 208 in its original form is a simple one. As stated by Professor Thomas Emerson of Yale University, one of the Nation's foremost authorities on constitutional law, the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.

"The existence of a characteristic found more often in one sex than the other does not justify legal treatment of all members of that sex different from all members of the other sex. The same is true of the functions performed by individuals. The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex.

"The main reason underlying the basic concept of the original text derives from both theoretical and practical considerations. The equal rights amendment (H.J. Res. 208) embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society with the individual, and with the right of each individual to develop his own potentiality.

"The legal principle underlying the equal rights amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

"Just as the principle of equality does not mean that the sexes must be regarded as identical, so too it does not prohibit the States from requiring a reasonable separation of persons of different sexes under some circumstances. In this regard, two collateral legal principles are especially significant. One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.

"Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1966). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

"With respect to other constitutional considerations, it should be noted that (H.J. Res. 208) would apply only to governmental action, and not to private or individual action. In this regard, as well as in some of its other features, (H.J. Res. 208)' is similar to those provisions of the 14th Amendment which are directed against racial, ethnic, and religious discrimination. Thus, in interpreting (H.J. Res. 208) the courts would have available a substantial body of case law which could be used as a guide when relevant. At the same time much as the struggle of women for equality is comparable to that of racial, ethnic, and religious minorities, there are some differences which the courts could also take into account in appropriate cases."

Because substantial controversy has arisen over the impact of the Equal Rights Amendment in a few specific areas, it is appropriate to suggest the likely application of these general principles in such areas.

B. Military service

It seems clear that the Equal Rights Amendment will require that women be allowed to volunteer for military service on the same basis as men; that is, women who are physically and otherwise qualified under neutral standards could not be prohibited from joining the service solely on the basis of their sex. This result is highly desirable for today women are often arbitrarily barred from military service and from the benefits which flow from it: for example, educational benefits of the G.I. bill; medical care in the service and through Veterans Hospitals; job preferences in government and out; and the training, maturity and leadership provided by service in the military itself.

It seems likely as well that the ERA will require Congress to treat men and women equally with respect to the draft. This means that, if there is a draft at all, 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. Once in the service, women, like men, would be assigned to various duties by their commanders, depending on their qualifications and the service's needs.

Of course, the ERA will not require that all women serve in the military any more than all men are now required to serve. Those women who are physically or mentally unqualified, or who are conscientious objectors, or who are exempt because of their responsibilities (e.g., certain public officials; or those with dependents) will not have to serve, just as men who are unqualified or exempt do not serve today. Thus the fear that mothers will be conscripted from their children into military service if the Equal Rights Amendment is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service. For example, Congress might well decide to exempt all parents of children under 18 from the draft.

Our understanding of the effect of the Equal Rights Amendment comports with that of the House. The members of the House Judiciary Committee, quoting from the Report of the Senate Judiciary Committee on the Equal Rights Amendment in 1964, said:

"It could be expected that women will be equally subject to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the government would not require that women serve where they are not fitted just as men [are not required to serve where not fitted]."

Or, as Congresswoman Martha Griffiths, the primary sponsor of H.J. Res. 208, said on the floor:

"The draft is equal. That is the thing that is equal. But once you are in the Army you are put where the Army tells you where you are going to go."

Congressman Edwards, who had chaired the House Subcommittee Hearings on the Equal Rights Amendment, put it this way:

"Women in the military could be assigned to serve wherever their skills or talents were applicable and needed, in the discretion of the command, as men are at present."

Furthermore, our understanding comports with that of the witnesses at the hearings and other interested parties. See, for example, the testimony of Professor Norman Dorsen of New York University Law School in *Equal Rights for Men and Women 1971*, Hearing Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. 162–164 (1971); Report of the President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (April, 1970) (the Equal Rights Amendment "would impose on women an obligation for military service"); National Association of Women Lawyers, Letter to Hon. Emanuel Celler (April 27, 1971) (females "would be . . . subject to the draft on the same basis as young men" and "women in the military would receive the same benefits and veterans' preferences, employment, education skills learned in the service").

One question often raised is whether men and women can serve together efficiently in the Armed Services. Perhaps the best answer is that they are doing so now without apparent difficulty. The experience of other countries supports this conclusion. In Israel, women are required to serve in the Defense Forces just as men. They are not, however, assigned to combat posts, nor are they required to engage in physical combat. Rather, they perform critical noncombatant tasks in the clerical, communication, electronics and nursing fields. Separate and independent facilities are maintained for women soldiers. Under these circumstances, no significant difficulties have arisen from having men and women serve together.

C. Labor legislation

A number of States have laws which restrict or limit the occupations or conditions of employment of females, but not of males. These laws are often called "protective", but in practice many of them discriminate against women by making it difficult and sometimes impossible for a fully qualified woman to obtain certain jobs, often highly desirable ones. Because of Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment in certain instances where sex is not a "bona fide occupational qualification", these laws are not nearly as great a barrier to fair employment for women as they once were. Nevertheless, some States retain their laws.

Most of the so-called "protective" laws were passed to protect women from exploitation in another era, and they represented hard won progress. But today, some are merely restrictive, and because they apply only to women confer no real benefit. For example, some States have laws which absolutely prohibit women, whether qualified or not, from certain jobs—jobs which are open to men. Other States have weight lifting laws applicable only to women which effectively deny fully qualified women certain jobs. Still others have laws limiting the hours women may work—and these sometimes prevent women from gaining promotions to supervisory positions. As the Equal Employment Opportunity Commission has found, such laws "do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect."

Ratification of the Equal Rights Amendment will result in equal treatment for men

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and women with respect to the labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit, which offer real protection, will, it is expected, be extended to protect both men and women. Examples of laws which may be expanded include laws providing for rest periods or minimum wage benefits or health and safety protections. Men are now sometimes denied the very real benefits these laws offer. As Professor Leo Kanowitz pointed out to your Committee at its Hearings in September 1970: "The fears of some opponents of the [Equal Rights] Amendment that its adoption would nullify laws that presently protect women only are thus unfounded—since the equality of treatment required by the [A]mendment can be achieved by extending the benefits of those laws to men rather than by removing them for women." The Association of the Bar of the City of New York pointed out in discussing laws requiring rest periods for women only, that they "may be extended to both sexes without burden or disruption."

D. Expansion versus nullification of unconstitutional statutes

The question of whether laws found unconstitutional under the Equal Rights Amendment will be struck down or extended to cover both men and women, is a question which extends beyond the area of labor legislation. Of course, the legislatures of the several States will have the primary responsibility for revising those laws which conflict with the Equal Rights Amendment. Indeed, the purpose of delaying the effective date of the Equal Rights Amendment for two years after ratification is to allow legislatures—particularly those which meet only in alternate years—and agencies an opportunity to review and revise their laws and regulations. As stated above, the Committee expects that any labor law, or other legislation, which is truly protective will be extended to include both sexes, while laws which are restrictive will become null and void.

In those situations where a court finds a State or federal law in conflict with the Equal Rights Amendment, the legal infirmity will be cured either by expanding the law to include both sexes or nullifying it entirely. As discussed above, it is expected that those laws which are discriminatory and restrictive will be stricken entirely as the court did in *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D. Ill. March 31, 1970) which involved a law banning women from a certain occupation. On the other hand, it is expected that those laws which provide a meaningful protection would be expanded to include both men and women, as for example minimum wage laws, see *Potlatch Forests, Inc* v. *Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), or laws requiring rest periods. *cf.* Equal Employment Opportunities Commission Case No. 6-8-6654 (June 23, 1969), 1 CCH Employ. Prac. Guide 6021.

There can be no question that the courts, upon holding a statute unconstitutional, can expand the scope of the statute if necessary to cure its legal infirmity. As Mr. Justice Harlan said, concurring in *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (footnote omitted):

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *See Skinner* v. *Oklahoma ex rel. Williams*, 316 U.S. 535, 543 (1942); *Iowa Des-Moines Nat'l. Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Developments In the Law-Equal Protection* 82 Harv. L. Rev. 1065, 1136-37 (1969).

The Supreme Court has applied this principle in many cases. In 1880, for example, the Court extended a State statute limiting jury service to "electors" to include blacks enfranchised by the 14th and 15th Amendments rather than striking the law down. *Neal* v. *Delaware*, 103 U.S. 370 (1880). In *Sweat* v. *Painter*, 339 U.S. 637 (1950), and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) the Court held that State laws restricting access to State institutions of higher education on the basis of race were unconstitutional; it expanded the laws so that black students had equal access. And in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), the Court extended to illegitimate children the right, restricted by a State statute to legitimate children, to recover wrongful death benefits. See generally Dorsen, *The Necessity of a Constitutional Amendment* in Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rts.—Civ. Lib. L. Rev. 216 (1971).

As previously stated, courts have had a great deal of experience in dealing with laws which discriminate on the basis of sex, for Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex unless sex is a "bona fide occupational qualification". Under that Federal statute a State overtime wage law was extended to include men, *Potlatch Forests, Inc.* v. *Hays*, 318 Supp. 1368 (E.D. Ark. 1970) as were weightlifting limitations, *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). On the other hand, State laws banning women from an occupation have been struck down, *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D., Ill. March 31, 1970), *on remand from* 418 F. 2nd 366 (7th Cir. 1969). See generally *Developments In the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1188-1190, 1194-1195 (1971).

E. Criminal law, education and family law

The general principles discussed above will govern the application of the Equal Rights Amendment to all fields of law. With respect to criminal law, for example, the Amendment will prohibit a State from providing for different punishments for men and women who commit the same crime, *cf. Commonwealth* v. *Daniel*, 430 Pa. 642, 243,.243A. 2d 400(1968). But the Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men.

With respect to education, the Equal Rights Amendment will require that State supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The Amendment would not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population; rather admission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. A similar result may be expected with respect to the distribution of scholarship funds. State schools and colleges currently limited to one sex would have to allow both sexes to attend. Employment and promotion in public schools would, as in the case of other governmental action, have to be free from sex discrimination.

It should also be noted with respect to education that the Amendment would not require that dormitories or bathrooms be shared by men and women. As explained above, the Amendment does not prohibit the separation of the sexes where the right of privacy is involved. As the Association of the Bar of the City of New York pointed out in its report, "[t]he constitutional right of privacy could be used to sanction separate male and female facilities for activities which involve disrobing, sleeping and personal bodily functions."

The Equal Rights Amendment may also have an effect on those State laws affecting domestic relations. In this area, as elsewhere, the Amendment will prohibit discrimination based on sex. This will mean that State domestic relations laws will have to be based on individual circumstances and needs, and not on sexual stereotypes. The report of the Association of the Bar of the City of New York accurately describes the Amendment's effect in this area:

"The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. 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.

"Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.

"Although courts still probably would be reluctant to interfere in the allocation of support between husband and wife in an ongoing marriage, upon the dissolution of marriage, both husbands and wives would be entitled to fairer treatment on the basis of individual circumstances rather than sex. Thus alimony laws could be drafted to take into consideration the spouse who had been out of the labor market for a period of years in order to make a non-compensated contribution to the family in the form of domestic tasks and/or child care."

As Professor Norman Dorsen pointed out to the Committee:

"The National Conference of Commissioners on Uniform State Laws recently adopted a Uniform Marriage and Divorce Act which takes an approach similar to that contemplated by the Equal Rights Amendment. It provides for alimony or maintenance for either spouse, and child support by either or both spouses, by defining all duties neutrally in terms of functions and needs of the people involved, rather than in terms of their sex. The action by the Commissioners, a respected and prudent body, deserves special consideration."

In sum, there is no reason to fear that the Equal Rights Amendment will have undesirable effects on the rights of men and women under State domestic relations laws.

Mr. ERVIN. Mr. President, I ask unanimous consent to have printed in the RECORD the minority views expressed by me in respect to the committee report.

There being no objection, the minority views were ordered to be printed in the RECORD, as follows:

MINORITY VIEWS OF MR. ERVIN

Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?—Dr. Jonathan H. Pincus, Professor of Neurology, Yale Medical School.

I. INTRODUCTION

To abolish unreasonable and unfair discriminations against women is a worthy goal. No one believes more strongly than I that discriminations which society makes against women in certain areas of life ought to be abolished and they ought to be abolished by law in every case where they are created by law.

To stop discriminations against women we are considering Constitutional amendments which would abolish all legal distinctions between men and women. Therefore, the question to be resolved by the Senate is that: Should all laws which treat men and women differently be abolished and should the Federal government and the State legislatures be forbidden by the Constitution to pass any such legislation in the future?

Before we abolish all legal differences in the treatment of men and women to reach the admittedly unfair discriminations which do exist against women, I believe that we should consider the following questions:

1. What is the character of the unfair discriminations which society makes against women?

2. Does it require an amendment to the Constitution of the United States to invalidate them?

3. If so, would the Equal Rights Amendment constitute an effective means to that end? In other words, would the ERA reach areas in which the Congress does not really want to act?

It is the better part of wisdom to recognize that discriminations not created by law cannot be abolished by law. They must be abolished by changed attitudes in the society which imposes them.

II. DO WOMEN REALLY WANT THE EQUAL RIGHTS AMENDMENT?

One of the recurring myths that surround the equal rights for women amendment is the allegation that all women are for the amendment. This is not so.

The only detailed poll that has been taken on women's feelings on the equal rights question was done by Elmo Roper in September 1971. It is interesting to compare the feelings of women on specific subjects with what the sponsofs of the equal rights amendment, including Congreaswoman Griffiths, indicate will be the effect of the amendment.

a. In Elmo Roper's poll, 77 percent of the American women disagree "that women should have equal treatment regarding the draft." Yet, there is no doubt that all those interpreting the amendment believe that it will cause women to be drafted and to serve in combat. A *Yale Law Journal* article which the amendment sponsors, including Congreaswoman Griffiths, have lauded as explaining how the amendment will work after passage says, "the amendment permits no exception for the military . . . Women will serve in all kinds of units, and they will be eligible for combat duty."

b. In Elmo Roper's poll, 88 percent of American women disagree that "a wife should be the breadwinner if better wage earner than husband." Yet, the supporters of the amendment in the *Yale Law Journal* say that "the equal rights amendmsht would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex . . . child support sections of the criminal nonsupport laws could not be sustained where only the male is liable for support."

c. In the Elmo Roper poll, 69 percent of American women disagree that "a divorced woman should pay alimony if she has money and her husband hasn't." Yet, the supporters of the amendment say in the *Yale Law Journal* that "the equal rights amendment would not require that alimony be abolished but only that it be available equally to husbands and wives."

In interpreting these figures, it is important to remember that these large percentages of American women do not want the very things the ERA proposes. The primary sponsors of the ERA, including Congresswoman Griffiths, maintain that: A wife should have the legal responsibility for family support if she is the better wage earner; the alimony laws should apply equally to men and women with the result that a divorced woman should pay if she has the money; the draft laws should apply equally to men and women with the result that women will serve in combat.

So what we have with the equal rights amendment is a proposition that will destroy all legal distinctions between men and women and the majority of men do not want this and the majority of woman do not want this.

III. UNFAIR EMPLOYMENT DISCRIMINATION

From the information given me by many advocates of the Equal Rights Amendment and from my study of the discriminations which society makes against women, I am convinced that most of the unfair discriminations against them arise out of the different treatment given men and women in the employment sphere. No one can gainsay the fact that women suffer many discriminations in this sphere, both in respect to the compensation they receive and the promotional opportunities available to them. Some of these discriminations arise out of law and others arise out of an absence of law.

When I sought to ascertain from them the specific laws of which they complain, the advocates of the Equal Rights Amendment have cited certain state statutes, such as those which impose weighlifting restrictions on women, or bar women from operating saloons, or acting as bartenders, or engaging in professional wrestling. Like them, I think these laws ought to be abolished. I respectfully submit, however, that resorting to an amendment to the Constitution to effect this purpose is about as wise as using an atomic bomb to exterminate a few mice.

Let me point out that Congress and the Executive Branch have done much in recent years to abolish discriminations of this character insofar as they can be abolished at the Federal level.

a. Under the Equal Pay Act of 1963 (29 USC 206) Congress made it obligatory for employers to pay men and women engaged in interstate commerce or in the production of goods for interstate commerce equal pay for equal work, irrespective of the number of persons they employ.

b. Under Title VII of the Civil Rights Act of 1964 (42 USC 2000) Congress decreed that there can be no discrimination whatever against women in employment in industries employing 15 or more persons, whose business affects interstate commerce, except in those instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the enterprise. Just recently, the Congress has vastly extended the powers of the Equal Employment Opportunity Commission to enforce women's employment rights by allowing the EEOC to seek enforcement orders from the Federal District Court.

c. The President and virtually all of the departments and agencies of the Federal government have issued orders prohibiting discrimination against women in Federal employment, and have provided for affirmative action in the hiring and promotion of women.

Moreover, State Legislatures have adopted many enlightened statutes in recent years prohibiting discrimination against women in employment.

If women are not enjoying the full benefit of this Federal and state legislation and these executive orders of the Federal government, it is due to a defect in enforcement rather than a want of fair laws and regulations. Since the ERA is not self-enforcing, this defect in enforcement will survive the passage of the amendment, and women will still have to bring suits to enforce their rights in the employment sphere with no more remedies than they presently enjoy.

IV. EQUAL RIGHTS AMENDMENT UNNECESSARY BECAUSE OF THE 14TH AMENDMENT

A good case can be made for the proposition that it is not necessary to resort to a Constitutional amendment to abolish state laws which make unfair discriminations between men and women in employment or any other sphere of life. This argument rests upon the Equal Protection Clause of the Fourteenth Amendment which prohibits states from treating differently persons similarly situated, and is now being interpreted by the courts to invalidate state laws which single out women for different treatment not based on some reasonable classification.

To be sure, the Equal Protection Clause may not satisfy the extreme demands of a few advocates of the Equal Rights Amendment who would convert men and women into beings not only equal but alike, and grant them identical rights and impose upon them identical duties in all the relationships and undertakings of life.

It cannot be gainsaid, however, that the Equal Protection Clause, properly interpreted, nullifies every state law lacking a rational basis which seeks to make rights and responsibilities turn upon sex.

My view is shared by legal scholars. Their views on this subject are succinctly expressed by Bernard Schwartz in his recent commentary on the Constitution of the United States which declares "that a law based upon sexual classification will normally be deemed inherently unreasonable unless it is intended for the protection of the female sex."

The best example of the Supreme Court's willingness to use the 14th Amendment to strike down laws which discriminate against women, thus rendering the ERA unnecessary, is the case of *Reed* v. *Reed*.

The Reed case

On November 22, 1971, the Supreme Court, in a unanimous decision, gave a strong indication that they would find all unreasonable sex-based classifications to be in violation of the equal protection clause of the 14th Amendment.

In the case of *Reed* v. *Reed*, 40 L.W. 4013 (1971), the Court found unconstitutional an Idaho statute requiring preference of male relatives over female relatives for appointment as administrators of an intestate's estate. The Court applied the conventional test of reasonableness and found an "arbitrary preference established in favor of males." The Court continued by saying, "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the equal protection clause."

A *New York Times* editorial on November 23, 1971, construed the decision to mean that:

"The effect of this ruling is to place the fate of various sexually discriminatory laws on a case-by-case basis. This is a slower but preferable way to correct the evils of discrimination than the passage of the proposed equal rights amendment."

Professor Paul Freund of the Harvard Law School has the same view. He stated in a recent letter to me on the significance of the *Reed* case:

"In view of the *Reed* decision, however, I believe more strongly than ever that the subject should be left to be worked out under the equal protection clause, as are other questions of group classification. The equal protection guarantee, together with the ample legislative powers of Congress, is the best avenue to achieve meaningful equality of the sexes under law. This approach is greatly to be preferred to one that would force all the manifold legal relationships to men and women, from coverage under selective service to the obligation of family support, into a mold of mechanical unity."

Professor Phil Kurkland of the Chicago Law School and Editor of the *Supreme Court Review* also wrote to me concerning the significance of the *Reed* case. Professor Kurkland is convinced that the *Reed* case will pave the way for action by the courts and the legislatures to rectify many of the admittedly unfair discrimination which confront women, but without the dangers resulting from an absolute Constitutional amendment. Professor Kurkland said:

"But I am of the view that a sound program of legislative reforms would do more, especially under the mandate now received from the Supreme Court in *Reed* v. *Reed*, to eliminate more of the grievances that women have against their roles frequently imposed on them in our society. Legislation can get at specific problems in a way that no constitutional provision can."

I believe the *Reed* case indicates that the Supreme Court will act under the 14th Amendment to strike all discriminations of which women now complain and, therefore, I believe the *Reed* case renders the ERA unnecessary.

V. RECENT DEVELOPMENTS IN THE LAW

I firmly believe that recent case law illustrates very dramatically a statement made by Professor Freund last year. He said:

"It seems to me, incidentally, if the energy and dedication that have gone into the movement for the equal rights amendment over the past 40-odd years had been devoted to the selection and the sponsorship of test cases with respect to some of the unjust State laws that we have heard about this morning, a great deal more accomplishment could be shown with respect to the advancement of equal rights than we can boast of today."

Proponents of the equal rights amendment have frequently cited what they believe to be hesitance on the part of courts to deal with inequalities facing women. The Supreme Court particularly has received criticism on this score.

Yet this term the Supreme Court has heard several cases relating to sex discrimination. On October 19, 1971, the Court heard oral argument in a case challenging a provision of the Illinois Juvenile Court Act which regards unwed mothers as parents but does not consider unwed fathers as parents for the purpose of deciding who shall have custody of illegitimate children. *In re Stanley*, 266 N.E. 2d 814 (Ill. 1970), cert. granted, No. 4014. In upholding this provision the Illinois Supreme Court held that this is not a denial of equal protection because the distinction between the class of mothers and the class of fathers "is rationally related to the purposes of the Juvenile Court Act" (presumably to protect the best interests of the children). A case heard by the Court on December 7, 1971, involves the holding of the Louisiana Supreme Court that the absence of women on general venire lists for grand jury duty is not cause for quashing an indictment. *State* v. *Alexander*, 233 So. 2d 891 (La. 1970), cert. granted, No. 70-5026.

In a case already decided this term, the Supreme Court unanimously struck down an Idaho statute which required preference of male relatives over female relatives as administrators of intestates' estates. *Reed* v. *Reed*, 40 L.W. 4013 (November 22, 1971). I have discussed this case earlier at length. Chief Justice Burger, writing for the Court, quoted from *Royster Guano Co.* v. *Virginia*, 153 U.S. 412, 415 (1920), to the effect that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similiarly circumstanced shall be treated alike." *Reed*, slip opinion, p. 5.

Last term the Court reached a decision in a landmark case arising under Title VII of the Civil Rights Act of 1964. In the first sex discrimination case arising under Title VII to reach the Supreme Court, a Court of Appeals decision permitting a corporation to distinguish between women with pre-school age children and men with pre-school age children in hiring was reversed. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). The Supreme Court remanded the case for an evidentiary hearing in the District Court as to whether the family obligations of women with pre-school age children are so relevant to job performance that hiring or other employment distinctions based on the fact of a woman having pre-school age children are justifiable as a bona fide occupational qualification.

I think it is very obvious that the Supreme Court is not ignoring the issue of discrimination against women. Certainly the lower courts are tackling the question and usually deciding in favor of women's equality. Many successful employment discrimination suits have been brought under Title VII. For example, numerous state labor laws have been held invalid as being in conflict with Title VII's mandate for equal employment opportunity. A federal district court has held a California statute prohibiting female employees from lifting objects weighing 50 pounds or more to be in conflict with Title VII and, therefore, void. *Local 246, Utility Workers Union of America, AFL-CIO* v. *Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970). In an earlier decision, a California statute regulating hours and conditions of employment for women was struck down as being in conflict with Title VII. *Rosenfeld* v. *Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Calif. 1968). Illinois hours limitations for working women have fallen. *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970). Ohio legislation restricting female employment in workshops and factories and prohibiting female employees from lifting anything weighing more than 25 pounds has also been held invalid. *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Jones Metal Products Co.* v. *Walker*, 25 Ohio App. 2d 141 (1970).

In addition, certain policies relating to the employment of women have been held to violate Title VII. Recently the Supreme Court declined to review a Seventh Circuit decision holding that a retirement plan which requires female employees to retire at 62, but does not require men to retire until 65 is sex discrimination in violation of Title VII. *Dreyrys Limited U.S.A., Inc.* v. *Bartmess*, 444 F. 2d 1186 (1971), rev. denied 40 L.W. 3212 (November 9, 1971). The Court also declined to review a Fifth Circuit ruling that an airline company's refusal to hire males as flight cabin attendants is sex discrimination in violation of Title VII. *Pan American World Airways, Inc.* v. *Diaz*, 442 F. 2d 385 (1971), rev. denied 40 L.W. 3212 (November 9, 1971). In two other cases employers' policies of refusing to hire women for jobs requiring the lifting of weights over a certain amount have been held invalid under Title VII. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). An airline's no-marriage rule for stewardesses have been held to constitute sex discrimination under Title VII. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971).

Other employment cases favorable to women have been brought under the Equal Pay Act. For example, payment of men at a higher rate than women for the same job has been held to violate the Equal Pay Act. *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3rd Cir. 1970).

Women have also made gains in other areas of sex discrimination. Many of the long-accepted prohibitions and segregations are being removed. An example is state laws prohibiting female bartenders, which have been struck down in New Jersey and California. *Paterson Tavern and Grill Owners Assn., Inc.* v. *Borough of Hawthorne*, 108 N.J. Super. 433 (1970); *Sail'er Inn, Inc.* v. *Kirby*, 485 F. 2d 529 (1971). In another case a federal district court in New York held that the refusal of an ale house to serve women violated the equal protection clause of the Fourteenth Amendment. *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (1970).

Other suits challenging the treatment of women on equal protection grounds have also been successful. A Pennsylvania statute providing for longer prison terms for women than for men committing the same crimes was held to violate equal protection. *Commonwealth* v. *Daniel*, 430 A. 2d 400 (1968). (See also, *U.S. ex rel, Robinson* v. *York*, 281 F. Supp. 8 (D. Conn. 1968), in which a federal court struck down a similar Connecticut statute.) A school board regulation requiring women teachers to take a leave of absence at the end of the fifth month of pregnancy has been held to violate equal protection.

Cohen v. *Chesterfield County School Board*, 326 F. Supp. 1159 (E.D. Va. 1971). In *Kirstein* v. *Rectors and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), a three-judge federal court held that the denial to women of education equal to that offered men at the University of Virginia at Charlottesville violated equal protection. The court approved a plan setting quotas for the admission of women.

The Justice Department has taken action to aid women in fighting discrimination. In an important suit against Libbey-Owens-Ford, the Attorney General won a decree giving women opportunity to achieve promotions and advancement on the same basis as male employees.

These events are not typical of a society which does not care to eliminate discrimination. Nor are they characteristic of a judicial system determined to maintain the status quo.

VI. HOW WOULD THE ERA BE INTERPRETED

If the Equal Rights for Women amendment is approved, I believe that the Supreme Court will reach the conclusion that the ERA annuls every existing Federal and state law making any distinction between men and women however reasonable such distinction might be in particular cases, and forever robs the Congress and the legislatures of the fifty states of the Constitutional power to enact any such laws at any time in the

future. I am not alone in entertaining this fear.

When the so called Equal Rights Amendment was under consideration in 1953, Roscoe Pound of the Harvard Law School and other outstanding scholars joined one of America's greatest legal scholars, Paul A. Freund of the Harvard Law School, in a statement opposing the Equal Rights Amendment upon the ground that they feared that this devastating interpretation might be placed upon it if it should be adopted. This statement made these indisputable observations:

"If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen, but it would certainly embrace such diverse legal provisions as those relating to a widow's allowance, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and the maximum hours of labor for women in protected industries.

"Not only is the range of the amendment of indefinite extent, but, even more important, the fate of all this varied legislation would be left highly uncertain in the face of judicial review. Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. A more flexible view, permitting reasonable differentiation, can hardly be regarded as the object of the proposal, since the Fourteenth Amendment has long provided that no state shall deny to any person the equal protection of the laws, and that Amendment permits reasonable classifications while prohibiting arbitrary legal discrimination. If it were intended to give the courts the authority to pass upon the propriety of distinctions, benefits and duties as between men and women, no new guidance is given to the courts, and this entire subject, one of unusual complexity would be left to the unpredictable judgments of courts in the form of constitution decisions.

"Such decisions could not be changed by act of the legislature. Such a responsibility upon the courts would be doubtless as unwelcome to them as it would be inappropriate. As has been stated, however, the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. This branch of the dilemma is as repelling as the other."

After analyzing in some detail the laws whose validity might be jeopardized by the Equal Rights Amendment, the statement concluded with these observations:

"The basic fallacy in the proposed amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction. This abstraction is undoubtedly a worthy ideal for mobilizing legislative forces in order to remedy particular deficiencies in the law. But as a constitutional standard, it is hopelessly inept. That the proposed equal rights amendment would open up an era of regrettable consequences for the legal status of women in this country is highly probable. That is would open up a period of extreme confusion in constitutional law is a certainty."

Appearing before the Senate Judiciary Committee hearings in September, 1970, it was obvious that Professor Freund has the same view today of the proposed amendment. In a colloquy with me, Professor Freund had the following to say:

Senator ERVIN. I also interpret your statement and what you have said to indicate a conviction on your part that there is grave danger that the courts will interpret the House-passed equal rights amendment, if it is ratified by the requisite number of states, as depriving Congress of the powers it now has under the equal protection clause to adopt legislation which is for the benefit of women?

Mr. FREUND. Yes. I think that is quite right because there must be intended some more absolute standard of equality than the equal protection clause embodies. That would be the point of the amendment.

Senator ERVIN. And if the House-passed equal rights amendment were ratified by the states, thus made a part of the Constitution, it is susceptible of interpretation that it would require the courts to strike down all legal distinctions made between men and women, no matter how reasonable and necessary those distinctions might be?

Mr. FREUND. That is my understanding of what the language as well as the purpose of the sponsors is today.

Professor Philip Kurland of the Chicago Law School also arrived at the same conclusion as Professor Freund. He said:

Professor KURLAND. I would think that the amendment as it is now simply provides that classification by sex by any governmental action is invalid.

Senator ERVIN. In other words, your interpretation of the amendment as presently phrased is that it would be probably interpreted to eliminate sex as a basic for classification in legislation?

Professor KURLAND. If I were charged with the interpretation of the language, that would be the conclusion that I would reach.

Senator ERVIN. If that interpretation would be correct, the law which exists in North Carolina and virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Perhaps one of the best guides to a general interpretation of the Equal Rights Amendment can be found in the *Yale Law Journal* article of April, 1971. That article has been called a "masterly piece of scholarship" by Senator Bayh and has been cited by Congresswoman Griffiths, the primary sponsor of the ERA in the House of Representatives, to "help you understand the purposes and effects of the ERA . . ." The *Yale Law Journal* gives us the following guidelines for the general interpretation of the ERA:

1. "The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of *any* person by the law may not be based upon the circumstance that such person is of one sex or the other." (p. 889) ". . . the principle of the Amendment must be applied comprehensively and *without* exceptions." (p. 890)

2. "Only an *unequivocal ban* against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment." (p. 892) ". . . prohibition against the use of sex as a basis for differential treatment applies to *all* areas of legal rights." (p. 891) ". . . From this analysis it follows that the constitutional mandate must be *absolute*." (p. 892)

3. "Our legal structure will continue to support and command an inferior status for women so long as it permits *any* differentiation in legal treatment on the basis of sex." (p. 873) ". . . Equality of rights means that sex is not a factor." (p. 892)

VII. SPECIFIC AREAS AFFECTED BY THE EQUAL RIGHTS AMENDMENT

Time and space preclude me from an attempt to picture in detail the constitutional and legal chaos which would prevail in our country if the Supreme Court should feel itself compelled to place upon the Equal Rights Amendment the devastating interpretation feared by these legal scholars.

For this reason, I must content myself with merely suggesting some of the terrifying consequences of such an interpretation.

While the amendment would affect all areas of our society, I will mention only a few of the specific areas including: the military, the criminal law, privacy, domestic relations, and protective labor legislation.

VIII. MILITARY

The impact of the ERA on the military will be *massive*.

The Congress and the legislatures of the various states have enacted certain laws based upon the conviction that the physiological and functional differences between men and women make it advisable to exempt or exclude women from certain arduous and hazardous activities in order to protect their health and safety.

Among Federal laws of this nature are the Selective Service Act, which confines compulsory military service to men; the acts of Congress governing the voluntary enlistments in the armed forces of the nation which restrict the right to enlist for combat service to men; and the acts establishing and governing the various service academies which provide for the admission and training of men only. There is no question that these laws will be abolished. As Professor Paul Freund of the Harvard Law School said, "And so women must be admitted to West Point on a parity with men; women must be conscripted for military service equally with men . . ." Professor Phil Kurkland of the Chicago Law School agrees.

The position of the Justice Department and the Defense Department is that women will be subject to the draft. In a letter to Senator Bayh dated February 24, 1972, the General Counsel for the Defense Department, J. Fred Buzhardt, dealt with some of the problems which would be caused by the ERA in the military. Mr. Buzhardt said:

"Further, there is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.

"On the other hand, 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.

"If this amendment allowed no discrimination on the basis of sex even for the sake of privacy, we believe that the resulting sharing of facilities and living quarters would be contrary to prevailing American standards.

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

In a letter to Senator Ervin, Deputy Assistant Secretary of Defense Don R. Brazier said that Defense had not made any estimates of costs on changing the military to

conform with the Equal Rights Amendment. Furthermore, Mr. Brazier said:

"The Department has not made such estimates and without specific programs for such 'equal' service, it is impossible to make any estimate. One of the major areas that would contribute to increased costs would be separate facilities, both in terms of living quarters, as well as working facilities in areas where women are not currently stationed.

"Until a definitive plan is developed indicating where and under what circumstances women would serve in isolated areas, with combatant forces, aboard ships, etc., it is not possible to make a definitive estimate of costs. *If extensive additional facilities or modifications to current facilities were required, the costs could be considerable.*"

A very complete analysis of the ERA's effect on the military was compiled in the *Yale Law Journal* in April 1971. The significance of this article that Congresswoman Griffiths has said that the article ". . . will help you understand the purposes and effects of the Equal Rights Amendment" and Senator Bayh has called it a "masterly piece of scholarship." Thus, the supporters of the amendment feel that it will have the following effect on the military and I agree with them. No clearer or more unique history of legislative intent can be presented of the amendment and the military because both the opponents and the proponents agree on the amendment's effect in this area.

Significant excerpts from the *Yale Law Journal* which is supported by the amendment's proponents are as follows:

1. "The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military." (p. 969)

2. "Women will serve in all kinds of units, and *they will be eligible for combat duty*. The double standard for treatment of sexual activity of men and women will be prohibited". (p. 978)

3. "Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women." (p. 969)

4. "Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination." (p. 969)

5. "These changes will require a *radical* restructuring of the military's views of women." (p. 969)

6. "The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men." (p. 970)

7. "A woman will register for the draft at the age of eighteen, as a man now does." (p. 971)

8. "Under the Equal Rights Amendment, all standards applied through (intelligence tests and physical examinations) will have to be neutral as between the sexes." (p. 971)

9. "The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the statute." (p. 971)

10. "First, height standards will have to be revised from the dual system which now exists." (p. 971)

11. "The height-weight correlations for the sexes will also have to be modified." (p. 972)

12. Deferment policy "could provide that one, but not both; of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female would be deferred." (p. 973)

13. "If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged . . . The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignments in noncombat zones, as men are now permitted to do." (p. 975)

14. "Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children." (p. 975)

15. "Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact." (p. 975)

16. "Under the Equal Rights Amendment the WAC would be abolished." (p. 976)

17. "Women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations . . . there is no reason to prevent women from doing these jobs in combat zones." (p. 977)

18. "No one would suggest that . . . women who serve can avoid the possibility of physical harm and assault. But it is important to remember that all combat is dangerous, degrading and dehumanizing." (p. 977)

19. "Male officers are provided a dependents' allowance based on their grade and the number of dependents . . ." The Equal Rights Amendment will recognize "the husband of a female officer . . . as a dependent." (p. 978)

20. "Athletic facilities will also have to be made available to women personnel." (p. 978)

IX. CRIMINAL LAW

Because of different physical characteristics, and health considerations, and other reasons, legislatures have adopted some criminal laws which apply to only one sex or the other or treat men and women differently in some degree. Because the Equal Rights Amendment will forbid any legal distinctions between men and women, all existing and future criminal laws of this nature would be nullified.

As in several areas, a good review of the types of laws that will be changed by the ERA was discussed in the April 1971 issue of the *Yale Law Journal*. This article has been cited with approval by the proponents of the ERA and the statements which I have exerpted should constitute a good example of what we could expect after passage of the act in the area of criminal law. The excerpts from the *Yale Law Journal* are as follows:

1. "Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike." (p. 966)

2. "Courts will not likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike." (p. 962)

3. "Seduction laws, statutory rape laws, laws prohibiting obscene language in the presence of women, prostitution and 'manifest danger' laws . . . The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social sterotypes." (p. 954)

4. "The statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law . . . suffer from a double defect under the Equal Rights Amendment." (p. 957)

5 "To be sure, the singling out of women probably reflects sociological reality . . . Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. *But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard . . .*" (p. 958)

6. "Adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment." (p. 961)

7. "Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment." (p. 963)

8. "Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so the ERA would require invalidation of laws specially designed to protect women from being forced into prostitution." (p. 964)

9. "A court would probably resolve doubts about congressional intent by striking down the (Federal White Slave Traffic—Mann Act)." (p. 965)

X. DOMESTIC RELATIONS LAWS

The common law and statutory law of the various states recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. To enable women to do these things and thereby make the existence and development of the race possible, these state laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these state laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the Equal Rights Amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

As with the military, a good analysis of what the amendment will accomplish in the area of domestic relations was set out in the *Yale Law Journal* which has been fully endorsed by Congresswoman Martha Griffiths and other proponents of the ERA. As I have stated earlier, no clearer legislative intent can be presented because I agree with the amendment's proponents that the ERA will have the following effects.

Significant excerpts from the Yale Law Journal which is supported by the proponents of the ERA in the area of domestic relations are as follows:

1. "The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex." (p. 959)

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2. "Thus, common law and statutory rules requiring name change for the married women would become legal nullities." (p. 940)

3. "These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both." (p. 940)

4. "The Amendment would also prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's." (p. 941)

5. "In ninety per cent of custody cases the mother is awarded the custody. The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent." (p. 953)

6. "physical capacity to bear children can no longer justify a different statutory marriage age for men and women." (p. 939)

7. "mere estimates of emotional preparedness founded on impressions about the 'normal' adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids." (p. 939)

8. "The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage." (p. 940)

9. "a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment." (p. 942)

10. "A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home." (p. 942)

11. "the traditional rule is that the domicile of legitimate children is the same as their father's . . . The Equal Rights Amendment would not permit this result." (p. 942)

12. "In all states husbands are primarily liable for the support of their wives and children . . . the child support sections of the criminal nonsupport laws . . . could not be sustained where only the male is liable for support." (p. 944 and 945)

13. "The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." (p. 945)

14. "Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system . . . As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment." (p. 946)

15. "Under the Equal Rights Amendment, laws which . . . favor the husband as manager (of community property) in any way, would not be valid." (p. 947)

16. "All states except North Dakota and South Dakota give women a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate . . . the discriminatory laws would either be invalidated or extended." (p. 948)

17. "a court could invalidate (many grounds for divorce) without doing any serious harm to the overall structure of the states' divorce laws . . . These are pregnancy by a man other than husband at time of marriage, nonsupport, alcoholism of husband, wife's unchaste behavior, husband's vagrancy, wife's refusal to move with husband without reasonable cause, wife a prostitute before marriage, indignities by husband to wife's person, and willful neglect by husband." (p. 950)

18. "Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only . . ." (p. 951)

19. "The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests." (p. 951)

20. "The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives." (p. 952)

21. "the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child so long as there was no legal presumption that the parent granted custody should be the mother." (p. 952)

22. The ERA could require "for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for *his* reasonable needs and is unable to support *himself* through appropriate employment." (p. 962)

XI. PROTECTIVE LABOR LEGISLATION

Many states and the Federal government have enacted labor legislation which protects women from certain forced activities. These protections were not always easy to develop. As Margaret Mead, noted anthropologist, said to a AFL–CIO meeting in March, 1971, "In the beginning of mining, there were women down those mines and children . . . we got the women and children out of the mines you know." Dr. Mead then goes on to say, "I've been against the equal rights amendment always."

The largest labor organization in the country, the AFL–CIO has recommended that Congress not pass the Equal Rights Amendment for the same reason that Margaret Mead opposed it: The adverse effect the amendment will have on hard-won protective legislation for women.

In its Resolution No. 122, the AFL–CIO states:

"We continue opposition to the so-called equal rights amendment as an unnecessary addition to the Constitution, ultimately more harmful than helpful to the legal rights of women."

Prior to the adoption of the resolution, the executive council of the AFL–CIO, in a report to its convention, said:

"We have opposed the equal rights amendment to the Constitution because of its potentially destructive impact on State labor legislation for women workers . . . Experience, to date, shows that 'equality' has been used to remove labor law protections for women, rather than to extend them or adapt them to man. The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently. Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers."

A librarian at the University of California Library, Mrs. Laurel Burley, has written on the drastic consequences which would result to the protective labor laws for women if the ERA passes. Those upper-class, well-educated women who are pushing so hard for this amendment should ponder Mrs. Burley's words. She states that:

"The major danger in the proposed ERA lies in the fact that it would in one fell swoop invalidate all protective legislation enacted by the States to protect working women from exploitative employers . . . Protective legislation not only sets maximum hours and minimum wages standards, but also mandates such provisions as rest areas, toilet facilities, and elevators, adequate lighting and ventilation, rest and meal breaks (including the right to eat one's meal away from the immediate work area), adequate drinking water (important for women and children who are farmworkers), and protective garments and uniforms."

Mrs. Burley feels that some of the results of court action under Title VII of the 1964 Civil Rights Act are indicative of the changes which will be brought about the extreme because of the Equal Rights Amendment. On this point, she states:

"Some idea of what might be expected were the ERA to pass can already be seen in the use being made of Title VII of the Civil Rights Act. In late 1969 Fibreboard Corporation in Antioch, California began to force women to work 16 hours a day and to lift backbreaking weights. Pacific Telephone in 1970 began ignoring state protective legislation relating to minimum hours. In fall 1970 Oregon took away the right of women to have two ten-minute rest breaks in an eight-hour day; and another large California corporation, Crown Zellerbach, began denying meal breaks to both men and women working in the Antioch plant. In summer 1971 a U.S. Court of Appeals struck out the sections of the California Labor Code regulating maximum weight lifting and the eight-hour day, 48-hour week for women. All these actions were justified on the basis that Title VII and EEOC guidelines superseded state protective legislation. Such instances are mounting at an incredible rate. On the basis of Title VII, 17 states have either totally or substantially annulled or repealed protective legislation covering women. *The ERA as it stands will add the finishing touch.*

As in other areas, I believe the *Yale Law Journal* article which has been adopted by Congresswoman Griffiths as "explaining the ERA" should be read to determine its effects on labor legislation. Excerpts from the article state that:

1. "Under the Equal Rights Amendment, courts are thus not likely to find *any* justification for the continuance of laws which exclude women from certain occupations." (p. 929)

2. "Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits . . . would fall." (p. 929) The article cites as an example which will be struck down in every state, a school board regulation imposing maternity leave at least four months prior to the expected birth of her child." (p. 931)

3. "There is little reason to doubt, therefore, that courts will invalidate weightlifting regulations for women under the Equal Rights Amendment." (p. 935)

4. "This result (to invalidate maximum hours which apply only to women) would also be predicted from principles of statutory construction under the Equal Rights Amendment." (p. 936)

5. "The courts are likely to . . . equalizing both sexes under the Equal Rights Amendment by invalidating (a law protecting women from coerced overtime)." (p. 936)

6. "Laws which restrict or regulate working conditions would probably be invalidated." (p. 936)

XII. MISCELLANEOUS

Because of the broad nature of the ERA, there is really no way to tell just how far

it will reach. As Professor Paul Freund of the Harvard Law School said, "The range of potential litigation is too great to be readily foreseen . . ." Therefore, I believe it would be profitable to mention just several random examples which were brought out in the April 1971 *Yale Law Journal*. As I have mentioned, before, the *Yale Law Journal* is unique because it provides a very minimum level of change which the ERA will bring about. This is true because of the strong support of the article by Congresswoman Griffiths and other supporters of the ERA. Under miscellaneous examples, the article mentions:

1. "the government cannot rely upon the administrative technique of grouping or averaging where the classification is by sex . . . whatever the price in efficiency, the classification must be made on some other basis." (p. 891)

2. "It is obvious that the marginal relationship of the unique physical characteristics of pregnancy to the problem of absenteeism would require invalidation . . . of a government regulation to reduce absenteeism by barring women from certain jobs.

3. Men will get extensive leave for child rearing because "if only women can get extensive leave for child rearing it becomes economically impossible for men to stay at home to care for children while their wives work." (p. 897)

4. "A rule allowing sick leave only to mothers when a memmber of their household is sick is a prohibited sex classification." (p. 898)

5. "a law might prohibit adults with primary responsibility for child care from working in managerial jobs, on the grounds that the function of caring for children was inconsistent with substantial occupational responsibility. Such a law or government regulation would constitute a serious evasion of the Equal Rights Amendment." (p. 898)

6. "Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment." (p. 900)

7. "Thus the courts have power to grant affirmative relief in framing decrees in particular cases . . . such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against." (p. 904)

8. "affirmative action may appear, paradoxically, to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done." (p. 904)

9. "There is no doubt that the Equal Rights Amendment would eliminate differentiation on account of sex in the public schools and public university systems." (p. 906)

10. "It would seem clear that the basic principles of state action would, as a general proposition, require that the state eliminate male domination from the educational system." (p. 907)

11. "states which grant jury service exemptions to women with children will either extend the exemption to men with children or abolish the exemption altogether." (p. 920)

XIII. RIGHT TO PRIVACY

I believe that the absolute nature of the Equal Rights Amendment will, without a doubt, cause all laws and state-sanctioned practices which in any way differentiate between men and women to be held unconstitutional. Thus, all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. Also, men and women will be thrown together with no separation on the grounds of sex in the military.

The proponents of the ERA mention that the Constitutional right to privacy will protect and keep separate items such as public restrooms; however, this assertion overlooks the basic fact of constitutional law construction: The most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exception for elements of publically imposed sexual segregation on the basis of privacy between men and women.

Even assuming the *very unlikely* result that privacy will allow segregation of the sexes in places like the military, Fred Buxhardt, General Counsel of the Defense Department, mentioned the physicial impossibility of providing this always in the military. Mr. Buxhardt said:

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

Professor Paul Freund of the Harvard Law School testified about this matter before the Senate Judiciary Committee in 1970. After stating that the amendment would be absolute, Professor Freund said that it would follow that the ERA "would require that there be no segregation of the sexes in prison, reform schools, public restrooms, and other public facilities."

Professor Phil Kurland, Editor of the *Supreme Court Review* and a Professor of Law at the University of Chicago Law School stated before the Judiciary Committee:

Senator ERVIN. The law which exists in North Carolina and in virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Senator ERVIN. And the laws of the states and the regulations of the Federal government which require separate restrooms for men and women in public buildings would also be nullified, would it not?

Professor KURLAND. My answer would be the same.

As Professors Freund and Kurland indicate there is no qualification of the ERA for the privacy of women just as there will be none for the draft or protective labor laws.

A few examples in our society where the privacy aspect of the relationship between men and women would be changed are:

1. Police practices by 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. This includes close quarter living in combat zones and foxholes.

4. Segregation by sex in hospitals would be outlawed.

5. Physical exams in the armed forces will have to be carried out on a sex neutral basis.

There are, of course, numerous other examples which flow from the absolute nature of the Equal Rights for Women amendment.

XIV. THE RADICAL EFFECT OF THE EQUAL RIGHTS AMENDMENT ON THE AMERICAN SOCIAL STRUCTURE

In the hearings before the Senate Judiciary Committee last year, Professor Paul Freund of the Harvard Law School testified that:

"Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear."

Like Professor Freund, it is not clear to me either if the proponents of the amendment shrink from these implications. This matter illustrates as well as any the radical departures from our present system that the ERA will bring about in our society. Speaking in opposition to the ERA, Professor James White of the Michigan Law School also mentioned certain bizarre results which would flow from passage of the ERA. Professor White said:

"With the exception of Illinois and perhaps a few other states, there are laws on the books which make it a crime to engage in certain kinds of homosexual activity. First of all, I suppose the amendment would bring in question all that law . . . I think the question is, is this the way we should do away with it or should we allow the states to control this themselves?"

Professor White continued that there would certainly be litigation on the sexual requirements of the marriage ceremony and that "conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex." At that point in the testimony, Professor White's comments centered on the effect on the community property laws of homosexual marriages. I wondered about the effect on adoption procedures.

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Professor of Neurology at the Yale Medical School, Dr. Jonathan H. Pincus, has asked the following question: "Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?" In a statement in opposition to the ERA, Dr. Pincus goes on to answer his question in the affirmative, and in his discussion he sheds some real light on the radical changes which will be made in our social structure.

At the present time in all states husbands are primarily liable for the support of their wives and children but, as Representative Griffiths' approved article in the *Yale Law Journal* states, "The ERA would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." Dr. Pincus is very concerned about the effects of this removal of a husband's responsibility. Dr. Pincus said:

"It seems to me that the removal of legal responsibility from a man for supporting a family, giving the family a name and protecting his daughters from the sort of influences the U.S. Army might have in store for them before marriage is likely to have some effect on the manner in which men relate to their wives and children and vice versa; those traditional ties will be weakened."

Dr. Pincus feels that "a solid happy family life is the foundation of mental health and happiness," and as to the effects of the ERA on this family life, he goes on to state:

"I would predict that the Equal Rights amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and, possibly, sexual deviation."

Whether or not one agrees with the predictions of Dr. Pincus, I believe he is asking very genuine questions which should be discussed before the Constitution is amended. Before we begin tinkering with the very subtle mechanisms of family relationships and social responsibilities, should we not consider that we might in fact be passing a Tonkin Gulf Resolution of the American social structure?

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While I believe that any unfair discriminations which the law has created against

women should be abolished by law, I have the abiding conviction that the law should make such distinctions between them as are reasonably necessary for the protection of women and the existence and development of the race.

I share completely this recent observation by Mr. Bernard Swarts: "Use of the law in an attempt to conjure away all the differences which do exist between the sexes is both an insult to the law itself and a complete disregard of fact."

The late Justice Felix Frankfurter, in an eloquant statement in the *New Republic* magazine many years ago put it a different way. Justice Frankfurter said:

"Only those who are ignorant of the nature of law and of its enforcement and regardless of the intricacies of American constitutional law, or indifferent to the exacting aspects of woman's industrial life, will have the naivete or the recklessness to sum up woman's whole position in a meaningless and mischievous phrase about "equal rights'."

Let us consider for a moment whether there be a rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women.

To say these things is not to imply that either sex is superior to the other. It is simply to state the all important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nuture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nuture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and makes its laws is woefully lacking in rationality.

Our country has not thus far committed this grievous error. As a consequence, it has established by law the institutions of marriage, the home, and the family, and has adopted some laws making some rational distinctions between the respective rights and responsibilities of men and women to make these institutions contribute to the existence and advancement of the race.

It may be that times are changing and more and more women will leave the home to compete in the business and professional community. However, I would like to call the Senate's attention to the remarks of Professor Phil Kurland of the University of Chicago Law School on this point. He said:

"Times have changed in such a way that it may well be possible for the generation of women now coming to maturity, who had all the opportunities for education afforded to their male peers and who had an expectation of opportunities to put education to the same use as their male peers, to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains a very large part of the female population on whom the imposition of such a constitutional standard would be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. In the eyes of some, this may be unfortunate, but it is true. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Certainly the desire to open opportunities to some need not be bought at the price of removal of legal protections from others."

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XVI. A REASONABLE ALTERNATIVE TO THE ERA

This brings us to the question whether Congress should consider the submission to the States of a Constitutional amendment to deal with the matter, and whether such amendment should permit Congress and the States acting within their respective jurisdictions to make reasonable distinctions between the rights and responsibilities of men and women in appropriate areas of life.

I honestly believe that the equal protection clause, properly interpreted, is sufficient to abolish all unfair legal discriminations made against women by state law.

Despite this belief, I intend to offer an amendment to the ERA which would prevent constitutional chaos. The amendment to the ERA which I plan to offer on the floor of the Senate reads as follows:

"The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses."

The assistant legislative clerk called the roll.

Mr. EASTLAND. Mr. President, on this joint resolution, I have a pair with the Senator from Arkansas (Mr. MCCLELLAN) and the Senator from Florida (Mr. CHILES). If they were present and voting, they would vote "yea." If I were permitted to vote, I would vote "nay." I therefore withhold my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from Washington (Mr. JACKSON) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "yea."

The yeas and nays resulted—yeas 84, nays 8, as follows:

[No. 122 Leg.]

YEAS—84

Aiken	Fulbright	Muskie
Allen	Gambrell	Nelson
Allott	Gravel	Pastore
Anderson	Griffin	Pearson
Baker	Gurney	Pell
Bayh	Harris	Percy
Beall	Hart	Proxmire
Bellmon	Hartke	Randolph
Bentsen	Hatfield	Ribicoff
Bible	Hollings	Roth
Boggs	Hruska	Saxbe
Brock	Hughes	Schweiker
Brooke	Humphrey	Scott
Burdick	Inouye	Smith
Byrd, Va.	Javits	Sparkman
Byrd, W. Va.	Jordan, N.C.	Spong
Cannon	Jordan, Idaho	Stafford
Case	Kennedy	Stevens
Church	Long	Stevenson
Cook	Magnuson	Symington
Cooper	Mansfield	Taft
Cranston	Mathias	Talmadge
Curtis	McGee	Thurmond
Dole	Metcalf	Tower
Dominick	Miller	Tunney
Eagleton	Mondale	Weicker
Ellender	Montoya	Williams
Fong	Moss	Young

NAYS—8

Bennett	Ervin	Hansen
Buckley	Fannin	Stennis
Cotton	Goldwater	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Eastland, against.

NOT VOTING—7

Chiles	McGovern	Packwood
Jackson	McIntyre	
McClellan	Mundt	

The PRESIDING OFFICER (Mr. ROTH). Before announcing the result, the Chair would like to remind the occupants of the galleries that no demonstrations are permitted under the rules of the Senate. The Chair respectfully requests that the galleries comply with that request.

On this vote the yeas are 84, the nays are 8. Two-thirds of the Senators present having voted in the affirmative, the joint resolution is passed.

[Demonstrations in the galleries.]

FINAL VOTE IN THE HOUSE OF REPRESENTATIVES ON THE PROPOSED ERA

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker having assumed the chair, Mr. BOLLING, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee having had under consideration the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women, pursuant to House Resolution 548, he reported the joint resolution back to the House.

The SPEAKER. Under the rule, the previous question is ordered.

The question is on the engrossment and third reading of the joint resolution.

The joint resolution was ordered to be engrossed and read a third time, and was read the third time.

MOTION TO RECOMMIT OFFERED BY MR. HUTCHINSON

Mr. HUTCHINSON. Mr. Speaker, I offer a motion to recommit.

The SPEAKER. Is the gentleman opposed to the joint resolution?

Mr. HUTCHINSON. I am, Mr. Speaker.

The SPEAKER. The Clerk will report the motion to recommit.

The Clerk read as follows:

Mr. HUTCHINSON moves to recommit the joint resolution (H.J. Res. 208) to the Committee on the Judiciary.

The SPEAKER. Without objection, the previous question is ordered on the motion to recommit.

There was no objection.

The SPEAKER. The question is on the motion to recommit.

The motion to recommit was rejected.

The SPEAKER. The question is on the passage of the joint resolution.

Mr. EDWARDS of California. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 354, nays 24, not voting 51, as follows:

[Roll No. 294]

YEAS—354

Abbitt	Begich	Brinkley
Abzug	Belcher	Brooks
Adams	Bell	Broomfield
Addabbo	Bennett	Brotzman
Alexander	Bergland	Brown, Mich.
Anderson, Calif.	Betts	Brown, Ohio
Anderson, Tenn.	Bevill	Broyhill, N.C.
Andrews, Ala.	Biaggi	Broyhill, Va.
Andrews, N. Dak.	Biester	Buchanan
Annunzio	Bingham	Burke, Fla.
Archer	Blackburn	Burke, Mass.
Ashley	Blanton	Burleson, Tex.
Aspin	Blatnik	Burlison, Mo.
Badillo	Boggs	Burton
Baker	Boland	Byrne, Pa.
Barrett	Bolling	Byron
	Bow	Cabell
	Brademas	Caffery
	Brasco	Camp
Carey, N.Y.	Hicks, Wash.	Price, Tex.
Carney	Hogan	Pryor, Ark.
Carter	Hollifield	Pucinski
Casey, Tex.	Horton	Purcell
Cederberg	Hosmer	Quie
Chamberlain	Howard	Quillen
Chisholm	Hull	Railsback
Clawson, Del	Hungate	Randall
Clay	Hunt	Rangel
Cleveland	Ichord	Rees
Collins, Ill.	Jacobs	Reid, N.Y.
Collins, Tex.	Jarman	Reuss
Conable	Johnson, Calif.	Rhodes
Conte	Johnson, Pa.	Riegle
Conyers	Jones, Ala.	Roberts
Corman	Jones, N.C.	Robinson, Va.
Cotter	Jones, Tenn.	Robison, N.Y.
Coughlin	Karth	Rodino
Crane	Kastenmeier	Roe
Culver	Kazen	Rogers
Daniel, Va.	Keating	Roncalio
Daniels, N.J.	Keith	Rooney, N.Y.
Danielson	Kemp	Rosenthal
Davis, Ga.	King	Rostenkowski
Davis, S.C.	Kluczynski	Roush
Delaney	Koch	Roy
Dellenback	Kuykendall	Roybal
Dellums	Kyl	Ruppe
Denholm	Kyros	Ruth
Dent	Landrum	Ryan
Devine	Latta	St Germain
Dickinson	Lennon	Sarbanes
Diggs	Lent	Satterfield
Donohue	Link	Scherle
Dow	Long, Md.	Scheuer
Dowdy	Lujan	Schneebeli
Downing	McClory	Scott
Drinan	McCloskey	Sebelius
Duncan	McCollister	Selberling
du Pont	McCormack	Shipley
Dwyer	McDade	Shoup
Eckhardt	McDonald, Mich.	Sikes
Edwards, Ala.	McEwen	Sisk
Edwards, Calif.	McFall	Skubitz
Ellberg	McKevitt	Slack
Esch	McKinney	Smith, Calif.
Eshleman	McMillan	Smith, Iowa
Evans, Colo.	Madden	Smith, N.Y.
Evins, Tenn.	Mahon	Snyder
Fascell	Mann	Springer
Findley	Martin	Staggers
Fish	Mathias, Calif.	Stanton, J. William
Fisher	Mathis, Ga.	Stanton, James V.
Flood	Matsunaga	Steed
Flowers	Mayne	Steele
Foley	Mazzoli	Stephens
Ford, William D.	Meeds	Stokes
Forsythe	Melcher	Stratton
Fountain	Metcalfe	Stubblefield
Fraser	Michel	Symington
Frelinghuysen	Mikva	Talcott
Frenzel	Miller, Ohio	Taylor
Frey	Mills, Ark.	Teague, Calif.
Fulton, Tenn.	Mills, Md.	Teague, Tex.
Fuqua	Minish	Terry
Galifianakis	Mink	Thompson, Ga.
Gallagher	Minshall	Thompson, N.J.
Garmatz	Mitchell	Thomson, Wis.
Gaydos	Mizell	Tiernan
Gibbons	Monagan	Udall
Goldwater	Montgomery	Ullman
Gonzalez	Moorhead	Van Deerlin
Goodling	Morgan	Vander Jagt
Grasso	Morse	Vanik
Gray	Mosher	Veysey
Green, Pa.	Moss	Vigorito
Griffin	Murphy, Ill.	Waldie
Griffiths	Murphy, N.Y.	Wampler
Gross	Myers	Ware
Grover	Natcher	Whalen
Gude	Nelsen	Whalley
Hagan	Nichols	White
Haley	Nix	Whitehurst
Hall	Obey	Widnall
Hamilton	O'Hara	Williams
Hammer-schmidt	O'Konski	Wilson, Charles H.
Hanley	O'Neill	Winn
Hanna	Passman	Wolff
Hansen, Wash.	Patman	Wright
Harrington	Patten	Wyatt
Haraha	Pepper	Wydler
Harvey	Perkins	Wylie
Hastings	Pettis	Wyman
Hathaway	Peyser	Yates
Hays	Pickle	Yatron
Hechler, W. Va.	Pike	Young, Tex.
Heckler, Mass.	Podell	Zablocki
Helstoski	Poff	Zion
Henderson	Powell	Zwach
Hicks, Mass.	Preyer, N.C.	
	Price, Ill.	

NAYS—24

Abernethy	Flynt	Rousselot
Ashbrook	Hutchinson	Sandman
Byrnes, Wis.	Jonas	Saylor
Celler	McCulloch	Schmitz
Chappell	McKay	Steiger, Ariz.
Colmer	Nedzi	Sullivan
Dennis	Poage	Whitten
Dorn	Rarick	Wiggins

NOT VOTING—51

Abourezk	Ford, Gerald R.	Miller, Calif.
Anderson, Ill.	Gettys	Mollohan
Arends	Giaimo	Pelly
Aspinall	Green, Oreg.	Pirnie
Baring	Gubser	Rooney, Pa.
Bray	Halpern	Runnels
Clancy	Hansen, Idaho	Schwengel
Clark	Hawkins	Shriver
Clausen, Don H.	Hébert	Spence
Collier	Hillis	Steiger, Wis.
Davis, Wis.	Kee	Stuckey
de la Garza	Landgrebe	Thone
Derwinski	Leggett	Waggonner
Dingell	Lloyd	Wilson, Bob
Dulski	Long, La.	Young, Fla.
Edmondson	McClure	
Edwards, La.	Macdonald, Mass.	
Erlenborn	Maillliard	

So (two-thirds having voted in favor thereof) the joint resolution was passed.

The Clerk announced the following pairs:

On this vote:

Mr. Gerald R. Ford and Mr. Maillliard for, with Mr. Erlenborn against.

Mr. Hillis and Mr. Arends for, with Mr. Landgrebe against.

Until further notice:

Mrs. Green of Oregon with Mr. Anderson of Illinois.

Mr. Aspinall with Mr. Lloyd.

Mr. Leggett with Schwengel.

Mr. Waggonner with Mr. Spence.

Mr. de la Garza with Mr. Thone.

Mr. Mollohan with Mr. Derwinski.

Mr. Edmondson with Mr. Bray.

Mr. Macdonald of Massachusetts with Mr. Gubser.

Mr. Rooney of Pennsylvania with Mr. McClure.

Mr. Dulski with Mr. Pirnie.

Mr. Dingell with Mr. Clancy.

Mr. Baring with Mr. Halpern.

Mr. Abourezk with Mr. Shriver.

Mr. Hébert with Mr. Collier.

Mr. Hawkins with Mr. Bob Wilson.

Mr. Miller of California with Mr. Pelly.

Mr. Giaimo with Mr. Young.

Mr. Gettys with Mr. Davis of Wisconsin.

Mr. Clark with Mr. Don H. Clausen.

Mr. Stuckey with Mr. Steiger of Wisconsin.

Mr. Runnels with Mr. Kee.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.