MYTH, RHETORIC, AND REALITY:
THE EQUAL RIGHTS AMENDMENT

BY

GARY LEE CLINE

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THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

Gary Lee Cline

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Instructor in Charge

APPROVED

Acting HEAD OF DEPARTMENT OF
I. INTRODUCTION

I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is that they will take their feet from off our necks.

Sarah Grimke, 1837

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

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

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

Proposed 27th Amendment to the United States Constitution

Although the proposed Equal Rights Amendment was presented to the states some 135 years Sarah Grimke made her plea, its purpose is to help take the foot off the neck of woman-kind. This paper will attempt to cut through some of the popular rhetoric about ERA and see just how well the amendment is likely to accomplish its purpose and finally allow the ancestors of Ms. Grimke some degree of equality.

The rhetoric dissecting process will progress through three distinct stages, each of which will comprise a separate section of this paper. One section will attempt to determine what the extent of the problem of sex discrimination really is; another will answer some of the arguments against equal rights and formulate some in support of the position; and the third will look at the limitations and possibilities of the Equal Rights
Amendment with regard to one issue, namely affirmative action. Hopefully, this will at least allow the reader to more objectively draw his own conclusions, if not convince him to accept the ones offered here.
II. SCOPE OF THE PROBLEM

A. Introduction

A good starting point for any discussion of the Equal Rights Amendment is an attempt to define the problem that the amendment is supposed to solve, for if you have no problem, no solution is necessary. While the actual scope of sex discrimination is unknown and probably unknowable, this does not mean that the problem is too small to measure. On the contrary, it is probably too large to comprehend. Most forms of discrimination do not lend themselves to precise measurement, instead they are present in the subtle attitudes of the culture. Throughout this entire work, it will be argued that these attitudes and the myths about the role of women in society which result from them are central to the controversy over the proposed 27th amendment. The areas of discrimination which will be described shortly can be viewed as applications of the attitudes in everyday life; the rhetorical discourse which arose in reaction to the proposed amendment is best described as an attempt to preserve old attitudes; and the ERA itself is both a result of changes in women's roles and an impetus to further change.

The attitudes about which I am speaking did not appear over night, they actually predate the founding of this country. English Common Law, a system of law which relies on the precedents established in past judicial decisions as guides for determining the outcome of present cases with similar facts, is the source of this country's attitudes towards women. Under Common Law, a married woman could not, without the consent of her husband, bring suit in her own name; she could not enter into a binding
contract; nor could she own property. In effect, she had no legal existence separate from her husband. The presumption was that a wife would assist her husband in any way she could and that these services would be considered as gifts.

The fact that these restrictions seem to apply only to married women and not to women in general might suggest that the Common Law did not contribute to the present attitudes about the rights of women, but only to the attitudes about the relations between husband and wife. A closer look at the prevailing conditions in England at the time that the body of law relating to the rights of married women developed and a present-day analogy to the situation will serve to show that the attitudes are simple sex discrimination. Originally, the limitations on the legal capacity of married women to contract, sue, and own property were also placed on minors, both males and females. Theoretically, a female could exercise the same rights as a man from the time she reached the age of majority until she married. The reality was that girls were married at very young ages during this period in England. Marriage often took place before a female reached majority and she never had equal rights. This situation is analogous to others where courts have struck down statutes as being unconstitutionally discriminatory because they granted some right or privilege to males and females at different ages.

Though these notions are of English origins, they unfortunately did not die out when America severed its ties with that country. In fact, one of the authors of the Declaration of Independence, Thomas Jefferson, is quoted as saying:

Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of
moral and ambiguity of issues, should not mix promiscuously in of men.

That a man so committed to liberty could utter such a blatantly sexist remark gives some indication of how deeply ingrained these attitudes were even 200 years ago. Nothing changed dramatically in the 100 odd years following Jefferson's statement.

In 1873, the Supreme Court hears the now famous case of Bradwell vs. Illinois, which denied women the right to practice law in that state.

Here is the Court's rationale for the denial:

The claim that under the fourteenth amendment . . . , that the statute law of Illinois . . . can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It cannot be affirmed . . . that this has ever been established as one of the fundamental privileges of the sex. On the contrary . . . the natural timidity and delicacy which belongs to the female sex evidently unfit it for many occupations of civil life.

Admittedly, things have changed a great deal since Myra Bradwell's time, but one should not dismiss an old precedent such as this for a lack of applicability in the modern context without first looking further into the judicial history of sex discrimination. Such a search will reveal that the 19th century attitudes found in Bradwell are still prevalent today.

The Bradwell case was the first in a long line of cases in which the Supreme Court was asked to decide whether or not a practice was unconstitutional under the 14th amendment because that practice discriminated against women. As late as 1948, Felix Frankfurter, another liberal, was carrying on in the tradition of Jefferson. Speaking for a majority of the U.S. Supreme Court, Frankfurter said that the state of Michigan
could, beyond question, forbid all women from working behind a bar because allowing them to do so could cause "moral and social problems" which a legislature has a right to prevent. 7

Common law attitudes were still so prevalent as recently as 1961 that the Court could rule that a state could automatically exclude women from jury lists because they were presumed to be needed at home. To quote:

Despite enlightened emancipation of women from the restrictions of bygone years, and their entry into many parts of the community life formerly considered to be reserved for men, woman is still regarded as the center of the home and family life. We cannot say that it is constitutionally impermissible 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. 8

Finally, in 1971, the long series of defeats for women seeking equality under the 14th amendment was broken. In that year, the Court decided that statutory preference for men over women as administrators of the estates of persons who die intestate was an unconstitutional denial of equal protection of the laws. 9 The classification was arbitrary and unreasonable because it automatically assumed that women were inferior to men as administrator... and did not judge them on an individual basis.

Since the Reed case the court has moved to strike down some forms of sex discrimination, but the old Common Law attitude is still evident. For example, Hoyt was overruled in Taylor vs. Louisiana 10, but in Kahn vs. Shevin 11 the Court saw fit to uphold a Florida law which gives a tax break of $500 to widows but not widowers. The implication is that widows, being females, need help because as a class they are less able to support themselves than are those males whose spouses have died.
This brief history of sex discrimination before the Supreme Court serves a dual purpose. First, it provides a sample of the subtle and complex forms which sex discrimination can take on. In the cases discussed above it is not always obvious how women are being discriminated against and there are always other issues intertwined, but the major element is unequal treatment of women. The second purpose of the history discussion is to show that although the common law and nineteenth century attitudes are not as strong as they once were, they are still present.

There is one drawback to such an approach. It assumes that the Supreme Court is the only institution in the United States still perpetuating the myth of female inferiority. In a way it is. As final arbiter of which laws are unconstitutional and which are not, the Court could use its power of judicial review to put an end to a large part of the myth. It has not done so. As a result, a number of other institutions perpetuate the myth by passing laws or setting up regulations and there are a number of forms of discrimination which cannot be discovered by reading the decisions of Supreme Court Justices.

Some of these areas are employment, credit, income security, probate, the military, insurance, and criminal justice. It is not claimed that these are the only areas in which the myth still exists, nor that the institutions behind them are the only ones still perpetuating it. It is only hoped that they will give some indication of its pervasiveness even today. Of the eight areas, discrimination in employment of course has gotten the most publicity. It is also probably the most serious. Before getting into any comparison of women and men in the labor force, let us first look at how the myth that a woman's place is in the home has functioned to keep women out of the labor force altogether.
B. Employment

In 1973, 79.5% of the male population over age 16 was in the labor force. This compares with 44.7% of the similar female population. 77.2% of the female nonparticipants gave home responsibilities as the reason for their nonparticipation. Only 1.6% of the males surveyed gave the same response. It seems the only a man could get out of the role of provider was to retire. 40.8% of the male nonparticipants gave this response. The myth is so deeply ingrained that both men and women seem to adhere to it.

Women who do enter the labor force usually go into fields in which they are not in competition with men. In 1960, one quarter of the women in the labor force were employed in one of five job categories. Each of these categories had 95% or more of the available positions filled by females. Women, in turn are almost excluded from other job categories such as electrician, plumber, and upper level white collar and professional jobs. It is significant that these "male" jobs are more lucrative and stimulating than the "female" jobs, which tend to be low paying and repetitive. According to more recent statistics, this situation remains much the same.

Of course, this job segregation may not be due to overt discrimination. The male jobs described above all require some level of skill or education, so it is possible that females just do not have the qualifications to enter the fields. Overt discrimination or not, the myths are still at work. To see that this is so, one need only ask the question why women don't have the qualifications to be plumbers, electricians, professional managers, doctors or lawyers. The answer is that as children they
played with dolls instead of Erector sets; they were the nurses instead
the doctor; and they bought the groceries at the play store instead of
selling them. The example may be somewhat facetious, but it illustrates
the point. Almost from the day they are born, women are taught not to
compete with men and to conform to traditional roles.

Fortunately, this socialization of women is not effective in all
cases and a significant number of women do compete directly with men in
the labor force. Paul Samuelson, an economist, makes an interesting com-
parison between the incomes of a group of these women and their male
counterparts. Samuelson tells of going to his wife's 25th year class re-
union at Radcliffe. While there he was able to find the range of incomes
for all his wife's class mates and compare that range with one from the
same class at Harvard. He found that the top women's salaries ended about
where the bottom men's began, this despite the fact that a class at Rad-
cliffe is intellectually equal if not superior to a class at Harvard and
this despite the fact that many of the Radcliffe group had pursued full-
time careers. 17

These differentials at the top levels of income, while shocking,
do not have nearly the serious implications of differentials at the other
end of the income scale. According to a document presented to a Senate
Subcommittee holding hearings on the Equal Rights Amendment during the 91st
Congress, in 1968 52.9 percent of all families headed by a nonwhite woman
and 25.2% of all families headed by a white woman had incomes below the
poverty line. Figures for male headed families were 18.9% (nonwhite) and
6.3% (white) living at or below the poverty line. 18 In the same year, the
median income for full-time, year-round white male workers was $7,870,
while for women it was only $4,580. 19
How much of this differential is due to discrimination and how much can be attributed to things such as educational level and both short and long term work experience is difficult to determine. Some authors put the figure at about 20%; others as high as 30 or 40 percent. What these authors fail to take into account is that women don't have the education nor the work experience because of the socialization factors mentioned above. It is possible to contend that the subtle ways in which women are forced into acceptable roles are forms of discrimination, so that 100% of the income differential between men and women is due to some form of discrimination. Whichever way the situation is viewed, it seems that the myth of female as housewife and mother functions to either keep women out of the labor force altogether or else steers them into low paying jobs and in many cases, to the welfare roles.

C. Credit

Just as women often cannot make enough money to get ahead, they have a difficult time borrowing, or at least a more difficult time than men. This is despite the Equal Credit Opportunity Act of 1974. This Act basically makes it "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of credit transaction." There are several ways in which creditors discriminate, including an unwillingness to count a wife's income when a married couple applies for a loan. Also, divorced, separated, or widowed women often have trouble re-establishing credit in their own names. Reasons for this behavior on the part of creditors are both simple and simple-minded. They make assumptions about pregnancy terminating employment and about single/divorced women being unstable. In addition, married women
have a hard time establishing credit under their own name because they are considered to have become subordinate to their husbands upon marriage. This is a direct extension of the antiquated common law doctrine that forbade married women from owning property. The reasons that this kind of discrimination can still exist despite the Act is that political pressure of the Board of Directors of the Federal Reserve System caused the Board to weaken guidelines it drew up for the enforcement of the Act.²⁴

D. Income Security

Because many women cannot earn enough nor borrow enough money to meet their financial needs, they may have to turn to government income security programs in order to provide for themselves and their families. Unfortunately, women often receive less than equal treatment in this area also. Congressperson Martha Griffiths, in an article in the Notre Dame Lawyer, identifies three different income security programs (Social Security, unemployment insurance, and welfare) and discusses how each operates to the disadvantage of women.²⁵

Griffiths reviews several provisions of the Social Security Act and seems to have no trouble deciding that all do, in fact, discriminate against women. Her assurance is by no means justified. The Act²⁶ is a complex legislative program which can be briefly but inadequately described as determining who receives what kind of benefits and how much each person shall receive. This necessarily involves the creation of different classes of people and inevitably leads to inequities when the classifications are imperfect. Imperfect classifications do not always involve women. Because there are so many different classes, (widows who were
dependent on their husbands, widowers who were dependent on their wives, the deceased husbands of dependent widows, the deceased wives of dependent widowers, and of course any children which might have been born as a result of either kind of marriage) it is often difficult to determine just who is being discriminated against.

Doctrinaire feminists would argue that any inequality which results from a classification by sex is wrong and should be eliminated. This is the position that Griffiths seems to be taking. However, courts in general and the Supreme Court in particular have refused to adopt this reasoning. Instead they have looked to the legislative history of the Act for the purpose of a challenged imperfect classification as well as who is benefitted/burdened by it before ruling on its constitutionality. Which approach to judging Social Security benefit distribution formulas and other programs which purport to make up for past economic discrimination suffered by women is a difficult question, and not one entirely appropriate to a discussion of the scope of sex discrimination. It will be taken up again in the last section of this paper, and is only mentioned here to prevent the discussion of the inequities of the Social Security system which follows from seeming simple-minded.

Of the six aspects of the Social Security Act which will be discussed here, three come from the Griffiths article cited above, and three were the subjects of recent Supreme Court cases. One of the ways which Griffiths says the Act operates to the disadvantage of women is that a full-time homemaker can never qualify for Social Security in her own right. She can only receive benefits because of her dependent relationship with her husband. This totally discounts the wife's contribution to her family's standard of living by providing services which would
otherwise have to be purchased. Even if a wife does work outside the home and pays Social Security all her life, she may never receive any more in benefits than she would have been entitled to from her dependent's allowance. The only way she could receive more is if her total earnings were greater than her husband's, which, in light of the income statistics quoted above, is unlikely. Finally, according to Mrs. Griffiths, a retired couple where both spouses have worked may get less in benefits than a retired couple where only the husband has worked and has managed to earn as much as the combined earnings of the first couple. These three examples show that Social Security provides an incentive for women not to work, but to stay at home and fulfill her "natural" duties as wife and mother, yet the drafters of the Act did not think that these duties were worthy of compensation.

Oddly enough, all three of the recent Supreme Court cases challenging provisions of the Social Security Act were brought by men. Weinberger vs. Wisenfeld 28 successfully challenged a benefit distribution scheme which made payments to the wife but not the husband of a deceased wage earner. According to Justice Brennan, such a scheme was irrational because its purpose was in no way premised on special disadvantages of women. Califano vs. Goldfarb 29 similarly found unconstitutional a denial of benefits to a widower unless he could prove that he was dependent on his wife for at least half of his support. Doctrinaire feminists probably were unhappy with the Supreme Court's most recent decision involving the Social Security Act. Women's benefits are computed by a more lenient formula than are men's under Section 215(b) of the Social Security Act, 42 USC section 415(b). The Court upheld this provision in Califano vs. Webster, 30
saying that the purpose of the section was to remedy discrimination against women in the job market and that this was a legitimate purpose. The fact that Congress changed its mind in 1972 and made computations the same for men and women had no bearing on this decision. These three cases show that some steps have been taken toward eliminating inequities in the Social Security system, but there may be a limit to how far the Court is willing to go.

Discrimination is also prevalent in government unemployment insurance programs. According to Margaret Dahm, Director of Research and Actuarial Services, Unemployment Insurance Service, U.S. Department of Labor:

Unemployment Insurance discrimination against women has its roots in . . . the concept that it is really a man's responsibility to take care of his wife and family, and that woman's unemployment is just not very serious—in fact, that much, if not most, of it is voluntary.\textsuperscript{31}

Specific examples of discrimination show up in statutes limiting the benefit rights of pregnant women; those denying benefits to those who leave work for marital or domestic reasons even though the person might be actively looking for work (the burden of these laws falls heaviest on women who leave work to take care of a sick child); and the denial of benefits to a woman who leaves her job to follow her spouse to a new location (as she is legally bound to do in most states).\textsuperscript{32} These types of discrimination are not discriminatory on their face, but do have that effect.

Discrimination in welfare programs stems from the basic assumption on which they are founded, and that is that the father in a family is the breadwinner. The myth is that women should be protected and man is her protector, has a correlate that says no "man" needs welfare, almost by definition. In practice this assumption and this myth results in a complete denial of AFDC benefits to families with two able-bodied parents
in 27 states and a denial to similar families in the other 23 states unless the father is unemployed. Two-parent families where only the mother is employed are still eligible for AFDC payments in this latter group of states. In addition to the prerequisite that a father be unemployed for his family to be eligible for AFDC payments, he must also not be receiving unemployment insurance. This restriction does not apply to one-parent families where a woman is more likely to be the head. A final example of sex discrimination in welfare programs is in federal job training programs. The Work Incentive Program (WIN) is supposed to provide job training and employment services for AFDC recipients. Although women constitute over 90% of the parents receiving AFDC, they comprise only 60% of the WIN enrolles. The reason is that fathers are given first priority for enrollment and women have to take the places which remain. The net effect of these discriminatory practices is to almost compel a woman to leave her husband in order to feed herself and her children. This completely defeats the stated purpose of AFDC, which is to promote family stability.

E. Probate

Sex discrimination also exists at the other end of the socio-economic scale. If a woman and/or her husband should be able to amass enough wealth during their lifetime to leave an estate upon death, a woman might still be put at a disadvantage. According to a case discussed in *Sexist Justice* by Karen DeCrow, some courts will apply a stricter standard of testamentary capacity when a woman makes a bequest than when a man does so. This is especially true if the woman displays some feminist tendencies and leaves all her worldly possessions to an organization
such as the National Women's Party, as Louisa Strittmatter did. Should a man die and leave his estate to his wife, there is no reason to believe that she will actually have control of it. On the contrary, the law makes it easy to see that the opposite is true. The husband will usually appoint someone to serve as executor who will dole out the estate according to the provisions of the will, and the executor will almost invariably be a man. Under this type of arrangement the wife will be comfortable but will have no real financial freedom. Until 1971, if a husband failed to appoint an executor, the state would appoint someone, usually a man, to do the job. In many western states, which have community property laws, the husband and wife are considered joint owners of all property acquired after marriage. This arrangement sounds beneficial to women until you consider the fact that the husband is normally the manager of the property and can transfer it during his lifetime without the consent of his wife.

F. The Military

Armed Forces regulations are a fifth area of sex discrimination. Several practices have been challenged in the courts, but many others remain. The military is in the process of re-evaluating these. Joan Krauskopf explains why:

Largely because the military expects ratification of the Equal Rights Amendment, much of (the discriminatory treatment has been undergoing change recently, but numerous vestiges still remain.

Let us first review the court cases, and then do a more general review of the remaining practices. In a now famous case, Frontiero vs. Richardson, a female Air Force lieutenant successfully challenged the Air Force
practice of automatically granting certain services to the wives of members of the uniformed services, but requiring a female member to prove that her husband was dependent on her for at least half of his support before he could receive the same benefits. Another seemingly discriminatory practice was upheld in a 1975 case, Schlesinger vs Ballard. This time, a section of the United States Code provided for the mandatory discharge of a male naval officer who was passed over for promotion twice in a nine year period. Another section provided essentially the same thing for women, except that the period was 13 years. The Court ruled that since men and women in the Navy are in substantially different positions, the differential treatment did violated neither due process or equal protection. This case was brought by a man who thought female officers were benefitted by the practice. This may not be the case. A woman has challenged the statute, claiming that it allows a female in the Navy to be discharged without even being considered for a promotion. It seems that male officers are reviewed periodically to see if they are worthy of promotion, but there is no such mandatory system for women.

An article in The Yale Law Journal provides an excellent review of the discriminatory practices which are either currently being re-evaluated by the military or which have already been reassessed. The article separates the practices into three categories, those which effect enlistment, those which effect promotion, and those effecting discharge. Until 1967, sex discrimination in enlistment consisted of a statutory limit on the percentage of females in the Armed Forces. This has since been lifted in all branches except the Army, but less direct restrictions still operate. These include a high minimum age requirement as well as
stricter education, aptitude, and physical standards. One of the promotion inequities was discussed above along with the Ballard case, but others include higher education requirements for women to get into Officer's Candidate School, limitations on the occupational specialities open to women, and "separate but equal" promotion lists for the Women's Army Corps. A female in the service may be terminated (married or not) if she is or becomes the parent of a minor child while in the service, and termination of the tour of duty can occur as soon as the woman becomes pregnant. Also, the retirement age for Lt. Colonels in the male Corps is at age 60, while for Regular Army and WAC officers it is after only 30 years service.

G. Insurance

The insurance industry is another major source of unequal treatment for women. There are, of course, several different kinds of insurance. For instance, there is disability income, medical care, annuity, and life insurance. There are also several sex differentials involved in each kind of insurance. Because this discussion is not as concerned with insurance per se as it is with sex discrimination, each of the four kinds of insurance will be discussed only as they relate to different premiums paid by men and women, different underwriting practices for the two sexes, and the policy terms and conditions available to males and females who wish to purchase insurance.

The following table will illustrate the premium differentials paid for disability income insurance by men and women.
<table>
<thead>
<tr>
<th>Company</th>
<th>Male Premium</th>
<th>Female Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prudential</td>
<td>$355</td>
<td>$626</td>
</tr>
<tr>
<td>Equitable Life</td>
<td>429</td>
<td>676</td>
</tr>
<tr>
<td>Mutual of New York</td>
<td>508</td>
<td>704</td>
</tr>
<tr>
<td>Allstate</td>
<td>320</td>
<td>490*</td>
</tr>
</tbody>
</table>

A comparable male and female attorney purchasing disability income insurance with a maximum benefit of $1000 per month to life. * indicates that the female was not able to get a full $1000 benefit. Source: Taylor, "Women Insurance Companies are at Fault in Many Things" N.Y. Times Feb. 9, 1974, P. 35 cols. 1-6.

Similar premium differences exist for medical care insurance. Women are likely to pay less for the same life insurance coverage than a man would, but likely to pay more for an annuity policy (which would start paying at age 65).

In underwriting women, many insurance companies use stricter criterion than are used for men. For example, a woman might be required to take a medical examination when a man would not. Also, insurance is not available to women who do freelance work at home or share a professional practice with a spouse, while men in these occupations would be insured. Finally, a woman who wishes to make an initial purchase of an insurance policy may not be able to do so if she is under 25 or over 55. A male wishing to make an initial purchase need only be between 18 and 60.48

Discrimination in policy terms includes making policies which pay larger benefits for longer time periods available only to men; reduction of benefits up to 50% if a female (but not a male) is unemployed at the time of disability; and longer waiting periods for disabled women before they are able to collect. Most disability insurance will not cover pregnancy and often will not cover a woman's disability from medical or
surgical sex-linked disorders. Women may not be able to get benefits for partial disability, indemnification for the hospitalization of a spouse, or a guaranteed increase option.49 These policy limitations apply equally well to disability income and medical care insurance, but not to life insurance and annuity policies. The major discrimination in these latter two kinds of insurance seems to center on the payment inequities, with a few inequitable underwriting practices also existing.

Of course, the insurance industry does have some explanation for its inequitable treatment of women. Higher premiums for disability and medical care insurance are justified with statistics that show that women make more claims. Lower life insurance premiums for women are based on assumptions that women will live longer and pay more into a policy. Higher annuity payments are charged to women because it is assumed that they will live longer after 65 and be able to get more back out of a policy than a man would. The unequal treatment of women in underwriting practices and available policy terms is claimed by the industry to be a legitimate way to shrink the pool of insureds, to avoid paying some benefits, and to increase profits. Women are selected as the group to carry these burdens because they are readily identifiable, they do not really need insurance, and if they do get a policy, they are likely to abuse it by applying for benefits when they do not deserve them. Gender is probably statistically correlated with the extent of risk involved in insuring, but unlike some other criterion, the causal link between gender and risk is less than clear. The exact same statement could be made about race as a factor in the quality of insurance one could, but no one would advocate the use of that characteristic,50 so the sex-based inequities in the insurance
must be attributed to a desire on the part of the insurance industry to perpetuate the old myths about a woman's role in order to reap increased profits.

H. Criminal Justice

Sex discrimination in the criminal justice system, the final area that will be discussed, takes on many forms. These include different sentences for men and women for the same crime; poorer quality penal institutions for women or ones which isolate them from their families due to their location; and crimes such as prostitution which are often only enforced against women when men play an equal part. However, rape laws are by far and away the greatest source of discrimination against women in the criminal justice system. It is not rape laws themselves that are so offensive, although some have argued that the exclusion of women as violators of statutory rape laws is unconstitutional, but the procedures which are followed at rape trials that create the inequities. As an example, a rape victim may have her past sexual activity introduced as part of the defense of her alleged attacker. She must also prove that she resisted the attack. She must also pay for a medical examination which will provide the prosecution with much of the evidence it will need to obtain a conviction. Rape is the only crime to which these rules apply. A person's financial records would be irrelevant in the trial of someone accused of robbing him, and the robbery victim would never have to show that he resisted his assailant. On the contrary, police often counsel citizens not to resist in order to reduce the chances of bodily injury. These burdens placed on the woman plus the requirement that she pay for her own medical examination result in a woman not only having to defend
herself at the trial of a person who allegedly victimized her, but she must perform part of the prosecutor's duties also. Ohio and at least five other states have made some steps to change this situation, but women are still disadvantaged in the rest of the country.

I. Conclusion

In sum, it can be seen that sex discrimination is not limited to a specific area such as employment, rather it is prevalent throughout all aspects of society. Nor are all forms of sex discrimination on the verge of being eliminated. The common law attitudes which were the breeders of unequal treatment for women are slowly changing, but the change is not coming fast enough. Passage of the Equal Rights Amendment could speed things somewhat, but vestiges of the myth of females as the weaker sex which must be protected add fuel to the opposition to ERA. The vestiges take the form of arguments against the amendment which are based on the old attitudes. Let us now review some of these arguments and try to answer them.
III. ARGUMENTS PRO AND CON

A. Introduction

I believe that it is important to include a section such as this, despite its negative tenor, because it is these arguments which instill fears in the minds of state legislators, keep them from ratifying the ERA, and perpetuate the myths. Most people find discrimination of any kind offensive; evidence of sex discrimination in all its many forms can be readily documented; and most rational people will accept this documentation, so the fears and reservations about the ERA (as demonstrated by the arguments against it) are the main obstacle in the road to ratification. This is not to say that once the ERA becomes part of the Constitution that all forms of discrimination and all of the antiquated notions about the role of women in society will suddenly disappear. On the contrary, that this notion should take hold is one of the greatest fears of the proponents of the amendment. The ERA would only be a preliminary step, but it would also be a mandate for all change to follow.

I have grouped the various arguments against the ERA under four main headings: (1) "We have the tools to fight discrimination, we just need to use them"; (2) "Other means of ending sex discrimination will be better in some way"; (3) "Not all women want the ERA"; and (4) "The detrimental side effects of the amendment will outweigh any of its possible benefits." It will become apparent that these categories are not exclusive, and that an opponent of the ERA would not want to put forth all of these arguments in the same setting. It is not surprising that many of the arguments against the ERA are in conflict, especially when
one considers the diversity of the groups opposing. The Catholic Church would certainly not be expected to oppose it on the same grounds as the American Communist Party. I have chosen the arguments purposely to show this diversity. The pattern of organization was chosen both for simple administrative convenience and to attempt to show a common bond between all the groups in opposition to the ERA. That common bond is the motivation to perpetuate the myths pertaining to the role of women in society.

B. "We have the tools to fight discrimination, we just need to use them"

The existing tools which some opponents argue could be used to adequately fight the denial of equal rights to all, regardless of sex are of two types: Constitutional and statutory. The constitutional tools come mainly from the 14th amendment, although sometimes the 5th and 13th amendments are also invoked. The relevant clauses of the 14th amendment are:

No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I have already spoken briefly of this argument when describing the history of sex discrimination in this country. Undoubtedly, these clauses, especially the equal protection clause, could be used to eliminate all kinds of sex discrimination. The problem is that they haven't been, and probably won't be. The reason is twofold. First, neither the Supreme Court, nor any other court hears about all the kinds of unequal treatment women receive before the law. A large number of discriminatory laws go unchallenged because women do not know they are being discriminated against. A woman has always just taken her husband's name without
questioning why. She has been conditioned to be deferential. Also, the
dismal record of cases of sex discrimination argued on an equal protec-
tion theory may have what former Justice Douglas called a "chilling effect"
on challenges to laws and practices that could be identified as discrimina-
tory. What I would rather imply than state at this point is that the
ERA would raise women's consciousness about hitherto unnoticed forms of
discrimination, and reduce their reluctance to go to court to seek relief
from this unequal treatment.

In the present state of things, there is no guarantee that the
Court will hear a sex discrimination case brought before it. For almost a
century and a half after its first session, the Supreme Court heard and
resolved every case it was asked to review. By 1925, the workload was
getting too heavy, so Congress gave the Justices the authority to handle
their own calendar, and to screen out those cases they did not consider
sufficiently important to warrant their time. In one respect, this dis-
cretion is necessary. Many petitions brought before the Court are hand
written documents drafted by inmates in prison law libraries, or from
irrate land owners who have been involved in eminent domain proceedings
and have their land condemned. These are usually completely without legal
merit. On the other hand, allowing the Court to manage its own docket
leaves the Justices free to dismiss not only trivial cases, but also
those which are politically too controversial or those which are incon-
sistent with the Justices' personal philosophies.

Judicial Restraint is the term that has come to be associated with
this reluctance to hear cases. The opposite of judicial restraint is
judicial activism. A Court with this tendency attempts, through its
decisions to solve some of the problems of society. In order to solve problems, an activist court must first address them. Addressing problems for the Supreme Court means granting writs of certiorari. There seems to be a connection between the political philosophy of the Court, and whether it practices activism or restraint. Political philosophy, of course, falls somewhere on a liberal/conservative spectrum. In this case, liberal and conservative are used in their original meanings. That is, if someone is described as being a liberal, it infers that he is in favor of expanding the role of government and vice versa for a conservative.

Although this discussion might seem only tangential to the topic of arguments against the ERA, it is not. What I am trying to show is that the conservative character of the present Court, while it might not have any bearing on how sex discrimination cases are decided, may have an effect on how much attention the problem gets. A Court exercising restraint will hear fewer cases of all types, sex discrimination included. Since the Burger Court is decidedly conservative, it can be expected to hear fewer cases, and there is, in fact, some statistical evidence to support this notion.

It is doubtful that the ERA will successfully transform the Burger Court from its Conservative/restrained stance to a more liberal/activist one, but the amendment should induce the Court to hear more of a particular type of case. That is to say, with the increased awareness of sex discrimination, greater desire to eliminate it, the proportion of sex discrimination cases the Court is asked to hear will be larger. Given this increased input, plus the pressure to interpret a new constitutional amendment, the Justices would have to give sex discrimination
cases a priority among the cases they do hear.

Until now, the fact that the Supreme Court does hear some sex discrimination cases without the ERA has been ignored. The question is, then, if the problems outlined above were somehow eliminated, could the Equal Protection clause be used to strike down practices that treat people differently solely because of their sex? The answer seems to be no. The reason is the standard of review the court decides to apply to cases of this type. Ordinarily, the action of a legislature is given great deference. The Court will find a practice to be valid and sustain it if the State can show that it is rationally or reasonably related to some legitimate purpose. This is a very low standard of review, and as can be expected, almost any practice judged by it will be sustained.

However, there is another standard by which the Court measures the validity of state practices. This standard is called strict scrutiny. According to this formula, for a statute challenged as being discriminatory to stand, it must be shown to be clearly related to some compelling State interest. While the wording of this test is not that much different from the first test, in practice it has produced almost opposite results. Invocation of the strict scrutiny test has meant almost certain death for a challenged practice.

The Court reserves the use of the higher test to situations where either some fundamental right is involved, or the practice separates the population into groups that the court has found to be automatically suspicious with regard to the denial of equal protection. There are basically two kinds of fundamental rights: those found in the Constitution and those inferred by the judiciary. Some fundamental rights found in the
Constitution are the First Amendment freedoms of speech, religion, and association; the 4th amendment guarantee of freedom from illegal searches and seizures; and the 6th amendment right to an attorney. Two fundamental rights which do not actually appear in the Constitution, but have been inferred from it are the right to travel and the right to privacy. Several classifications which the Court has found to be suspect are race, creed, color, or national origin.

This discussion is a preliminary to the statement that if the Court could be convinced to employ strict scrutiny in all sex discrimination cases, that the 14th amendment equal protection clause would, indeed, become a useful tool in eliminating unequal treatment of women. However, it is unlikely that this will be done. Although there are fundamental rights other than the ones mentioned above, the right to work, the right to equal pay, to equal access to credit, and the right to equal benefits from government income security programs and from employer insurance/pension programs are not among them. Many of the rights women are deprived of simply are not fundamental. Therefore, the strict scrutiny test would not be invoked to decide cases in those areas.

However, if the Court were to declare sex a suspect classification, the equal protection clause would become a much more effective tool. It could be applied to all rights, fundamental or not, that are being deprived or granted on the basis of sex. There is little hope that this will occur. The Supreme Court has never had a majority of Justices agree that sex is a suspect classification. Four is the greatest plurality. Some have argued that this refusal indicates a reluctance on the part of the Court to undertake the difficult task of re-examining
the legal doctrine surrounding the sex roles in society. According to Justice Powell, in his concurring opinion in the *Frontiero* case, the Court has not declared sex a suspect classification because it should not assume "a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed (Equal Rights) amendments." Mr. Justice Powell might as well have said that under the 14th amendment, that sex would never be suspect. He did say that it would never be so long as the ERA was being considered. If the ERA is ratified, then there will be no need to base sex discrimination cases on equal protection grounds. If it is not, then in all likelihood, the Court will infer from the failure to ratify a desire not to have sex classifications leveled suspect.

Not only is Justice Powell saying more than he appears to be, but he is going directly against principles which are the very foundation of the Court. As James Iseman has argued:

If the Court intends to await the Equal Rights Amendment, and is simply stalling, as the *Frontiero* judges suggested, such action is questionable and certainly contrary to the principles of *Marbury v Madison* (65) which uphold the belief that judicial thought will not be inhibited by tangentially related acts in the political arena.66

To summarize, the 14th amendment is an ineffective tool for dealing with sex discrimination because not enough cases will be generated by it, and because under it the Court is able to refuse to consider sex a suspect classification, thereby making it easy to sustain discriminatory practices (such as that in *Kahn v Shevin*) which if feels are benign or which treat women in the way they "ought to be treated." The ERA would make discrimination more noticeable, and would almost force the Court to
declare sex a suspect classification (as the 14th amendment did with race).

The argument that statutory tools exist to eliminate discrimination is wholly without foundation. It reflects a very narrow understanding of the scope of discrimination. There is legislation on the federal level which deals directly with sex discrimination in employment and tangentially with unequal treatment under employee insurance programs, but that leaves several areas without any statutory control whatsoever. There are even problems with the laws covering employment discrimination.

In essence, there are five pieces of legislation that attempt to deal with sex discrimination in employment. They are The Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964; Executive Order #11375 (1967); Executive Order #11478 (1969); and Revised Order #4 (1971). Briefly, the Equal Pay Act has as its purpose requiring that equal work be rewarded by equal wages irrespective of sex. At first glance, this seems to be a fine goal, but further examination, reveals it to be rather limited. First, as I stated before, almost one-quarter of the female labor force is employed in occupations where the concentration of women workers is 95% or greater. There are no men with which to compare the pay of this large segment of the labor force, and thus the Act doesn't apply. The Equal Pay Act is even limited in occupations where there is substantial integration between the two sexes. There are five elements that must be proven in order to win a case under the Equal Pay Act. You must have male workers; female workers; both doing essentially the same job; both groups working in the same place; and a difference in pay. The third element, doing the same job, is where the loophole exists. Differentials
based on unequal work may be unreasonable, and based on discriminatory intent. Distinctions between one job and another may be rather minor. For example, in September of this year, the 2nd U.S. Circuit Court of Appeals for New York held that Columbia University could pay its female cleaners 45 cents an hour less than its male cleaners because the men were required to lift heavier loads. Dissenting Judge James Oakes found no substantial difference in the overall effort required of the two groups, despite the formal job titles. Despite these limitations, some women have successfully litigated for equal pay under the Act. Winning courtroom battles is small consolation, however, because according to U.S. Representative Martha Griffiths of Michigan, less than one-half of the back pay found by the Labor Department to be owed to women because of violations of The Equal Pay Act has ever been paid. Because of these three factors—the limited number of women to which it applies; the ease with which employers can circumvent its provisions; and the poor record of payment by violators—the Equal Pay Act does not seem to be an adequate tool for eliminating sex discrimination in employment.

Title VII cannot be attacked on exactly the same grounds as the Equal Pay Act. There is no doubt that Title is a much more comprehensive piece of legislation. It has been said of the two Acts:

In contrast (to the Equal Pay Act) Title VII covers a panoply of discrimination practices and can be used to force change in employment patterns where the Equal Pay Act cannot.

However, this is only a broader scope within the limited area of employment. Just as with the Equal Pay Act, Title VII does not apply to most kinds of discrimination that women face.
The main problems with Title VII are administrative. The agency charged with that job is the Equal Employment Opportunity Commission (EEOC).

The EEOC not only has the duty to set up guidelines for the enforcement, but it also performs a quasi-judicial function. That is, all persons who feel they have been discriminated under Title VII must file a charge with the EEOC, and cannot go directly to court. The Commission then waits 60 days until it has the jurisdiction to act on a particular charge. Only then is an investigation begun. Once the investigation is completed, the EEOC takes on the role of mediator. The Commission cannot force a company to reimburse an employee for losses when it finds reasonable cause to believe that discrimination exists. All it can do is make an effort to reconcile the parties. If this conciliatory action fails, then the employee can bring suit in a court of law.

These administrative problems become even more complicated when the fact that the EEOC has a backlog of some 65,000 cases, and the above process can take as long as 3 years. Of course, there are some shortcuts to the procedure. For instance, if the person who feels discriminated against lives in a state or municipality with a law against the practice they are challenging, the EEOC will defer to the state or local agency administering the law. With a lighter load, the local agency may be able to move faster. Another way around the EEOC backlog is to exercise one's automatic right to bring suit 180 days after the EEOC is empowered to act on your case, which is 60 days after you file your complaint with them. The disadvantages of this alternative are, first, an employee would have to hire a lawyer, where he or she would not at the EEOC. Also, a court has the right to refuse to hear a case before the administrative
remedies have been exhausted. The Commission can give an employee a letter giving the "notice of the right to sue," but there are no guidelines for the granting of this notice, and it must be assumed that the EEOC can deny it at will. This presents Due Process problems for Title VII. 75

A third administrative problem with Title VII is that there are certain deadlines, set up by the EEOC, which must be met. 76 These include the requirement that a charge must be filed with the Commission within 180 days of the occurrence of the discrimination, or 300 days if there is a state or local law regulating the challenged action. Also, suit must be brought in court within 90 days of the receipt of notice of right to sue. If these deadlines are not met, it could mean the loss of an otherwise strong lawsuit.

These administrative requirements, because of their complexity, make it very difficult for an employee to successfully combat discrimination. Even though there are ways to get around some of the requirements, the very fact that one must search for loopholes indicates that Title VII is inequitable, and for that reason, not an adequate tool for eliminating sex discrimination.

A final problem with the Title is not administrative, but goes straight to the intent of the legislators who enacted the 1964 Act. The problem I am speaking of is the Bona Fide Occupational Qualification exception to the prohibition of sex discrimination in the Act. This exception, called BFOQ, allows sex to be a factor in employment practices when the fact that the employee or prospective employee is a male will have some direct effect on his or her ability to perform the job. Fortunately, the EEOC has interpreted this exception narrowly, 77 but that is
not the real problem. The real problem is that the legislators who passed the Civil Rights Act of 1964, despite all their good intentions, could not shake the ingrained attitudes that there are some things that women are not supposed to do. This seriously limits the Act's value as a symbol or rallying point, and makes it far inferior to the ERA as a tool for fighting sex discrimination.

The three Executive Orders dealing with Sex discrimination—#11373, #11478, and Revised Order #4—are all subject to much the same criticism as the Equal Pay Act. They are very limited in scope, even within the area of sex discrimination in employment. #11375 provides protection against discrimination by Federal contractors, subcontractors, and on federally assisted construction projects. #11478 extends this to cover all federal employment, and Revised Order #4 requires affirmative action in hiring by federal contractors, subcontractors, and on federally assisted construction projects. In essence what these 3 Orders do is require the federal government to act in the same nondiscriminatory fashion as private employers. While the affirmative action requirement is a step in the right direction, it is hardly earth-shattering.

In fact, the same can be said about all the existing tools for fighting sex discrimination, both the statutory and constitutional ones. They all are or could be helpful in eliminating some form of sex discrimination, but even taken as a whole, they are not sufficient if one wants to really do the job right.

C. "Other means of ending sex discrimination will be better in some way"

The second category of arguments against the ERA can be further subdivided into the argument that statutory reform would be better, and
two arguments why the ERA would inhibit the reform process. There really
is no question that we need to reform our statutes. According to Ruth
Ginsburg, "A Department of Justice computer printout, which is now under
study by the U.S. Commission on Civil Rights, has turned up over 800 sec-
tions of the U.S. Code that contain gender based references. Assuming
that there is a similar number of sex based classifications in each of the
State Codes, that would mean that a possible 40,000 statutes would need
to be reviewed. The key words are "need to be reviewed." There is a great
need for statutory reform, whether or not the ERA is ratified, but my
argument is that without the ERA the job won't be undertaken.

Legislators can be expected to give much the same argument as
Justice Powell in his Frontiero concurrence. The job won't be begun
while the ERA is still pending, and it will be abandoned altogether if
ratification fails. According to Ruth Ginsburg,

...If the Equal Rights Amendment is adopted, the
task of adding and revising particular legislation will
be undertaken in earnest, but absent ratification, legis-
lation may continue to be regarded as premature.

No one argues that the ERA is a panacea, it is merely the first step on
the road to recovery. If the first step is not taken, the journey will
never be completed.

Paul Freund was obviously thinking along the same lines when he
drew this analogy about the choice between legislation and constitutional
amendment as means for eliminating sex discrimination:

The choice resembles that in medicine between a single
broad-spectrum drug with uncertain and unwanted side-
effects and the selection of specific pills for specific
ills.

It seems to me that the choice is really between going to the doctor in
the first place and staying home and waiting for the illness to cure
itself. In going to see the doctor, you do more or less commit yourself to abide by his decisions, and in that way lose some freedom of choice, but by not going to a doctor you run the risk of the disease getting worse or at least never getting any better in exchange for your freedom. The wise choice is obvious.

In effect, what I am arguing is that the ERA and statutory reform can and indeed must co-exist. As a counter to this, some opponents of the proposed amendment argue that the ERA will inhibit rather than promote the needed reform. The two arguments are that first Congress will have less power, and second, that state legislatures will be denied the right to legislate in an area they have traditionally been concerned with.

Various authors, Freund for example, have alluded to the idea that the ERA will reduce Congressional power to legislate equal rights for women, but the idea is most directly dealt with in an article by Emily Calhoun. She argues that it is in the enabling clauses, not in the judicial interpretation of the 13th and 14th amendments, that the power to end discrimination lies. The enabling clauses, which say, in effect that Congress shall have the power to pass such legislation as is necessary to enforce the amendments. Calhoun points to a section of the United States Code, and says that this example of 19th century legislation designed to implement the 13th and 14th amendments, if properly interpreted, could be used to challenge all forms of private sex discrimination. 42 U.S.C. 1985(3) is nearly a statutory enactment of the 14th amendment Equal Protection clause. The difference is that the statute has no state action requirement. In addition, the section fails to state on what bases denial of equal protection of the laws is
prohibited. That is, 42 U.S.C. 1985(3) doesn't say equal protection may not be denied on account of race, color, or creed, let alone sex.

There is some merit in Calhoun's argument. The section she has chosen does show that it is possible to get around the state action requirement in any amendment, be it the 13th, 14th, or the proposed 27th. However her contention that the enabling clauses of the 13th and 14th amendments, but not that of the ERA, can be used to add to or create new antidiscrimination laws simply does not obtain. First of all, these two amendments, and presumably section 1985(3), as well, have been around since the end of the Civil War. No legislation enacted under their enabling clauses has yet been used to substantially reduce the denial of equal rights to women, and there is nothing to suggest a sudden change. Without denying that such legislation could be enacted, I contend that it won't because the Civil War amendments do not apply specifically to women.

On the other hand, the Equal Rights amendment does apply directly to the denial of equal rights on the basis of sex, and its enabling clause is word-for-word the same as that of the 14th amendment. Therefore, even though the 27th amendment would not add to Congress's power to legislate against private sex discrimination, it would not detract from it either. The new amendment would help clarify what Congress can do, and hopefully will provide some impetus to exercise the new-found or newly rediscovered power.

The State's rights argument, of course, has been around since America was just a colony, and has been used in numerous contexts. It is really not one of the anti-ERA force's strongest arguments, and is often
just thrown into a discussion for good measure. Nevertheless, the notion that the States ought to be more or less autonomous from the Federal government does have some appeal, and thus the argument must be addressed.

In the context of the ERA, the state's rights argument focuses on an alleged revocation of states rights to legislate in an area that has traditionally been within their jurisdiction. The area is that of family relations. Specific areas include child support, alimony, property rights, and probate. To say that the ERA will prohibit state legislation/regulation in these areas is simply a distortion of the facts. What the new amendment will do is set up guidelines that states must follow in enacting any legislation, not just that involving family relations. These guidelines will prohibit the denial of equal rights to anyone on the basis of sex. If this prohibition is an infringement of states' rights, then so be it.

D. "Not all women want the ERA"

The third class of arguments against equal rights can hardly be called a class at all. It consists of two versions of a single argument. The argument is that not all women want equal rights. According to the more radical version, a few stringy-haired, braless feminists are crying to ruin things for everyone just so they can drive trucks, join the police department, or do any number of other jobs traditionally performed by men.87 A more moderate version of this same argument would allow that some "normal" women do face discrimination, and that the discrimination is to some extent due to statutory provisions and traditional practices. However, there are a great many other laws, practices, and
customs which protect and benefit women. These should not be sacrificed to aid those who may be inhibited by them.

These arguments have little substance. Those who put them forth shun statistical evidence of logical reasoning. For instance, it would be a simple matter to quote an opinion poll showing that a majority of American women or a majority of Americans oppose the Equal Rights Amendment, but this is not done. Instead, the whole issue is twisted. This line of argument seems to say that a lack of desire for equal rights can be inferred from a lack of exposure to discrimination. Despite these obvious defects, (which will be discussed more fully in a moment) both versions of the argument are persuasive, and thus dangerous to the ratification of the proposed amendment. The paradox of how defective arguments can nevertheless be persuasive is explained by examining the emotional appeals hidden in them.

There are two basic appeals made in both versions of this argument. The first could be described as telling the people what they want to hear. Basic to the nature of Americans is the belief that theirs is the greatest society on earth, and man's last best hope for liberty. Of course, this belief does not allow for the existence of discrimination, which is both a sign of weakness and a denial of liberty. The great weight of evidence which I summarized in the first section of this paper precludes the complete denial of the existence of unequal treatment of women, but it is not difficult to convince someone who does not even want to believe that discrimination exists at all that that which does exist affects only a few people. This situation is very convenient in light of the second emotional appeal made in this argument.
That is, if only a few people are affected by laws which are purported to be discriminatory, but which in fact protect many women, then what the ERA will do is impose the will of a few on the majority. This is completely out of keeping with the basic premise of democracy that the majority rules. If anything fires the blood of Americans, it is advocacy of a position that could be construed as being undemocratic. 89

Because emotion often prevails over reason, these arguments are hard to answer. It is simply not enough to go to a recent Gallup poll that shows 55% of the women in this country and 57% of the total population favoring the Equal Rights Amendment. 90 Statistics such as these are ineffective against the emotional opposition of Mrs. Schlafly and others like her. They have chosen to argue that women don't want equal rights (as opposed to an Equal Rights Amendment) just to avoid having to deal with them. In addition, such anti-feminist rhetoricians can always claim that the people in the sample really weren't committed to their support, and that you must look at who is affected by discrimination to see who wants or doesn't want equal rights.

Although the criticism of sample surveys is valid, the suggested alternative is not. Even given the status quo orientation of a significant portion of the population, it is ludicrous to think that one must feel discrimination to oppose it. An analogy would be a person saying that murder is alright so long as you don't try to kill me. On the other hand, it seems quite logical to assume that if one believes that discrimination is an evil, and one experiences that evil, that one would want to rid oneself of it by the most efficient means available. 91

The next logical step would be to test the results of the Gallup poll by looking at who is likely to be discriminated against. To do this
we must go back to the first section of the paper and reconsider the scope of the problem. 15 million households in the country are headed by a female. All of these women must attempt to function in the areas mentioned above as being sources of unequal treatment for women' there is no man around to do the job. In addition, some women chose to leave the home and enter into "man's world." By 1973, 44.7% of women aged 16 or older were in the work force. Most of these women, at some point in their lives, either have experienced or will experience discrimination with regard to employment, income security, insurance, taxes, and possibly probate. Anyone who is working pays taxes and social security; they will probably buy insurance; and they might be able to accumulate enough in their lifetime to leave an estate.

Obviously, more than a few stringy-haired feminists are involved here. It may be true that something less than a majority of women suffer discrimination because of their sex, but the fact that most of the 44.7% of the women in this country who are in the labor force are discriminated against in some way lends credence to the findings of the Gallup.

An important element is missing from this analysis. Any discussion of equal rights or the ratification of the ERA must take into account the male half of the population. Many of the laws which purport to provide protection or furnish benefits to women are discriminatory simply because men aren't afforded equal benefits and protections. Just as sex discrimination burdens both men and women; so will the ERA affect both groups; and so must the views of men be recognized.

The Gallup poll shows that 59% of the men surveyed favored the ERA. This figure is subject to the same shortcomings discussed above. It is possible that even fewer of the men who said they favored the
amendment actually had strong feelings about it. Since the ERA is so strongly identified with discrimination against women, most men probably don't even stop to consider what it means to them. Their responses can probably be explained in one of three ways: they feel discrimination is inherently wrong no matter who it is directed against; they know a female who has suffered discrimination and are bothered by it; or they are simply giving a socially acceptable response. It is impossible to tell which is the most prevalent reason, but given the sophisticated sampling techniques used by Gallup, one would surmise that it is one of the first two.

The verifying technique used on the women in favor of equal rights is not practicable here. There are several reasons for this. Unequal treatment of men because of their sex is probably rather limited in scope and subtle in form. Burden by a withholding of benefits is not as odious as are the restrictions placed on women. As a result, men are not conscious of unequal treatment, they raise no outcry, and nothing has been done to extract the data necessary to quantify sex discrimination against men. Without the data, one would have to assume that the number of men truly committed to equal rights is small, or else take the survey as valid on its own merits.

Whether the small number of men committed to equal rights combined with the near majority of women constitutes a majority of people in favor of equal rights is debatable, but to me, the question is really moot. As highly as the principle of majority rule is respected in this country, it was never meant to be as absolute as ERA opponents contend. Minority rights have always been considered. According to one author, a protection of minority rights was one of the reasons that this country was founded.
As a minority in the British Empire, Americans had seen their rights, as they regarded them, invaded by a legislature concerned only with the majority's interests.  

In order to protect against the possible future occurrence of tyranny by the majority, the Founding Fathers included such things as the Electoral College in the Constitution, and added amendments such as the Bill of Rights to protect individual freedoms. After the Civil War, the 14th Amendment was added to protect the rights of a black minority. The Equal Rights Amendment is simply an extension of this long tradition.  

It is of little consequence, then, whether a majority of women want equal rights or not. The will of the majority or the minority can only be exercised if it does not unduly burden the remaining portion of society. No matter how many women are not interested in equal rights, denial of them to even one person creates an undue burden on that person. In the opposite case, no one is burdened. No proponent of the ERA would suggest that the laws protective to women, which create what is known as benign discrimination, be done away with altogether. A more equitable solution would be to extend the benefits to males as well as females. There is evidence that this is precisely what will happen, once the amendment takes effect.  

E. Detrimental Side Effects vs. Benefits  
The above discussion may be somewhat misleading. The abolition of protective legislation is not the only burden that ERA opponents claim will be imposed by the amendment. The final segment of this section will attempt to deal with some of these claims. The four arguments which come under the heading of detrimental side effects of the ERA involve the family, privacy, the draft, and crimes involving sex classifications, and how these things will change under the amendment.
The impact of ERA on the family has probably been discussed more than any other aspect of this whole complex issue. This presents yet another paradox. The proposed 27th amendment, like the 14th amendment, contains a state action clause. This means that unless an act of discrimination is supported "by state authority in the shape of laws, customs, or judicial or executive proceedings," the amendment will not apply. Family matters are inherently personal, and therefore not subject to such state authority. So, despite all the speculation, the ERA will have limited applicability.

Limited applicability does not mean complete inapplicability. A survey of the literature reveals at least six exceptions to the non-intervention rule. Three of these: name change, domicile law, and support law, deal directly with the family. Three others, alimony, child custody and child support are more concerned with divorce and the breaking up of a family. Even within these limited areas of state action, the ERA will not have the dire consequences envisioned by its opponents.

At present, most states have statutes which either create an automatic presumption that a woman will assume her husband's name, or else place obstacles in the path of a woman who wants to retain her pre-marriage name. As was shown in a Supreme Court decision which ruled that a state may force a woman to use her husband's name on a state issued driver's license unless she goes thru a name change procedure, these obstacles can be overcome, but only after considerable expenditure in time, effort, and money. These statutes are blatant official sex discrimination because they have no similar requirements for men.
Among the various justifications for the denial of a woman's right to keep her pre-marriage name are 1) to avoid confusion in record keeping; 2) to prevent fraud; and 3) to mitigate a threat to family harmony and stability. The first two are legitimate goals, but hardly outweigh the loss of freedom to a person who is no longer allowed to use the name she was born with. This is especially true since adequate records could be kept, it just would take a little more effort to write "John Doe, son of Ralph Doe and Jane Q. Public" instead of "John Doe, son of Mr. and Mrs. John Doe" on a birth certificate. In the same way, fraud is not really prevented by the statutes. Anyone who would want to assume the name of another in order to obtain some illegal profit certainly would not use their own or a spouse's name. That would almost insure discovery and apprehension.

The third justification is the strongest, and if some threat to family harmony and stability was actually posed by allowing a woman to keep her pre-marriage name, there might even be a compelling state interest in the restriction. A woman's decision to keep her own name after marriage would presumably be made before the legal relationship of marriage is entered into, and would with the consultation and concurrence of the husband to be. If both the man and the woman agree, there is no reason to presume disharmony. Instability of marriages in which the husband and wife don't have the same last name is also mere conjecture. The argument contains the hidden but unsubstantiated premise that any woman who would want to retain the name she was born with is less likely to be a good mother and more likely to sue her husband for divorce. There is just no reason why this should be so.
The term domicile law refers to the requirement in some states that a woman, by law must assume her husband’s domicile as her own. These laws were enacted at a time when a woman was assumed not to have a career of her own. Thus, she was able to pick up and move any time her husband did, and without any subsequent material loss. It too, was designed to promote harmony and stability. Since a husband and wife residing in separate locations is not conducive to family stability, and a wife refusing to follow her husband to a new location, on its face, the law would seem to achieve its stated purpose. The problem is, that things have changed since this type of legislation was created. Women now do have careers. A family may lose a substantial income if the woman has to move. This in and of itself would tend to create instability. In addition, sending a woman to jail for refusing to take up her husband’s domicile, is hardly the way to stabilize and harmonize family relations. Refusal is likely to occur with increasing frequency as more and more women do seek careers outside the home. A more equitable solution would be for the state to cease action in this area altogether, and let couples make these personal decisions themselves. This, rather than some artificial, outside rule would be more likely to result in harmony and stability. The ERA, would provide a mandate for the private and thus no dire consequences would ensue.

Support law is another controversial area. It is contended, by Phyllis Schlafly and others, that the ERA would deny women support, during marriage, from their husbands. Paul Freund sees the amendment as making a husband liable for his wife’s support only if she is physically incapable of doing so herself. Mrs. Schlafly’s contention is simply incorrect, and Mr. Freund’s is based on the erroneous assumption that,
after the ERA takes effect, existing support laws will simply be made applicable to both sexes. This is not true. A Senate Report comes closer to making an accurate prediction of the state of things under ERA. It is worth quoting at length:

... where one spouse is the primary wage earner and the other runs the home, the wage earner would have the duty to support the spouse who stays at home in compensation for his or her duties.104

Mr. Freund negates the contribution of the homemaker, which would be unacceptable under the proposed amendment.

Further evidence that the ERA will not take away a woman's right to support comes from experience in states which have their own equal rights provisions. In Colorado103 and Pennsylvania106, support laws without reciprocal wording were struck down. Later, in Pennsylvania, a law which did not provide "precise mathematical equality," but which did "create substantial right to support in both sexes" was found to be constitutional under the state ERA.109

The prevailing practice in many states in this country is to almost automatically award custody of children, child support and alimony payments to the wife when a couple seeks divorce. The purported purpose is, again, to provide/promote stability. The difference is that it is only stability in the lives of the children, not the family as a whole with which the state is concerned. Two presuppositions, also related to traditional views about the role of women in society are at work here. The first is that a young child's best interest lies with its mother. The second is that to adequately provide for the emotional needs of the children, a mother should receive enough money so that she does not have to work.
The ERA will have consequences for this situation, but the consequences will be beneficial, not detrimental. Due to the particular circumstances of an individual family, the mother might not be best able to take care of the children. The usual cursory examination made at custody hearings might not reveal this. The ERA would require that the father's ability to care for the children be given equal consideration, and their well-being might be increased as a result.

It follows that if a wife is not always awarded child custody, that she should not be given child support, either. Just as ability to provide for the emotional needs of children should be assessed on an individual basis, so should the ability to provide for their physical well-being. Psychological studies have shown that it is the quality, not the quantity of care given children that matters. The parent with whom the children reside should be able to give them the best quality care, but this does not mean that he/she will not work. Support should not come from one parent alone, but should be shared by both according to their ability.

Alimony presents a different sort of problem. It is often set at a level which will allow the wife to live in circumstances to which she is accustomed. This is true whether there children as a result of the marriage or not. It also seems unfair. It should not automatically be assumed that it is the man who was the provider in the marriage, nor that the woman cannot contribute anything to her own support. However, alimony can be justified because while married and taking care of the home, the spouse was unable to develop the skills necessary to get a job that would allow for a life style similar to that enjoyed during marriage.
This must be compensated for. Equal rights would do away with the traditional presumptions and allow for a more equitable assessment of alimony payments, rather than doing away with them altogether, thus disadvantaging women who still perform "traditional" roles.

The argument that the ERA will destroy the right to privacy is, like the argument that not all women want equal rights, an emotional one. Opponents have created visions of men and women going to the bathroom together; naked boys and girls cavorting in the showers after physical education classes; cohabitation in the dormitories at our colleges and universities and in our army barracks. This in turn sent ERA advocates scurrying to the literature on constitutional theory saying, "we don't want it, but how can we prevent it?"

Such relics of the past as the "separate but equal" doctrine were resurrected. This doctrine, originally elucidated in Plessy v Ferguson in an effort to get around the 14th amendment, provided that you didn't have to let the races intermingle, so long as you provided both with substantially the same facilities. It is both unfortunate and curious that the doctrine should now be used by those who would advance the rights of another disadvantaged group by supporting an amendment similar to the 14th. Even if the doctrine's application were limited to the narrow class of facilities involving "private bodily functions," its historical context would be an open invitation to abuse.

A much more satisfactory alternative would be to balance the constitutional right to privacy with those rights guaranteed under the ERA. The result would be much the same as with the separate approach. No one would be forced to go to the bathroom, shower, dress/undress, or
sleep with someone of the opposite sex. The advantages would be that there would be little (or at least less) temptation to extend the exception. Privacy would not apply to things like employment, taxes, insurance, and many of the other discrimination problem areas. Also, the balance between privacy and the FRA would allow for more freedom of choice. If society's mores would change so that co-ed bathrooms became acceptable, there would be no road block to establishing them. While the ERA will certainly not prevent the things its opponents fear (there is nothing to prevent them from occurring without the amendment) it will do nothing to induce them, either.

The next argument in this segment is a little out of date. Fears about women being drafted were at the height just after Congress passed the joint resolution calling for an amendment to the Constitution. At that time, in 1972, we were still at war in Vietnam, and young men were still being drafted. In the intervening time the war has ended and the draft has been suspended. It could be started again at any time, so this argument is still worth considering.

More frightening to anti-ERA forces than the idea that women might be drafted is the possibility that they will be sent into combat. It is very hard to deny that men as well as women have a duty to serve their country in the armed forces. You do not need to fight and die to perform such a service. There are plenty of clerical, administrative, communications, and non-combatant support positions to be filled. The ERA would require that women be drafted, but they could be put in these positions, provided the assignment was made on a sex neutral basis. A sort of negative example would be the setting of physical strength and
endurance requirements for combat positions, with anyone who couldn't meet them being assigned a position at the rear. It is assumed that some men as well as a majority of women would not be able to meet these standards. Drawing from past experience with the 14th amendment, the standards would have to be reasonably related to some legitimate purpose. 112

The final argument in this segment deals with so called sex crimes, and what effect the ERA will have on them. The most serious sex crime is, of course, rape. Others would be prostitution and adultery. In almost all jurisdictions, rape is a crime that can only be committed by a man against a woman. Some states have prostitution statutes which allow prosecution of the "john," but they are rarely enforced or else enforced unequally. 113 It is more socially acceptable for a man to "fool around" so, even though adultery is defined as a married person having voluntary sexual intercourse with someone not his/her spouse, women are more adversely affected by the statutes than men. In addition, a woman who sends her husband to jail for the crime is often left without any means of support, so she chooses to put up with the conduct rather than face economic hardship.

Since the ERA requires equal treatment, and these statutes do not provide it, anti-amendment forces reason that rape laws will become unconstitutional, the incidence of the crime will go up, and the victims will be left with no recourse. Similar predictions are made about prostitution and extra-marital sex. Present laws are undoubtedly unconstitutional, either on their face, or in their application, but the above arguments seem to imply that no substitutes will be found, or at least that there will be a considerable time lag between the striking down of old laws and the drafting of new, sex neutral ones. Neither is true.
Although a myriad of laws will have to be revised after the 27th amendment is ratified, and the job will only be just getting under way when the two grace period is up, there is no reason why criminal laws, especially rape laws cannot be given priority and revised before the two years are up. This would eliminate any time lag.

As for suitable alternatives, legislatures would have two options. They could opt for the reciprocity route similar to that which would be followed in support law. This would mean that rape would be defined as sexual intercourse with another person without the consent or against the will of that person. Prostitution statutes would forbid the paying or taking of money for the performance or receipt of sexual favors. Most adultery laws would not even have to be changed, just enforced equally. A United States District Court case from New Hampshire suggests that the courts would look with favor upon this type of construction, at least for rape laws. *Meloon vs Helgemoe* struck down a statute of that state making it a crime for a male to have sexual intercourse with a female not his wife who was less than 15 years of age because it did not place similar restrictions on females.

The second alternative for new legislation would apply specifically to rape laws and would be similar to the exception made to allow for the right to privacy under the Equal Rights Amendment. Rape could be defined as the forcible (meaning without consent) insertion of a penis into a vagina. By defining the crime in terms of a determinable physical characteristic, a permissible sex classification could be made. Note that only a male could commit this crime. Thus sex crimes will certainly not cease to be crimes if the ERA is ratified, and they can even be written to exclude women as violators.
F. Conclusion

In drawing this section to a close I would like to offer some conclusions about what all these arguments against the ERA have in common and what this means to those who wish to see the amendment become part of our constitution. The common theme is a belief about the role of women in society. Those who argue that there exists adequate tools to deal with sex discrimination, and those that argue that other, less drastic means should be used to combat unequal treatment of women, at least admit that woman's role is changing, but they want to limit or at least postpone the change as long as possible. Those who argue that women don't want equal rights and that the ERA will have detrimental side effects oppose any change, and even go so far as to deny that anyone wants change.

Discrimination is an outgrowth of the common law attitude toward women, and of deeply ingrained myths about women as homemakers, cooks, mothers, etc. The ERA is a result of changes in these attitudes that have already taken place in society, and a signal for future change. Those who oppose it stand in the way of the natural evolution of civil rights in this country. This must be made clear in order to prevent reaction that will not be able to survive the challenges that lay ahead.
IV. LIMITATIONS AND POSSIBILITIES

A. Introduction

There has been much speculation about what the effect of the Equal Rights Amendment will be once it is actually put into practice. Idealistic advocates contend that it will eliminate all forms of unequal treatment. Opponents argue that the amendment will either fall far short of its goal or it will have negative consequences in areas not considered by ERA proponents. Writers with a more realistic outlook concede that the amendment will not erase all forms of discrimination immediately upon becoming part of the Constitution, but they do not fall victim to the unsupported fears of dire consequences of ratification of the amendment. Many of these limitations and possibilities for ERA have already been discussed at least indirectly in answering arguments against the amendment. However, at least one issue concerning the future implications of the proposed amendment has been almost uniformly ignored by writers pro and con of the subject of equal rights. This issue is whether or not compensatory legislation or so-called affirmative action programs for women will be constitutional under an amendment ...ich forbids denial or abridgement of equality of rights on account of sex. Let us consider this very important question in the final section of this paper.

B. Past Performance

The ultimate answer to the question of course lies with the Supreme Court as final arbiter of the Constitution. Some evidence of the
Court's propensity to accept legislation designed to compensate women for past discrimination under the proposed 27th amendment can be gathered from rulings on the constitutionality of such legislation based on the 14th amendment. Several of these cases have been referred to already. In *Kahn vs Shevin*, the Court held that a $500 tax exemption granted to Florida widows but not widowers was not an impermissible classification because the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." Justice Stewart, writing for the majority in *Schlesinger vs Ballard*, stated that allowing women in the Navy to serve longer before mandatory discharge for want of promotion was not "unconstitutional discrimination based on sex." The reason was that "Congress quite rationally believed the longer period of tenure for women officers would be consistent with the goal to provide women officers with fair and equitable career advancement programs." In the most recent case challenging compensatory legislation for women, *Califano vs Webster*, the Supreme Court reversed a District Court decision and upheld a provision of the Social Security Act which provided for a more favorable benefit computation formula to be used for women who reached aged 62 before 1975 than for similarly situated men. In deciding what standard of review to apply, the Court cited *Craig vs Boren*, and decided that the gender classification did withstand equal protection scrutiny because it tended to reduce the disparity in economic condition between men and women caused by the long history of discrimination against women, which is an important governmental objective.

Lower court cases also reflect the tendency to uphold compensatory schemes. A Georgia case ruled that alimony payments to women only are
not in violation of the 14th amendment equal protection clause because they tend to make up for past discrimination and grant the wife her share of the husband's estate. *Gruenwald v. Gardner* [123] held that women may be awarded Social Security benefits at a younger age than men. *Polelle v. Secretary of Health, Education, and Welfare* [124] a 1974 case from the Northern District of Illinois, sustained the same provision, saying:

Reduction of economic disparity between the sexes that is the result of past or present discrimination provided a compelling governmental interest in sustaining the statute.

C. Political Pressure

These cases adequately demonstrate that the Supreme Court is willing to and has upheld legislation which seems to treat women more favorably to make up for less favorable treatment in the past. However, the Equal Rights Amendment may prevent this willingness from being put into practice in the future. There are several reasons for this, some having to do with constitutional theory and others with simple political pressure. Political pressure is likely to come from both the staunch supporters and the hardline opponents of equal rights. Proponents such as Ruth Ginsberg do not favor affirmative action because it is logically inconsistent with true equality of rights. [125] Also, they wish to avoid charges that feminists want to have their cake and eat it, too. That is, they want all the benefits and none of the responsibilities of equal rights. On the other hand, ERA opponents who make these charges are likely to scream "I told you so" if affirmative action programs are sustained under the new amendment. It is possible that if the opposition is strong enough, that Congress would not enact any new compensatory programs for women and that the Supreme
Court as well as lower courts would bow to the winds of public opinion and strike down such programs as do exist now.

D. Constitutional Theory

Even if this pressure is not enough to coerce the Court into completely reversing its stance, it, along with the mandates of constitutional theory will at least force the Justices to take a closer look to see if the programs are truly compensatory or are simply a continuation of the attitudes about the need to protect women. The main change ERA will force on the Court is the standard it uses to review legislation containing sex classifications in general and compensatory legislation in particular. Currently there are four standards to choose from. Two of these, traditional review and strict scrutiny, have been discussed already. A third standard is the one referred to in Craig vs Boren (See fn. 120, above). In order to pass this test, a gender classification must serve some important governmental objective and be substantially related to achievement of those objectives. This test seems to fall squarely between the traditional review requirement that the challenged statute bear some rational relationship to a conceivable state purpose and the burden of proving that the distinctions made in a statute are necessary to further some compelling state interest placed on the state by the strict scrutiny test.

The fourth standard of review has not been articulated by the Supreme Court, but was the subject of a recent law review article, 126 and has been hinted at by several other writers. 127 This standard is the strictest of all, and could be termed "absolute review." This would mean that no governmental purpose would be sufficient to sustain a sex classification. It is unlikely that the Court will ever adopt this test as it
would effectively put the Court in a straight-jacket. It is probable that the Court will have to abandon its middle-level test and strictly scrutinize all sex-based classifications. The test is used when a law involves either a fundamental right or a suspect classification. Presumably the Equal Rights Amendment will make sex a suspect classification. If it does not, the whole intent of the amendment will be thwarted.

Given that once the Equal Rights Amendment takes effect, that strict scrutiny will be used to review all affirmative action plans, what new requirements must the plans meet? First, the language of the statutes creating the plans will probably have to be sex neutral. Remeding the effects of past discrimination, be it economic, educational, or other wise, may be a compelling state interest, but it is not necessary to only give the benefits to women to accomplish this purpose.

Refering back to the first section of this paper, it can be seen that most of the types of sex discrimination which do exist effect men adversely in only a small number of cases. The statutes could be couched in terms of physical stature economic or social status and still accomplish the goal of lessening the effects of discrimination for those women who have felt them.

A related requirement would be that the statutes be sufficiently narrow so that only those women who have suffered discrimination benefit from the programs they establish. This is where most existing compensatory legislation would be inadequate. The Social Security statutes discussed in Section I of this paper apply to all women regardless of whether or not they have been the victim of unequal treatment in the past, *Weinberger v. Mossman* is an example. Statutes of general
applicability are merely expressions of the old stereotypical attitudes about women and would not be permissible under the Equal Rights Amendment. Taken to its logical extreme, the narrowness requirement could necessitate the naming of certain individuals who would receive benefits, but this is unlikely to happen if Congress succeeds in meeting the first two requirements.

A third guideline for the drafting of affirmative action programs is in many ways the most obvious, but also the most likely to be overlooked. Such programs must truly help women gain an equal footing with men and not treat them as inferiors. This requirement, as well as the others, could be met if the legislature will draft all new ameliorative legislation with a degree of care and some forethought as to the implications of the classification to all parties concerned (a woman, her husband, and her children). The problem is not with the courts. They have accepted such schemes in the past, even if they have been imperfect. What Congress needs to do is to turn out more nearly perfect legislative programs so that they will withstand strict scrutiny under the new amendment.

2. Conclusion

In demonstrating that affirmative action programs are constitutionally permissible under the ERA, some hint has been made that they are desirable. The hint was intentional. An aid program implies that the group receiving its benefits is in some need of help, and if a group or individual is in need of help, the presumption is that that group or individual is in some way deficient or inadequate. Inevitably, then, any
affirmative action program, no matter how well it is designed will perpetuate to some degree the myth about female inferiority and thus frustrate the purpose of the amendment. However, expecting women to achieve equal rights in any reasonable length of time without arming them for the fight is about as unreasonable as a Roman expecting a Christian to defeat the lion. If ameliorative legislation is drafted according to the guidelines set down above, the stigma of inferiority will be small, women will be able to obtain some weapons, in the form of skills and educational qualifications, with which to fight for equality, and that goal will be achieved earlier as a result.
V. CONCLUSION

Hopefully, this discussion has provided the reader with some objective information about the proposed 27th amendment. It is an emotional subject, and opinion is often hard to separate from fact. However, it seems certain that the scope of unequal treatment of women is much broader than many would imagine and certainly not limited to discrimination in employment, although that area is also a source of inequality for women. It is also hard to dispute that the arguments in favor of equal rights carry more weight than those against it. Very few, if any, of the arguments against ERA are completely without basis, but the foundation is often only a half-truth which is made much more credible by the emotional appeals made by anti-feminist speakers. Finally, the proposed 27th amendment will not be limited in its ability to make up for past discrimination against women. Programs allowing them to gain the skills, education, etc. necessary to exercise their new-found equality will be possible. In light of these facts, I submit that the Equal Rights Amendment is both the result of and an impetus to changing attitudes about women in this society, and will go far towards truly taking the feet of their brethren off of women's necks.
FOOTNOTES


4. See *Stanton v Stanton* (95 S.Ct. 1373) support for males to 21, females to 18; *Craig v Boren* (97 S.Ct. 451) beer sales to females at 18, males at 21; *People v Ellis* (57 Ill. 2d 127) females prosecuted as juveniles until 17, males until 18. *Phelps v Ringer* (58 Ill. 2d 32) females marry without consent at 16, males 21.


13. Ibid., Table 8, page 47.


19. Ibid., p. 296.


27. See Griffiths, footnote 25.

28. 95 S.Ct. 1225 (1975).


32. Griffiths, 49, Notre Dame Lawyer 534 to 539.

33. Ibid., at 54.

34. Griffiths, at 542.


36. In Reed vs Reed the Supreme Court struck down an Idaho statutory preference for men as administrators of estates of persons who die intestate.


40. 419 U.S. 498.

41. 10 U.S.C. § 6382.

42. 10 U.S.C. § 6401.

43. Two vs U.S. 471 F. 2d 287 (1972).

45. 10 U.S.C. section 3209 set the limit at 2%.

46. 10 U.S.C. section 3848.

47. 10 U.S.C. section 3916.


49. Ibid., at 1385.


52. See Meloon vs Halsmo, a U.S. District Court for the District of New Hampshire case decided on April 21, 1977. See also the Derr article cited above.


55. U.S. Constitution, Fourteenth Amendment, Section 1.


58. As stated before, the conservative Burger court was the first court to strike down a practice that was sex discriminatory on an equal protection theory. Reed v Reed. The same Court has taken further steps in the cases Frontiero v Richardson, Stanton v Stanton, and Taylor v Louisiana, among others. Liberals have not treated sex discrimination cases so well. Two Justices noted for their civil libertarian views, Felix Frankfurter and William O. Douglas, wrote the majority opinions in the Goesaert v Cleary and Kahn v Shevin cases respectively. The language of these opinions epitomizes the myth of female inferiority.


60. See Shaw vs Thompson (394 U.S. 618).

61. See Griswold vs Connecticut (381 U.S. 479).


64. *Frontiero*, at 692.

65. 5 US (10 RANCH) 177 (1803).


68. 29 U.S.C.S. S 206.


74. Ross, p. 765.


76. Ibid., p. 67.

77. According to the EEOC Guidelines, the only two occupations falling under the exception would be a wet-nurse (female), and a sperm donor (male).

78. 32 C.F.R. 14303.

79. 34 C.F.R. 12985.

80. 41 C.F.R. Chapter 60, part 1.


82. See footnote 11.


86. 42 U.S.C. 1985(2).

87. This argument is based on those put forth by Phyllis Schlafly. See Phyllis Schlafly Reports 1972-


89. A parallel would be the sacrificing of free speech to suppress those who would advocate communism, socialism, or facism. See Whitney v. Calif. (274 U.S. 357); Dennis v. U.S. (249 U.S. 211).


91. It is hoped that the other arguments in this section will show that the ERA is the most efficient means.


93. See Footnote #12, above.

94. Two such laws that are known of simply because they have been challenged and sustained are a tax exemption for widows but not widowers (Kahn v. Shank 416 U.S. 351), and a larger period for discharge for non-promotion for women than men (Schlesinger v. Ballard 419 U.S. 498 1975).


96. See EEOC guidelines for the administration of Title VII (Revise'd Title 29 Chapter 14 part 1604, Code of Federal Regulations); Impact ERA: Limitations and Possibilities, California Commission on the Status of Women, p. 14.

97. Lockhart, Kamisar, and Choper, Constitutional Rights and Civil Liberties, Chapter 9, p. 962.


101. This seems to be the case in California, at least. See Juan Krauskopf, "The Equal Rights Amendment: Its Political and Practical Contexts." 50 Calif. State Bar Journal 78 at 139 (1975).
102. See Krauskopf, Cal. State Bar Journal (Fn. 47) at 140.


105. Denver District Court #68844.

106. Pennsylvania Supreme Court #251.

107. Lukens vs Lukens 303 A 2d 523.


109. Evidence that this will happen comes from a recent Maryland Court of Appeals case which held that the adoption of a state ERA required support obligations to be shared equally (Rand vs Rand 374 A 2d 900).


111. (163 U.S. 537).

112. The legitimate purpose would be, of course, getting soldiers who were capable of fighting and winning. Compare Washington vs Davis in which a test to qualify for a position as an officer on a police force was racially discriminatory in effect, but not in intent, was found to be valid. (96 S.Ct. 2040 (1974)).

113. No hard evidence, but it seemed to be the practice of the San Francisco D.A.'s office to let a john off if he would testify against the prostitute. (While I was there anyway).


115. 146 U.S. 351.

116. See Justice Douglas' majority opinion in Kahn vs Shevin.

117. 419 U.S. 498.

118. Ibid.


120. 97 S.Ct. 451, 457 (1977).

121. 97 S.Ct. 1192 at 1194.


124. Civ. No. 73-C-774.


127. Ruth Ginsburg, for example.