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ESSAY

THE SIXTIES SHIFT TO FORMAL EQUALITY AND THE COURTS: AN ARGUMENT FOR PRAGMATISM AND POLITICS

MARY BECKER*

Conventional wisdom tells a simple story of feminism during the first seventy years of this century. As the century opened, the women's movement was single-mindedly focused on suffrage, arguing that women should have the vote both because they are men's equals and because they are different from men in that their finer sensibilities will transform and purify politics. When women finally won suffrage in August of 1920, the coalition of women's organizations that had worked so long and so hard to achieve this goal fell apart from sheer exhaustion.¹

Feminism slept during the next forty-plus years.² The depression saw women forced out of a tight labor market that reserved jobs for male breadwinners.³ The 1940s saw women drawn into and then pushed out of the labor market as men left for and returned from World War II.⁴ The 1950s were particularly dismal

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1. See MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE 14 (1994); JUDITH HOLE & ELLEN LEVINE, REBIRTH OF FEMINISM 13-14 (1971).

2. See HOLE & LEVINE, *supra* note 1, at 14.

3. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 436 (1990).

4. See *id.*

for middle-class white women, who were once more relegated to the domestic sphere and repeatedly told that any well-adjusted woman finds complete happiness and fulfillment caring for her husband and children.⁵

The second wave of the feminist movement suddenly became visible in 1963 with the publication of Betty Friedan's book, *The Feminine Mystique*.⁶ Sameness feminism and formal equality arguments dominated this wave; specifically, the idea that women and men are similarly situated and, therefore, should have the same rights and opportunities.⁷ The second wave lasted until well into the 1980s, when difference feminism suddenly emerged with its emphasis on the differences between women and men and the need to value women's lifestyles as well as men's.⁸

In this essay, I tell a more complicated story about feminism during the twentieth century and about how feminists came to focus so overwhelmingly on formal equality by 1970. Feminism never quite died between suffrage and the second wave, though it did suffer a number of setbacks. From 1920 to 1963, feminists were divided into two hostile camps, one supporting a formal-equality approach—sameness feminism—and the other supporting legislation protecting women in light of their different needs and responsibilities relative to men—difference feminism.⁹ By 1970, however, this difference strand had disappeared. *Everyone* was on the formal equality bandwagon.

In the first section of this essay, I explain this shift. I describe the objections to formal equality at the beginning of the sixties and how those objections disappeared over the next few years. In the second section, I assess the successes and failures of the formal equality approach that has dominated feminism during the second wave. I also consider the extent to which the problems that have appeared were foreseen during the sixties when the crucial shift took place.

5. *See id.*

6. *See* FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960 50-52 (1991).

7. *See id.* at 48.

8. *See id.* at 475-76.

9. *See id.* at 29-34.

In the third section, I consider options for the future. We live in a far different world than did the feminists of 1970. I suggest that in the future, formal equality and constitutional cases in the courts will be less useful and more problematic than they have been in the past. I propose that we use a new Equal Rights Amendment (ERA) to shift to an approach that relies on women's political power to achieve equality rather than on judges enforcing formal equality.

I. THE SIXTIES SHIFT

After suffrage, one group of activists supported a formal equality approach under an Equal Rights Amendment. These women argued that an ERA was necessary to eliminate the many laws discriminating between women and men. At the time, laws routinely discriminated with respect to regulation of employment and families, obligations of citizenship, competency, and age, as well as crimes and sentences.

A few examples from each area will give the reader a sense of the breadth of sex-specific regulation. State laws often specified maximum hours or minimum wages for women workers in general or in certain industries, or banned women from bartending or working in factories at night.¹⁰ Family law was almost entirely sex-specific, with the obligation of support imposed only on husbands and fathers, and a preference for mothers as custodians of children of tender years after a divorce.¹¹ The man's domicile determined the domicile of the family¹² and the man was entitled to the homemaking and caretaking services of his wife.¹³ In addition, many states still denied married women full rights to contract and to convey real property.¹⁴

As full citizens, only men were subject to the draft¹⁵ and could engage in military combat,¹⁶ limiting to men the avail-

10. See BECKER ET AL., *supra* note 1, at 23, 26.

11. See *id.* at 26.

12. See *id.* at 26-27.

13. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 302 (2d ed. 1987).

14. See BECKER ET AL., *supra* note 1, at 27.

15. See *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (noting that because women are not eligible for combat, they are not similarly situated for purposes of the draft).

16. See *id.*

ability of the powerful preferences veterans often received for state employment.¹⁷ Many states also denied women the ability to serve on juries under the same rules as men for years after the extension of suffrage.¹⁸ The law generally regarded women as competent in various areas at younger ages than men: age of majority tended to be lower for women than men, and women were allowed to marry at younger ages than men.¹⁹

Criminal law routinely distinguished between the sexes in rape and statutory rape statutes, which defined rape as something a man did to a woman.²⁰ Often, prostitution statutes made the activity of the sex worker but not the activity of the sex consumer a crime.²¹ Some sentencing statutes imposed harsher penalties on women than men.²² Laws governing places of public accommodation or entertainment often banned women from bars, wrestling matches, and other events.²³ ERA supporters regarded the ERA as important to eradicate these and other discriminatory laws with a single blow.

Many women activists opposed the ERA, however. They worried about the consequences of eliminating all sex-specific family law rules and they supported sex-specific protectionist legislation, especially laws purportedly "protecting" women workers because of their special needs and responsibilities.²⁴ This position seems conservative, even reactionary, today. At the time, though, the anti-ERA position was associated with progressives

17. Cf. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 280-81 (1979) (holding that the state's preference for veterans did not discriminate against women even though the foreseeable result was the virtual exclusion of women from the higher echelons of state government employment).

18. See *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (upholding state statute that automatically placed men on juror rolls but placed only those women who, on their own initiative, asked to be listed on the rolls).

19. See BECKER ET AL., *supra* note 1, at 26.

20. See *Goldberg v. State*, 395 A.2d 1213, 1217 (Md. 1979) (interpreting a traditional rape statute); BECKER ET AL., *supra* note 1, at 26 (describing sex-specific statutory rape laws). A typical statute might provide that "[a] person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person." *Goldberg*, 385 A.2d at 1217. The statute is sex-specific because only men may engage in vaginal intercourse.

21. See BECKER ET AL., *supra* note 1, at 26.

22. See *id.*

23. See *id.*

24. See *infra* text accompanying notes 55-56.

and the ERA position was supported by economic conservatives opposed to government regulation of employment.²⁵

The progressive position opposing the ERA had its roots in opposition to nineteenth-century labor practices. Appalled by the sweatshop conditions under which many immigrants and other workers labored for low wages in American workplaces, reformers began pushing for minimum wage legislation, maximum hour limitations, and other protectionist legislation during the nineteenth century.²⁶ Many of these reformers, like Jane Addams, Lillian Wald, and Florence Kelley, were women who worked in settlement houses providing direct services to people in lower income and immigrant neighborhoods.²⁷ Progressive women coming out of this movement tended to have a strong commitment to legislation that treated women and men differently.²⁸

Indeed, for a few years early in this century, the only constitutional legislation protecting workers applied exclusively to women. In *Lochner v. New York*,²⁹ the Supreme Court in 1905 held unconstitutional a state statute limiting the number of hours employees could work in bakeries.³⁰ Three years later, in *Muller v. Oregon*,³¹ the Supreme Court upheld similar legislation limiting the hours of *women* working in laundries, stressing the importance of women's role as mothers and their special needs for protection.³² In 1917, the Supreme Court upheld a maximum hours law applicable to *all* workers,³³ but progressive reformers continued to see sex-specific protectionist legislation as important because, then as now, women working for wages often worked a second shift at home,³⁴ because some protections had

25. See DAVIS, *supra* note 6, at 31-32.

26. See BECKER ET AL., *supra* note 1, at 13.

27. See *id.* See generally ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 208-15 (rev. ed. 1975) (discussing the role reformist devices, such as settlement houses, had on women's rights).

28. See FLEXNER, *supra* note 27, at 213-15.

29. 198 U.S. 45 (1905).

30. See *id.* at 64.

31. 208 U.S. 412 (1908).

32. See *id.* at 421-23.

33. See *Bunting v. Oregon*, 243 U.S. 426, 433 (1917).

34. See KATHERINE POLLAK ELLICKSON, THE PRESIDENT'S COMMISSION ON THE

as yet only been enacted for women,³⁵ and because some sex-specific legislation was necessary to protect women from work requirements, such as lifting heavy objects.³⁶ ERA opponents also feared that the ERA indiscriminately would wipe out all sex-specific family laws, such as family support laws.³⁷ More fundamentally, to progressives and socialists, the ERA was an individualistic approach that was inconsistent with their basic frames of reference and their analysis of social causes for class problems.³⁸

Protectionist legislation was not entirely bad for women, though much of it was. Laws banning women from certain kinds of employment, such as working in factories at night, hurt women by limiting them to lower paying night jobs such as cleaning offices and hospitals.³⁹ Protectionist laws limiting women's hours in certain industries, however, such as maximum hours limits on women employed in laundries,⁴⁰ probably helped many women in situations in which employers nevertheless continued to employ women. Most women did work a second shift and benefited from laws that prohibited employers from requiring that they work more than ten or twelve hours a day in a laundry.⁴¹

A majority of the members of the suffrage coalition and a majority of politically active women opposed the ERA in the 1920s.⁴² Only "a tiny minority of women activists (primarily from elite backgrounds) were willing to jeopardize what most

STATUS OF WOMEN: ITS FORMATION, FUNCTIONING AND CONTRIBUTION 6 (1976).

35. See *id.*

36. See JUDITH PATERSON, *BE SOMEBODY: A BIOGRAPHY OF MARGUERITE RAWALT* 140 (1986).

37. See ELLICKSON, *supra* note 34, at 6.

38. I thank Caroline Goddard for this insight. For a discussion of how progressive reformers used "gender-specific" legislation as a means of advancing class-specific goals, see Kathryn Kish Sklar, *Why Were Most Politically Active Women Opposed to the ERA in the 1920s?*, in *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* 25, 28 (Joan Hoff-Wilson ed., 1986).

39. See DAVIS, *supra* note 6, at 32.

40. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (holding Oregon regulation promulgating maximum hours for women working in laundries constitutional).

41. See *id.*

42. See Sklar, *supra* note 38, at 25.

women saw as essential protections for female workers and for mothers.⁴³

The National Women's Party (NWP) introduced the ERA.⁴⁴ Alice Paul had organized the NWP during the final drive for suffrage;⁴⁵ it used radical tactics—such as picketing the White House, being arrested, and staging hunger strikes while in prison⁴⁶—borrowed from the English suffragettes.⁴⁷ After suffrage, NWP supported a formal equality approach and an ERA.⁴⁸ Two other large national organizations of elite women also supported the ERA by 1960: the National Federation of Business and Professional Women's Clubs (BPW) and the General Federation of Women's Clubs.⁴⁹ These were sameness feminists, women committed to achieving equality by requiring that laws treat similarly situated women and men the same.⁵⁰

The language of the original ERA read:

Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.⁵¹

Between 1923 and 1943, this ERA was introduced yearly in Congress.⁵² From 1940 on, the Republican party endorsed the ERA because it would eliminate protectionist legislation disliked by business.⁵³ Democrats tended to oppose the ERA because the Democratic party was closely aligned with organized labor, a powerful advocate of protectionist legislation.⁵⁴ Throughout this

43. *Id.* at 26.

44. *See* DAVIS, *supra* note 6, at 29.

45. *See* HOLE & LEVINE, *supra* note 1, at 78.

46. *See* DAVIS, *supra* note 6, at 31.

47. Alice Paul spent several years in England where, when jailed for her suffrage activities, she went on a hunger strike and was forcibly fed. *See* FLEXNER, *supra* note 27, at 263.

48. *See* DAVIS, *supra* note 6, at 33.

49. *See id.* at 33-34.

50. *See id.* at 29, 34.

51. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 8 (1986).

52. *See id.* at 9.

53. *See id.* at 8-9.

54. *See* BLANCHE LINDEN-WARD & CAROL HURD GREEN, *AMERICAN WOMEN IN THE 1960S: CHANGING THE FUTURE* 2-3 (1993).

period, the ERA was defeated by a coalition of social conservatives, which was opposed to change in the status of women, and democrats and progressives, like Eleanor Roosevelt, who feared that the ERA would invalidate sex-specific protective legislation⁵⁵ as well as sex-specific family support laws aiding women and children at divorce.⁵⁶

From the passage of the suffrage amendment through the beginning of the 1960s, these two feminist groups remained firmly opposed to the other's strategy. Three women played pivotal roles in the shift during the sixties from gridlock to agreement on seeking equality through the courts under the Fourteenth Amendment and under an ERA: Esther Peterson, Marguerite Rawalt, and Pauli Murray. Each of these women worked on President Kennedy's Presidential Commission on the Status of Women (PCSW), and the report of that commission was the first step towards ending the gridlock.

A. The Presidential Commission on the Status of Women

The story of the PCSW begins with Esther Peterson. Peterson was born in Provo, Utah, in 1906.⁵⁷ Her parents were immigrants from Denmark; her father was a superintendent of schools and her mother kept boarders.⁵⁸ Peterson went to Brigham Young University and Columbia University's Teachers College.⁵⁹ During the 1930s, she held a number of teaching positions, including one at the Bryn Mawr Summer School for Women Workers in Industry, a program combining "Shakespeare, drama and socialism," according to Peterson's son.⁶⁰ Attendees were garment workers, telephone operators, and milliners.⁶¹ Peterson subsequently worked for several labor un-

55. See BECKER ET AL., *supra* note 1, at 22.

56. See ELLICKSON, *supra* note 34, at 6.

57. See Irvin Molotsky, *Esther Peterson Dies at 91; Worked to Help Consumers*, N.Y. TIMES, Dec. 22, 1997, at B7.

58. See *id.*

59. See *id.*

60. *Id.*

61. See *id.*

ions.⁶² When President Kennedy appointed her Assistant Secretary of Labor and Director of the Women's Bureau in 1961, she was a friend of Eleanor Roosevelt with deep roots in progressive social movements.⁶³

Several pressures led to the creation of the PCSW. Peterson, one of the highest ranking women in the Kennedy Administration, was opposed to the ERA.⁶⁴ For years during the fifties, Congressperson Celler, a Democrat from New York and an ERA opponent, had been urging a national commission on women to produce "a constructive plan . . . that would overcome discriminations, provide necessary services, and be an alternative to the Equal Rights Amendment."⁶⁵ Peterson suggested a commission on the status of women in the hope that it would "substitute constructive recommendations for the present troublesome and futile agitation about the 'equal rights amendment,'"⁶⁶ which seemed to be gathering growing support.⁶⁷ Johnson firmly supported the idea of a commission and helped organize it.⁶⁸ The administration deflected criticism from Eleanor Roosevelt, among others, that Kennedy had appointed few women to top governmental positions despite the support of women activists during his campaign and Kennedy's own promises of equal rights and appointments of women to high positions.⁶⁹ A commission could suggest commitment to women's rights without actually doing anything.

President Kennedy issued an executive order creating the PCSW in December 1961.⁷⁰ Eleanor Roosevelt chaired the commission until her death in 1962.⁷¹ She was a progressive and

62. *See id.*

63. *See id.*

64. *See* PATERSON, *supra* note 36, at 125.

65. ELLICKSON, *supra* note 34, at 5-6.

66. DAVIS, *supra* note 6, at 34.

67. *See* LINDEN-WARD & GREEN, *supra* note 54, at 3. The head of the Women's Bureau under Eisenhower, Alice Leopold, also supported the ERA. *See id.* at 2.

68. *See* PATERSON, *supra* note 36, at 131.

69. *See id.* at 124.

70. *See* DAVIS, *supra* note 6, at 35.

71. *See id.* Johnson supported Roosevelt for the position. Kennedy was not a great fan of Roosevelt and even refused to personally invite her to serve as chair. Esther

had long supported sex-specific protectionist legislation and opposed the ERA, but by the spring of 1961, her position against the ERA was softening.⁷² In a speech that spring to the Lucy Stone League, Roosevelt said: "Many of us opposed the amendment because we felt it would do away with protection in the labor field. Now with unionization, there is no reason why you shouldn't have it if you want it."⁷³

The commission consisted of twenty-six members—fifteen women and eleven men—and included "[c]abinet officers, members of Congress, two college presidents, a magazine editor, labor leaders, the national presidents of several major women's organizations, and Washington attorney Marguerite Rawalt."⁷⁴ Esther Peterson picked the members, almost all of whom opposed the ERA.⁷⁵ Although the purpose of the PCSW was "to undermine" the ERA, Peterson realized it was important to include at least one supporter of the ERA, and that one person was Marguerite Rawalt.⁷⁶

Perhaps the reason Peterson included Rawalt as the lone ERA supporter was the impression Rawalt had made on Peterson when they met in the summer of 1961 at the BPW convention, at which Orval Faubus, the segregationist governor of Arkansas, gave the opening address.⁷⁷ Esther Peterson had agreed to speak at the convention and asked Rawalt if they could meet for breakfast prior to her speech.⁷⁸ When Peterson arrived, "she declared: 'I've come to face my enemies and I'm scared to death. I've come to say why I believe what I believe. I intend to uphold my views on these labor standards laws.'"⁷⁹ This is what Rawalt had feared: that Peterson would focus on what divided women, widening the "long-standing breach between ERA sup-

Peterson performed this function. *See id.*

72. *See* PATERSON, *supra* note 36, at 139.

73. *Id.*

74. DAVIS, *supra* note 6, at 35.

75. *See id.*

76. *See id.* at 34-35. As the executive order that created the Commission proposed an objective evaluation of the ERA, "a number of pro-ERA organizations supported PCSW." *Id.* at 35.

77. *See* PATERSON, *supra* note 36, at 126-27.

78. *See id.* at 127.

79. *Id.*

porters and women from the labor movement."⁸⁰ Rawalt replied: "You will not make any friends with that speech. . . . I wish we could find some other basis[,] . . . something we all agree on. I hope you won't go so strong"⁸¹

They discussed the reasons for their positions on the ERA. Peterson explained that it would take years of litigation and delay for the ERA to do anything for the "women at the bottom," and in the meantime these women "would lose the little protection they had from laws that make it illegal for them to work long hours at jobs that are too hard for them—and poorly paid."⁸² Rawalt insisted that, in the long run, the ERA would help all women and that protective laws often hurt women, keeping them out of the best jobs and preventing them from being promoted.⁸³ She stressed that protectionist laws, not the ERA, were discriminatory and it was discrimination that kept women at the bottom.⁸⁴ Peterson responded that she would continue to oppose the ERA until there were strong minimum wage and equal pay laws.⁸⁵

Her voice rising, she added, "I've always thought ERA women weren't with us on the equal pay question—didn't care about it. Some of you have businesses and you yourselves pay women less than men. As soon as you come along and support us on that and see that your poor sisters and your black sisters are taken care of, I'll join you."⁸⁶

Peterson changed her speech to stress "her hopes for women in the future rather than BPW's failure to support blue-collar women."⁸⁷ More importantly, despite their differences, Rawalt and Peterson established a lasting relationship at this meeting. Peterson later recalled:

80. *Id.* at 127-28.

81. *Id.* at 128 (quoting Marguerite Rawalt).

82. *Id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *Id.*

87. *Id.* at 129.

With that conversation, Marguerite Rawalt introduced me to the thinking of women I had no contact with. I really didn't know what they thought. I just knew we had always disagreed. But she accepted me. She was an honest woman, who could see broader issues—maybe the only one—and she listened to me and my reasons for why I thought the way I did. She helped me to draw my circle wider.⁸⁸

Perhaps as a result of this conversation, Peterson decided that, although she wanted the PCSW to avoid the ERA impasse and produce a practical and meaningful set of goals, it would be a mistake to ignore entirely the pro-ERA position.⁸⁹ In December of 1961, Esther Peterson called Marguerite Rawalt and asked her to become part of the PCSW.⁹⁰ Rawalt was thrilled and remained elated even after she saw the newspaper descriptions of the commission makeup and realized that she was the lone ERA supporter.⁹¹

Rawalt was a tall, energetic attorney from west Texas who had worked as a tax lawyer for the Internal Revenue Service in Washington for years.⁹² She had been born in a tiny Illinois farming community, Prairie City, in 1895,⁹³ and she was the oldest of three children and the only daughter.⁹⁴ Her family moved from Illinois, eventually settling in Texas.⁹⁵ As a young girl, Rawalt arrived in Texas in a covered wagon.⁹⁶ She worked her way through the University of Texas and George Washington Law School in Washington (after Georgetown refused to admit her because of her sex).⁹⁷ Rawalt was outgoing, intense,⁹⁸ a can-do person, passionately committed to equality for women and convinced that protectionist legislation did far more harm than good. Rawalt was, in Peterson's words, "so brilliant and

88. *Id.* at 128-29.

89. *See id.* at 131.

90. *See id.* at 130.

91. *See id.* at 130-31.

92. *See id.* at xvi-xvii, 125.

93. *See id.* at 3.

94. *See id.* at 5-6.

95. *See id.* at 6.

96. *See id.* at viii.

97. *See id.* at 37-38.

98. *See id.* at 135.

had all those degrees and everything; and, although I was opposed to it, I knew we couldn't disregard ERA."⁹⁹ Rawalt "was a past president of both BPW and NAWL (the National Association of Women Lawyers), a member of the NWP, and had been the first woman ever elected president of the Federal Bar Association."¹⁰⁰

Despite Peterson's hope that the commission would derail ERA and the fact that she packed it with ERA opponents (except for Rawalt), PCSW "produced a compromise that partly mended the rift in the women's movement."¹⁰¹ PCSW set in motion forces that ultimately would merge with the new wave of the feminist movement, and by the end of the decade, seek both an ERA and sex equality through judicial decisions under the Fourteenth Amendment.

Commission members divided into six committees, each headed by "two commission members with about ten additional members to be selected by the Women's Bureau."¹⁰² The six committees were to study: (1) education; (2) home and community; (3) employment; (4) protective labor legislation; (5) social insurance and taxes; and (6) civil and political rights.¹⁰³ Each committee had two years to study its particular issues; all were to report back to the commission in October 1963.¹⁰⁴

The committee charged with studying the ERA was the Committee on Civil and Political Rights, and Marguerite Rawalt, together with Congressperson Edith Green of Oregon, chaired it.¹⁰⁵ Rawalt managed to get two women who supported the ERA appointed to the committee,¹⁰⁶ and several other women

99. *Id.* at 125 (quoting Esther Peterson).

100. DAVIS, *supra* note 6, at 35.

101. *Id.* at 34-35.

102. PATERSON, *supra* note 36, at 134.

103. See ELLICKSON, *supra* note 34, at 2 (listing committee reports).

104. See PATERSON, *supra* note 36, at 134.

105. See DAVIS, *supra* note 6, at 35.

106. See PATERSON, *supra* note 36, at 135. The two women were Mrs. H. Lee Ozbirn, president of the General Federation of Women's Clubs and Katherine Peden, president of BPW. See *id.*

on the committee became supportive.¹⁰⁷ A number of members were opposed to the ERA and some were neutral.¹⁰⁸

Pauli Murray was invited to serve on the Committee on Civil and Political Rights in the spring of 1962.¹⁰⁹ Murray was an African-American lawyer, "a senior fellow at Yale Law School, a writer, a scholar, a civil rights and labor activist who had known Eleanor Roosevelt since the 1930s, she was bone-thin with light brown skin and an intensity that matched Marguerite's own. But she was fiercer, less outgoing, more intellectual, less inclined to spread herself thin."¹¹⁰ Murray neither supported nor endorsed the ERA: "[I] was not actually opposed to the amendment . . . I thought it had little chance of getting through Congress in the near future."¹¹¹

The first meeting of the Committee on Civil and Political Rights was in August of 1962, just after the passage of the Equal Pay Act.¹¹² The committee held a debate on the merits of ERA conflict: "The American Nurses Association and AAUW presented the protective argument while spokeswomen from BPW and the National Women's Party defended ERA."¹¹³ Although Pauli Murray did not support discriminatory laws, she suggested that "women should go through the courts—the way blacks were doing—rather than try to amend the constitution."¹¹⁴ The Supreme Court could use the equal protection clause to overturn laws that discriminated against women on

107. See *id.* at 135-36. Mary Eastwood was a young lawyer from the Attorney General's office who was to help write committee reports. See *id.* at 136. Catherine East was a staff assistant to the Committee on Federal Employment and attended meetings of all the committees. See *id.*

108. See DAVIS, *supra* note 6, at 35.

109. See PAULI MURRAY, *THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET* 347 (1987).

110. PATERSON, *supra* note 36, at 135.

111. MURRAY, *supra* note 109, at 349.

112. See PATERSON, *supra* note 36, at 138-39. The Equal Pay Act requires that women and men doing the same job receive the same pay. See 29 U.S.C. § 206(d) (1994). Esther Peterson and other progressives saw it as consistent with traditional goals of the Women's Bureau, i.e., "protecting working women from the perspective of their social roles as mothers and wives—not from any inherently independent economic right." PATERSON, *supra* note 36, at 232-33.

113. PATERSON, *supra* note 36, at 138.

114. *Id.*

the basis of sex just as it had used it to overturn laws that discriminated against African-Americans on the basis of race.¹¹⁵ Murray proposed that the commission recommend test cases "as a compromise between ERA advocates and supporters of the protective labor laws."¹¹⁶

Marguerite Rawalt was doubtful.¹¹⁷ The courts had been ruling against women in constitutional cases since the founding of the republic.¹¹⁸ On October 1 and 2, 1962, the full commission met and considered Murray's proposal.¹¹⁹ To Rawalt's surprise, Murray had been asked to present her suggestion directly to the commission, though her committee had never fully considered it.¹²⁰ By the time Murray concluded, Rawalt "was flushed and angry."¹²¹ She felt that the cards were hopelessly stacked against the ERA and that without Eleanor Roosevelt, who had begun to soften her anti-ERA position but was now in the hospital, there was no way ERA supporters could keep the Commission from opposing it.¹²²

B. The Murray Strategy on Paper

In December of 1962, Pauli Murray submitted a paper to the Committee on Civil and Political Rights describing in some detail her proposal to seek equality through the Fourteenth Amendment rather than an ERA.¹²³ The Supreme Court had already held racial classifications in public education unconstitutional under the Fourteenth Amendment,¹²⁴ and Murray emphasized the similarities between race and sex discrimination,

115. See DAVIS, *supra* note 6, at 35-36.

116. PATERSON, *supra* note 36, at 138.

117. See *id.*

118. See *id.* at 139.

119. See *id.* at 138-39.

120. See *id.* at 139.

121. *Id.*

122. See *id.*

123. See Memorandum from Pauli Murray to the Committee on Civil and Political Rights, President's Commission on the Status of Women, "A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se" (Dec. 1962) (on file with author) [hereinafter Murray Memorandum].

124. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

relying on two important early authorities on the parallels between racism and sexism: Gunnar Myrdal, author of a 1944 classic on racism, *An American Dilemma*, and Helen Hacker, author of a 1951 analysis of women's status as a minority group.¹²⁵

Myrdal discussed the similarities between the position of women and African-Americans, especially in the South.¹²⁶ Myrdal identified pre-industrialization paternalism in the South as a system that denied both slaves and women full humanity.¹²⁷ He noted the historical, intellectual, and personal connections between the nineteenth century women's movement and the abolition movement.¹²⁸

Hacker delineated a number of parallels between the treatment of women and African-Americans. Both were identified primarily by certain physical characteristics; seen as having smaller brains, lower intelligence, and fewer geniuses; more

125. See Murray Memorandum, *supra* note 123, at 11-12. In addition to Myrdal and Hacker, Murray quoted a portion of a 1935 article by Blanche Crozier, arguing that just as race-based classifications suggest inferiority (of African-Americans), so too sex-based classifications suggest women's inferiority. See *id.* at 12 (quoting Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 727-28 (1935)). Crozier wrote:

Race and sex are in every way comparable classes; and if exclusion in one case is a discrimination implying inferiority, it would seem that it must be in the other also. And if such discrimination implying inferiority is a violation of the equal protection of the laws in the case of one of these classes, it ought to be also in the case of the other, assuming that the guarantee of equal protection extends to both of the classes.

Not only are race and sex entirely comparable classes, but there are no others like them. They are large, permanent, unchangeable, natural classes. No other kind of class is susceptible to implications of innate inferiority. Aliens, for instance, are essentially a temporary class, like an age class. Only permanent and natural classes are open to those deep, traditional implications which become attached to classes regardless of the actual qualities of the members of the class. This is the only kind of class prejudice which can be reached by laws aimed not toward guarding against the unjust effect of the prejudice in the particular case but toward a general upholding of the dignity and equality, the legal status, of the class.

Id.

126. See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 1073-78 (citing both the historical and societal similarities between women and African-Americans).

127. See *id.* at 1073.

128. See generally *id.* at 1073-78 (citing both the historical and societal similarities between women and African-Americans).

emotional; happy and content in their place; and socially and professionally segregated.¹²⁹

Murray noted that the Supreme Court had resolved recent constitutional challenges to sex discrimination by a 5-4 or 6-3 split¹³⁰ and suggested that the Supreme Court might well find sex discrimination unconstitutional in the near future if it were to face an appropriate case with well-developed arguments supported by many amici.¹³¹ Murray therefore proposed that women model equal protection arguments after those that had succeeded for race in *Brown v. Board of Education*¹³² and that good cases should be deliberated, selected, and litigated by some group or coalition.¹³³

In 1962, when Murray wrote this memorandum suggesting that women model constitutional litigation after the race cases, the race cases reaching the Court were challenges to Jim Crow segregation laws,¹³⁴ which were always and obviously harmful to African-Americans. There were no affirmative action plans, let alone challenges to such plans. The legal situation of women was far more complex. Many members of PCSW regarded sex-specific protectionist legislation, such as the maximum hours for women working in laundries in Oregon upheld in *Muller*, as good for women. Similarly, most women on the commission assumed that women who were wives and mothers would have "the responsibility of homemaking and child rearing . . . whether or not they work[ed] outside the home."¹³⁵ For these women, the sex-specific family law rules protecting mothers and caretakers made a great deal of sense.¹³⁶

129. See Helen Hacker, *Women As a Minority Group*, 30 SOC. FORCES 60, 65 (1951).

130. See Murray Memorandum, *supra* note 123, at 25.

131. See *id.* at 27, 33.

132. 347 U.S. 483 (1954).

133. See Murray Memorandum, *supra* note 123, at 30-31.

134. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that equal protection clause protected African-Americans from discrimination in restaurant that rented space from a building funded by public entity); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that city's change in boundaries was unconstitutional insofar as it eliminated the vast majority of African-American voters).

135. HOLE & LEVINE, *supra* note 1, at 18-19.

136. Maternal custody of children of tender years, for example, was presumed to be in the best interest of the child. See BECKER ET AL., *supra* note 1, at 26. Alimony

Murray carefully avoided any suggestion that going to the Supreme Court to enforce equality between the sexes would mean the fall of all sex-specific labor or family laws. She analyzed *Muller* in a respectful manner, giving it a narrow reading: the Oregon statute setting maximum hours for women in certain industries was constitutional because of "(1) the relation of woman's health needs to her maternal functions and the public interest in preserving 'the strength and vigor of the race,' and (2) the necessity for some protective legislation for women 'to secure an equality of right' in the unequal struggle for subsistence."¹³⁷ Murray stressed that "[t]he Court made it clear, however, that the purpose of the legislation was 'to compensate for some of the burdens which rest upon' women and which prevent them from asserting their 'full rights.'"¹³⁸ Murray argued that subsequent cases—upholding all sorts of discriminatory legislation on the ground that *Muller v. Oregon* recognized any and every classification by sex as constitutional—had misunderstood the "principles of that case."¹³⁹

Murray suggested that the Supreme Court could develop a norm that would strike the bad sex-based classifications and uphold the good:

Where a statute or practice applies differential treatment to women as a class, it is based upon a reasonable classification if, and only if,

1. It is designed to protect the maternal and family functions through compensatory measures and is limited in operation to that class of women who perform these functions; or

was also something ex-husbands paid to ex-wives after divorce. See *id.* For a general description of sex-specific rules at this time, see *id.* at 25-27.

137. Murray Memorandum, *supra* note 123, at 13-14.

138. *Id.* at 14.

139. *Id.* at 15. Murray criticized *Muller v. Oregon's* application to jury exclusion in *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931); to differential treatment in the licensing of certain occupations in *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) and *People v. Case*, 116 N.W. 558, 560 (Mich. 1908); and to the exclusion of women from a state-supported university in *State v. Hunter*, 300 P.2d 455, 458 (Or. 1956), *Allred v. Heaton*, 336 S.W.2d 251 (Tex. Civ. App. 1960), and *Heaton v. Bristol*, 317 S.W.2d 86 (Tex. Civ. App. 1958).

2. It is a valid health regulation designed to protect any special health needs which, on the basis of the most advanced findings of medical science, women are shown to have and men not to have; or

3. It is designed to protect an equality of right which women, because of their traditionally disadvantaged position in society, themselves have been unable to assert adequately both at the time of the law and at the time the law is applied; and

4. The differential treatment does not imply inferiority or enforce an inferior status by singling women out as a class for restrictive treatment.

A governmental policy differentiating between men and women which does not meet these criteria is based upon a classification of sex *per se* and is arbitrary and unreasonable within the meaning of the Fourteenth Amendment.¹⁴⁰

Murray gave a few examples: A legislature might reasonably distinguish between mothers with custody of children under sixteen and other women and men or, in order to protect future mothers, between women of child-bearing age and other women,¹⁴¹ but it would not be reasonable to include women over the age of forty-five in a classification designed to protect prospective mothers;¹⁴² nor would it be reasonable to assume that all women are dependent on men, given that "20% of the female population is single, when women constitute 30% of the labor force, 10% of responsible heads of families, and outnumber the male population by nearly 4,000,000, in addition to having a life expectancy of five to seven years longer than the male."¹⁴³

Murray explained why a case-by-case approach would be superior to an ERA:

Thus, instead of a mechanistic application of the doctrine of sex as a basis of legislative classification on the one hand or

140. Murray Memorandum, *supra* note 123, at 17.

141. *See id.* at 17-18.

142. *See id.* at 18.

143. *Id.*

a denial that in some instances such classification may have a valid functional basis, the development of standards in a case-by-case approach provides the flexibility which permits the evolution of a more realistic application of the Fourteenth Amendment to protect both the maternal and family functions and the right of women to full human development.¹⁴⁴

Marguerite Rawalt and other ERA advocates had argued that judges were almost all male and had not recently indicated much commitment to recognizing women's rights under the Fourteenth Amendment.¹⁴⁵ Murray responded that there had been

no concerted effort to bring to bear upon the courts the body of current knowledge about the capacities, achievements and perspectives of women as individuals nor of the social implications of legal discrimination against them. No equivalent of the school desegregation cases, *Brown v. Board of Education*, has been presented to the Supreme Court which addresses itself to the psychological aspects of discrimination against women, nor, within this framework, to the concept of equality in contemporary society.¹⁴⁶

Murray concluded by restating her suggested criteria:

Obviously, not every law or regulation which affects the status of women is discriminatory. Protective and social labor legislation has been extended generally to male workers and represents enlightened social policy. Family support laws and social insurance provisions related to the family function are also socially desirable as compensation for the special services which women render to society. Restrictions on the employment of women in certain occupations may have valid health reasons or may forecast a general humane social development. Differential treatment for female offenders has been upheld where it represented experimentation with more enlightened penal methods. (The law which penalizes a female prostitute but imposes no penalty upon her male customer, however, cannot be justified on any ground.)¹⁴⁷

144. *Id.* at 19.

145. *See id.* at 19-20; PATERSON, *supra* note 36, at 138.

146. Murray Memorandum, *supra* note 123, at 21.

147. *Id.* at 28-29.

Murray suggested challenges to the following: cases involving exclusion of women from juries and educational institutions; the husband's right to determine the domicile of his wife; limits on women's ability to contract and control their wages; and cases involving "guardianship of children, involving similar problems arising out of marital and family relationships."¹⁴⁸ Murray also proposed that advocates for women's rights under the Fourteenth Amendment form a coalition to bring carefully selected cases before the courts, cases presenting shocking injustices in a manner likely to cut through judicial bias with strong appeals to basic fairness.¹⁴⁹ Eventually, the Women's Rights Project of the ACLU successfully implemented this approach under Ruth Bader Ginsburg.¹⁵⁰

C. *The PCSW Compromise*

At the March 1963 meeting of the Committee on Civil and Political Rights, the committee "followed Marguerite's lead on everything except the Equal Rights Amendment."¹⁵¹ Murray still favored going to the Supreme Court under the Fourteenth Amendment.¹⁵² At the Committee's final meeting, they agreed on compromise wording to be submitted to the full commission on April 23:

In view of the promise of this constitutional approach, the Commission *does not take a position* in favor of the proposed Equal Rights Amendment at this time.¹⁵³

When the full commission met in the spring of 1963 to agree on its final recommendations, it rejected the committee's compromise¹⁵⁴ and decided to take a clear position against ERA.¹⁵⁵ Rawalt fought determinedly to at least avoid a vote on

148. *Id.* at 30.

149. *See id.*

150. *See infra* text accompanying notes 278-80.

151. PATERSON, *supra* note 36, at 142.

152. *See id.*

153. *Id.*

154. *See id.* at 143.

155. *See supra* text accompanying notes 64-70.

the issue.¹⁵⁶ Eventually, the commission agreed to adopt a statement drafted by the Justice Department rather than the one drafted by her committee. It stated:

[I]n view of *the fact* that a constitutional Amendment does not appear to be necessary to establish the principle of equality, the Commission believes that constitutional changes *should not be sought* unless, at some future time, it appears from court decisions that a need for such action exists.¹⁵⁷

Rawalt waited through hours of meetings the next day, then she said: "Of course after yesterday's defeat, I should be glad to see nothing printed about what my committee did."¹⁵⁸ She asked merely that the word "now" be added to the commission's recommendation, so that it would read "the Commission believes that constitutional changes 'need not *now* be sought."¹⁵⁹ It is this compromise wording that appears in the final commission report.¹⁶⁰

On October 11, 1963, Eleanor Roosevelt's birthday but a little over a year after her death, the PCSW presented its report to President Kennedy. (Six weeks later he too was dead.) The report offered a number of proposals for both state and federal government, employers, foundations, and schools.¹⁶¹ It also recommended that the President establish a Citizens Advisory Council on the Status of Women, which Kennedy immediately did, appointing many who had worked on the commission, including Marguerite Rawalt.¹⁶²

The PCSW's compromise position on ERA—proposing that women seek equality through the courts under the Fourteenth Amendment and suggesting that, if that failed, an ERA might be appropriate—was an important breakthrough. Everyone agreed on seeking equality through the courts under the Fourteenth Amendment as the best short-term strategy.

156. See PATERSON, *supra* note 36, at 143.

157. *Id.*

158. *Id.* at 144 (quoting Marguerite Rawalt).

159. *Id.*

160. See *id.*

161. See *id.* at 147.

162. See *id.* at 147-48.

Equally important, the PCSW brought together women leaders from all over the country and created some real forward momentum on women's issues just as the second wave of the feminist movement began. Betty Freidan's book, *The Feminine Mystique*, often seen as the start of the second wave, also was published in 1963. Suddenly, it was possible to talk about women's issues and even to use the word "feminist."¹⁶³ Many states already had state commissions working on women's status, and eventually every state would have such a commission (or series of commissions).¹⁶⁴

Two of the PCSW's work-related proposals were adopted even before the commission had concluded its deliberations: in 1962, President Kennedy issued an executive order opening high-level federal employment to women, and in 1963, Congress enacted the Equal Pay Act.¹⁶⁵ The PCSW also recommended fair wage and hours laws for all women and men, and workplace accommodation of the needs of all women, whether they were mothers, married, single, young, or old.¹⁶⁶

At the time of the commission's report, Executive Order 10925 prohibited "discrimination based on race, creed, color, or national origin in employment under federal contracts."¹⁶⁷ The Commission did not suggest adding "sex" to this order because of members' continuing commitment to sex-specific protectionist legislation. Instead, the report suggested caution: "We are aware that this order could be expanded to forbid discrimination based on sex. But discrimination based on sex, the Commission believes, involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable."¹⁶⁸ Within a year, however, Congress enacted Title VII, banning sex discrimination by all employers, private as well as public, with more than twenty-five employees.¹⁶⁹

163. *See id.* at 152.

164. *See id.*

165. *See* HOLE & LEVINE, *supra* note 1, at 21.

166. *See* PATERSON, *supra* note 36, at 147-48.

167. Murray Memorandum, *supra* note 123, at 355.

168. AMERICAN WOMEN: THE REPORT OF THE U.S. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 48-49 (1965).

169. *See* PATERSON, *supra* note 36, at 154.

II. TITLE VII PREEMPTS PROTECTIONIST LEGISLATION

The conventional wisdom is that "sex" was added to Title VII's prohibition on discrimination in employment on the basis of race, religion, national origin, or color as a joke by a southerner hoping to derail the bill,¹⁷⁰ but the story is far more complicated than that, and many women and men, eventually even the President, worked for and supported the inclusion of "sex."

Late in 1963, Alice Paul and other members of the NWP began negotiating with Congressperson Howard Smith of Virginia, who opposed Title VII's ban on race discrimination.¹⁷¹ They suggested that he propose an amendment adding sex to the non-discrimination provision. The NWP hoped, of course, that the legislation ultimately would pass with a ban on sex discrimination as well as discrimination based on race, religion, national origin, and color. On February 8, 1964, Congressperson Smith moved to add "sex" to Title VII and got a good laugh in doing so.¹⁷² Congressperson Martha Griffiths then argued in all seriousness that "sex" *should* be added: "[A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister" who will otherwise be among the "white women . . . last at the hiring gate."¹⁷³

Initially, the Johnson administration opposed the inclusion of women, apparently out of fear it would derail the bill.¹⁷⁴ Esther Peterson, still head of the Women's Bureau, also opposed it.¹⁷⁵ Emmanuel Celler, who opposed the addition of sex to Title VII just as he had opposed the ERA, read into the brief House debate a letter from Esther Peterson that stated:

In view of [the PCSW's unwillingness to recommend the addition of sex to the Executive Order banning discrimination by federal contractors] reached by representatives from a variety of women's organizations and private and public agencies to attack discriminations based on sex separately, we are of the

170. See, e.g., BECKER ET AL., *supra* note 1, at 21.

171. See PATERSON, *supra* note 36, at 153.

172. See 110 CONG. REC. 2577-78 (statement of Rep. Smith).

173. *Id.* at 2578, 2580.

174. See PATERSON, *supra* note 36, at 153.

175. See *id.*

opinion that to attempt to so amend [Title VII] would not be to the best advantage of women at this time.¹⁷⁶

Congressperson Edith Green of Oregon also opposed it: "It will clutter up the bill and it may later . . . be used to help destroy this section of the bill by some of the very people who today support it."¹⁷⁷ Everyone seemed surprised when the House passed Title VII on February 10, 1964 with "sex" included by a vote of 290 to 130.¹⁷⁸

When Title VII came before the Senate in the spring of 1964, Marguerite Rawalt and Pauli Murray were among those working hard for its passage *with* the sex provision.¹⁷⁹ Pauli Murray stated:

[I] was overjoyed to learn of the House action, particularly because, as a Negro woman, I knew that in many instances it was difficult to determine whether I was being discriminated against because of race or sex and felt that the sex provision would close a gap in the employment rights of all Negro women.¹⁸⁰

After seeing the strong support the women's amendment had garnered in the House, even "Esther Peterson changed her position and worked for it in the Senate."¹⁸¹

Senator Everett Dirksen of Illinois, a Republican and the Senate minority leader, opposed the inclusion of "sex."¹⁸² The network of women supporting the inclusion of "sex," including Pauli Murray and Marguerite Rawalt, was able to put pressure on Dirksen through Illinois BPW members and Margaret Chase Smith.¹⁸³ Dirksen relented and withdrew his opposition¹⁸⁴ at a Senate Republican Conference, described in the words of Senator Margaret Chase Smith:

176. 110 CONG. REC. 2577 (statement of Rep. Celler).

177. *Id.* at 2581.

178. *See* 110 CONG. REC. 2804-05 (1964).

179. *See* PATERSON, *supra* note 36, at 153-54.

180. MURRAY, *supra* note 109, at 356.

181. PATERSON, *supra* note 36, at 154.

182. *See* MURRAY, *supra* note 109, at 356; PATERSON, *supra* note 36, at 154.

183. *See* PATERSON, *supra* note 36, at 154.

184. *See id.*

Senator Dirksen, the Republican Minority Leader upon whom much of the fate of the Civil Rights Bill rests, originally offered an amendment to strike the word "sex" from the Bill as passed by the House. I stood up and opposed and argued against his amendment. In doing so, I marshaled so much Republican opposition to it that Senator Dirksen decided not to introduce his amendment.¹⁸⁵

Meanwhile, Marguerite Rawalt had asked Pauli Murray to write a memorandum to be delivered to the President via Mrs. Johnson.¹⁸⁶ Murray quickly prepared a "Memorandum in Support of Retaining the Amendment to [Title VII to] Prohibit Discrimination in Employment Because of Sex."¹⁸⁷ Murray described this memo as follows:

It was a strongly worded document, pointing to the historical interrelatedness of the movements for civil rights and women's rights and the tragic consequences in United States history of ignoring the interrelatedness of all human rights. It argued that the inclusion of the "sex" amendment would strengthen the main purpose of the bill and reduce the bitter tensions that would result from the exclusion of so large a category as women workers. It declared: "A strong argument can be made for the proposition that Title VII without the 'sex' amendment would benefit Negro males primarily and thus offer genuine equality of opportunity to only *half* of the potential Negro work force." A further argument was made that the amendment would buttress the recently enacted Equal Pay Act of 1963, and in answer to the PCSW position that a separate program was necessary to eliminate employment discrimination against women, the memorandum asserted: "This view betrays an undue caution in dealing with the near-revolutionary problem of human rights today. The 'uniqueness' of the nature of the discrimination on the basis of sex is largely fictitious and cloaks both timidity and paternalism. There are few, if any, jobs for which an employee's sex could be considered relevant"¹⁸⁸

185. MURRAY, *supra* note 109, at 357.

186. See PATERSON, *supra* note 36, at 154.

187. MURRAY, *supra* note 109, at 356.

188. *Id.* at 356-57.

Pauli Murray sent a copy to Lady Bird Johnson, "asking her to discuss the matter with the President."¹⁸⁹ Copies also were distributed to other important people in Washington, including "Attorney General Robert F. Kennedy, Vice-President Hubert Humphrey, and Senators Margaret Chase Smith [and] Everett M. Dirksen."¹⁹⁰

Pauli Murray received a response from Bess Abell, Lady Bird Johnson's social secretary, "acknowledging on her behalf my 'convincing and persuasive' memo and telling me: 'I have checked this matter out and I am pleased to advise you that as far as the Administration is concerned, its position is that the Bill should be enacted in its present form.'"¹⁹¹

Martha Griffiths also lobbied the President, sending him a message through Liz Carpenter: "If that amendment comes out of that bill, I will send my speech door to door in every member's district who voted against it, and in my opinion, those who voted against it would never return to Congress."¹⁹²

On July 2, Congress enacted Title VII *with* the provision banning sex discrimination in private and public employment in the United States,¹⁹³ but the Equal Employment Opportunity Commission (EEOC) did nothing to enforce it for years.¹⁹⁴ The EEOC's recalcitrance ultimately led to the creation of the National Organization of Women (NOW) and helped fuel the emerging second wave of the women's movement.¹⁹⁵

When Title VII became effective in July of 1965, help-wanted advertisements in newspapers routinely specified "Colored" or "White" and "male" or "female."¹⁹⁶ The EEOC, the federal agency responsible for enforcement of Title VII, immediately targeted racial help-wanted ads; targeted newspapers quickly agreed to drop such labels.¹⁹⁷ Neither the EEOC nor the newspapers,

189. *Id.* at 357.

190. *Id.*

191. *Id.* at 357-58.

192. PATERSON, *supra* note 36, at 154.

193. *See* MURRAY, *supra* note 109, at 358.

194. *See* PATERSON, *supra* note 36, at 159-60, 163-64.

195. *See id.* at 165-66.

196. *See id.* at 158-59.

197. *See id.* at 158.

however, were interested in eliminating sex-specific ads.¹⁹⁸ The newspapers joked about whether female and male ads *might* discriminate on the basis of sex,¹⁹⁹ and the EEOC's first chair, Franklin Roosevelt, Jr., thought that whether such ads discriminated on the basis of sex was a "tricky question."²⁰⁰

By the end of 1965, Marguerite Rawalt, Pauli Murray, and Betty Freidan, as well as many other activists, had expressed concern about the EEOC's attitude toward Title VII's prohibition on sex discrimination.²⁰¹ With the exception of the one woman on the five-member commission, Aileen Hernandez, the EEOC tended to regard the prohibition on sex discrimination as a joke.²⁰²

By the middle of 1966, more feminists were even angrier about the EEOC's refusal to enforce Title VII.²⁰³ Martha Griffiths gave a stinging speech in the House of Representatives shortly before a national meeting of the State Commissions on the Status of Women.²⁰⁴ It was at a lunch connected with this national meeting that Betty Friedan, Pauli Murray, and others decided to form NOW.²⁰⁵ Marguerite Rawalt soon joined and became a member of NOW's first executive board and head of its litigation committee.²⁰⁶

Meanwhile, in California, Velma Mengelkoch, a mother supporting two children, together with some other factory workers, brought a Title VII challenge against the company's use of maximum hours limits applicable only to women in order to limit the number of women employed and to deny them promotions.²⁰⁷

198. *See id.*

199. *See id.*

200. *Id.* NOW eventually became involved in a legal challenge to separate job wanted ads for women and men. *See id.* at 187. The case involved the interpretation of a municipal human rights ordinance worded like Title VII, and the newspaper raised the First Amendment as a defense. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (holding that the First Amendment did not bar municipal ordinance ban on sex-designated help-wanted ads).

201. *See* PATERSON, *supra* note 36, at 159-60.

202. *See id.* at 158-60.

203. *See id.* at 163 (reporting that women in the NAWL, BPW, ACLU, and the Citizens Council were all extremely upset).

204. *See id.* at 164.

205. *See id.* at 166.

206. *See id.* at 168.

207. *See Mengelkoch v. Industrial Welfare Comm'n*, 284 F. Supp. 956, 958 (C.D.

Mengelkoch had not been able to hire a lawyer and felt that her court-appointed lawyers were not doing their job.²⁰⁸ In October of 1966, she wrote Marguerite Rawalt—because of her association with NAWL²⁰⁹—and asked for her help.²¹⁰ Mengelkoch eventually fired her private attorneys and NOW took over the case.²¹¹ Rawalt and other members of NOW's legal committee worked hard on this and other important challenges to protectionist legislation.²¹²

In November, Aileen Hernandez, who had been the only woman on the EEOC, resigned in disgust and began to serve as Executive Vice President of NOW.²¹³ NOW marched on EEOC offices and filed a formal complaint with the EEOC about its non-enforcement.²¹⁴

NOW grew at an amazing rate during 1967. In November, it held its first annual convention.²¹⁵ On the agenda was whether to push for an ERA.²¹⁶ Those opposed argued that women in the unions needed another year; they were making progress (presumably in eliminating the need for sex-specific protectionist legislation).²¹⁷ At least one participant argued that the ERA did not have a chance in Congress and that NOW should concentrate on the courts, where there was a chance of success.²¹⁸

Cal.), *appeal dismissed*, 393 U.S. 83 (1968) (holding that plaintiffs must first seek relief in state courts and administrative agencies before bringing a federal action); see also PATERSON, *supra* note 36, at 169 (discussing NAWL involvement in Mengelkoch litigation).

208. See PATERSON, *supra* note 36, at 169.

209. See *supra* note 100 and accompanying text.

210. See PATERSON, *supra* note 36, at 169.

211. See *id.* at 169, 173, 178.

212. See *id.* at 170, 174, 178-79. NOW became involved in both *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir.) (holding that Indiana law barring women from jobs requiring lifting more than thirty-five pounds was preempted by Title VII), *opinion corrected*, No. 16624, 16625, 16626, 16632, 1969 WL 4715 (7th Cir. Oct. 29, 1969) and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) (holding that employer failed to show that sex is a bona fide occupational qualification for telephone "switchman" job).

213. See PATERSON, *supra* note 36, at 170.

214. See *id.* at 170-71.

215. See *id.* at 180.

216. See *id.*

217. See *id.*

218. See *id.*

Although the battle over the ERA was fierce and raged for several days, in the end, "ERA was number one in NOW's 'Bill of Rights,'" which also called for equality in employment, day care, maternity leave, tax deductions for child care, better safety nets for poor women, and reproductive freedom, including abortion rights.²¹⁹ Women from labor resigned from NOW's board and others were upset about the abortion position, but the battle was pretty much over.²²⁰

One of the major blocks to ERA support was the sex-specific nature of family law. Marguerite Rawalt had been a member of the Citizen's Advisory Council on the Status of Women from its initial creation by Kennedy immediately after the PCSW submitted its report in 1963. She had become chair of the Council's Task Force on Family Law and Policy, and in April of 1968, that task force issued its report. The report recommended that domestic relations laws be reformed to reflect the economic partnership of marriage, that custody in divorce cases be determined by the best interests of the child, and that distinctions between legitimate and illegitimate children be eliminated along with restrictions on birth control and abortion.²²¹

At about the same time, spring of 1969, the Citizens' Council's Task Force on Labor Standards recommended changes to labor laws and the reform of laws applicable only to women, changes consistent with NOW's Bill of Rights and an ERA.²²² Title VII arguably had made sex-specific protectionist legislation illegal as of its effective date, July 1, 1965. By late 1969, the Court of Appeals for the Seventh Circuit had held that Title VII preempted all state protectionist legislation applicable only to women.²²³ With the end of such legislation in sight—other circuits soon

219. *Id.*

220. *See id.* at 181.

221. *See id.* at 189. The report was documentary evidence submitted at the Senate's ERA hearings in May of 1970. *See The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong. 137-213 (1970) [hereinafter Hearings].*

222. *See* PATERSON, *supra* note 36, at 189.

223. *See* *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir.) (holding that Title VII banned disparate treatment of women and men even under protectionist legislation), *opinion corrected*, No. 16624, 16625, 16626, 16632, 1969 WL 4715 (7th Cir. Oct. 29, 1969).

would join the Seventh²²⁴—one of the major grounds for objection to an ERA approach disappeared. Increasing numbers of mainstream women leaders became supporters.²²⁵ There was now new wording for the Amendment:

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.²²⁶

In February of 1970, the Citizen's Advisory Council on the Status of Women endorsed the ERA and urged President Nixon to endorse it.²²⁷ A few days later, Marguerite Rawalt was astounded to hear that Senator Birch Bayh, a Democrat from Indiana and chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, announced plans to hold ERA hearings in May, the first action in Congress on the issue in almost ten years.²²⁸ Shortly thereafter, the United Automobile Workers Union became the first union to endorse the ERA.²²⁹ The subcommittee's hearings began Tuesday, May 5, two days after Kent State,²³⁰ and testimony overwhelmingly ran in support of the amendment.²³¹ Opposition to the ERA at the hearings came from some labor organizations and activists and some Catholic and Jewish women,²³² but many other labor unions, labor activists, and Catholic and Jewish women support-

224. See, e.g., *Homemakers, Inc. v. Division of Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974); *Kober v. Westinghouse Elec.*, 480 F.2d 240 (3d Cir. 1973); *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228 (5th Cir. 1972); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

225. See PATERSON, *supra* note 36, at 201-08.

226. BECKER ET AL., *supra* note 1, at 24.

227. See PATERSON, *supra* note 36, at 202.

228. See *id.*

229. See *id.*

230. See Don Bauer, *Kent State, 1970: The Kids Who Held The Rifles*, MIAMI HERALD, May 3, 1987, at 3C.

231. See, e.g., *Hearings*, *supra* note 221, at 331-37, 491-98 (testimony of Gloria Steinem and Betty Friedan).

232. See *id.* at 662-64 (reprinting statements of the National Council of Jewish Women and the National Council of Catholic Women).

ed the ERA.²³³ There was no identifiable interest group vigorously and uniformly opposed to it.

Supporters argued that the ERA would do in one giant step what would otherwise take years: eliminate all legislation discriminating against women.²³⁴ They pointed to the need to eliminate sex-specific protectionist legislation, which often hurt women and was no longer necessary to prevent sweat shops;²³⁵ to give married women in all states full rights to contract and to own property;²³⁶ to gain equal access to public education;²³⁷ to serve on juries under the same rules applicable to men;²³⁸ to equalize age of majority and of ability to marry for women and men;²³⁹ to equalize dower and courtesy rights on death of a spouse;²⁴⁰ to eliminate the rule that the husband, as head of the family, determines the family's domicile;²⁴¹ to ensure equality in military service;²⁴² and to equalize the benefits and burdens on women and men as citizens, wives and husbands, and

233. See, e.g., *id.* at 457-59, 619-20, 671-73 (statements of Stanley J. McFarland, Assistant Secretary for Legislation and Federal Relations of the National Education Association, the B'nai Brith Women, and St. Joan's Alliance).

234. See *id.* at 7-8 (statement of Hon. Eugene J. McCarthy, U.S. Senator from the State of Minnesota).

235. See *id.* at 10-12 (statement of Mrs. Myra Ruth Harmon, President, the National Federation of Business and Professional Women's Clubs, Inc.).

236. See *id.* at 3 (statement of Senator Bayh, Chairman of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary).

237. See *id.* at 412-15 (statement of Dr. Bernice Sandler, Women's Equity Action League).

238. See *id.* at 499-500 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers). Although women were permitted to serve on juries in all states at the time of the hearings, some states automatically excused mothers of small children. Cf. Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement*, 70 TEMP. L. REV. 907, 938 (1997) (discussing state court disagreement on constitutionality of laws or regulations that automatically excused women if they were needed to take care of minor children).

239. See *Hearings, supra* note 221, at 500 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers).

240. See *id.* at 501 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers).

241. See *id.* at 501-02 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers).

242. See *id.* at 504 (advocating service for young women as well as young men, but avoiding any suggestion that women would serve in combat: "there are thousands of activities by which our young military female could give service to her country").

mothers and fathers. As one supporter succinctly explained, “[m]en and women should share alike in the full range of family, economic, and political responsibilities.”²⁴³ In short, supporters argued that the ERA would strike down countless laws “still on the books that deny more than half our population the right of first-class citizenship.”²⁴⁴

Radical women, like most other women concerned with women’s status, did not oppose the ERA, though they did stress that it was likely to be ineffective. For example, three radical women from the Washington D.C. Women’s Liberation testified at the Senate subcommittee hearings using the names Emma Goldman, Sarah Grimke, and Angelina Grimke.²⁴⁵ Their testimony was clearly radical—but ambiguous on the ERA. Sarah Grimke spoke first:

We have come here today to support our sisters who have been working since 1923 for the passage of this amendment to guarantee equal constitutional rights. At the same time we recognize the fears of working women that an equal rights amendment may be used exploitatively against us rather than to guarantee rights. Equal rights under the law will give women the confidence to struggle further for liberation. The nature of the male supremacist system which viciously discriminates against women in all levels of our society will be exposed. No women could be against equality under the law, but we know that the amendment cannot guarantee real equality. . . . We know, moreover, that the Constitution was written to protect the privilege and status of white men. We do not come here to ask for our freedom. We are going to take it. It is rightfully ours. As was said more than 100 years ago, I ask no favors for my sex. I surrender not our claim to equality. All I ask our brethren is that they will take their feet from off our necks and permit us to stand upright on the ground on which God has designed us to occupy.²⁴⁶

243. *Id.* at 518 (statement of Virginia R. Allan, Chairman, President’s Task Force on Women’s Rights and Responsibilities).

244. *Id.* at 1 (statement of Senator Bayh, Chairman of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary).

245. *See id.* at 78 (statement of Emma Goldman, Women’s Liberation, Washington D.C., accompanied by Sarah Grimke and Angelina Grimke).

246. *Id.* at 78. Goldman incorporated Sarah Grimke’s 1837 statement: “I ask no fa-

Emma Goldman's testimony also was ambiguous with respect to her substantive position on the ERA:

These hearings are being held at a time when it is obvious that women are standing up for their rights. We know that this amendment will be passed by Congress in a vain attempt to absorb the growing pressure exerted by women in their own behalf. The liberation of women has become the issue of the 1970s. The mass media—television, comic strips, magazines from the Atlantic Monthly to Family Circle—has distorted, manipulated and exploited the women's movement. And now the U.S. Congress, close on the heels of Playboy Magazine, manifests its blatant hypocrisy by frantically searching for a way to co-opt a growing women's revolution. We are aware the system will try to appease with their paper offerings. We will not be appeased! Our demands can only be met by a total transformation of society which you cannot legislate, you cannot co-opt, you cannot control. The struggle belongs to the people.²⁴⁷

The third radical, Angelina Grimke, then announced that their testimony was over and the three turned their backs on the Senators so that Angelina Grimke could speak directly to the people in the room.²⁴⁸ She too noted the inadequacies of the amendment, but did not explicitly oppose it:

The amendment will place equal responsibility on men and women for alimony, divorce, and child custody. But it does not deal with the reasons for failed marriages: the nuclear family which cannot meet human emotional needs. The nuclear family which is an isolated unit of the husband, wife and children, in this society takes no responsibility for children. We must, all of us, men and women, take up this responsibility. We are experimenting in new forms of cooperative and communal living. We are working to provide free 24-hour a day child care, community controlled. . . . They offer

vors for my sex. . . . All I ask of our brethren is, that they will take their feet from off our necks" SARAH GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN: ADDRESSED TO MARY S. PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY 10 (1970).

247. *Hearings, supra* note 221, at 78-79.

248. *See id.* at 79.

us an equal chance to kill and to die for the U.S. imperialism. We oppose the draft for both men and women. But like our sisters in Vietnam and Cambodia, we will fight for the liberation of oppressed peoples wherever we are. . . . Constitutional amendments will not make any difference to [education, health care, "justice" in the criminal justice system], only revolutionary change can meet the demands that women are making today. Free our sisters, free ourselves, all power to the people.²⁴⁹

With that, the radicals swept out of the hearing room, leaving Senator Cook fussing about their rudeness and Senator Bayh regretting that he had not been able to question them about their substantive position.²⁵⁰ Bayh could not figure out whether they supported or opposed the ERA.²⁵¹

More analytical critiques of the ERA were presented at the May 1971 Senate subcommittee hearings, but they were few in number. As mentioned earlier, representatives from labor organizations were split.²⁵² Testimony included that the ERA would destroy needed protectionist labor legislation applicable to women²⁵³ and that protectionist legislation was used by employers to keep women in low-paying jobs.²⁵⁴ Union opponents of the ERA argued that the EEOC regulation went too far in eliminating all protectionist legislation and urged the EEOC, courts, and legislatures to reconcile the conflicts between laws that discriminated against women and protectionist legislation applicable only to women.²⁵⁵ Union supporters of the ERA argued that protectionist legislation applicable only to women already was illegal under Title VII's language, EEOC regulations, and judicial decisions to date.²⁵⁶

249. *Id.* at 79.

250. *See id.* at 80.

251. *See id.* at 80-81.

252. *See supra* text accompanying notes 229 and 232.

253. *See id.* at 81 (statement of Mortimer Furay, Metropolitan Detroit AFL-CIO Council).

254. *See id.* at 575-78 (statement of Georgianna Sellers, Acting Chairman of the Indiana and Kentucky Unit of the League for American Working Women); *id.* at 592-94 (statement of Olga M. Madar, Vice President of the United Auto Workers).

255. *See id.* at 467-68 (statement of AFL-CIO in opposition to ERA).

256. *See id.* at 575-92 (statement of Georgianna Sellers, Acting Chairman of the

Opponents from organized labor stressed the importance and value to women of protectionist legislation applicable only to women,²⁵⁷ but opponents also expressed other concerns. One was that the ERA actually could do little; that what was needed was detailed specific legislation designed to address specific problems.²⁵⁸ Both the National Councils of Jewish Women and of Catholic Women expressed concern that the ERA would eliminate existing family support laws that obligated men to support their families.²⁵⁹ The National Council of Jewish Women argued that most sex-specific laws dealt with personal and family relationships and concluded: "It is very doubtful that the majority of the women in the United States would agree that a family support law is a curtailment of their rights."²⁶⁰ The National Council of Jewish Women noted that ERA proponents were overwhelmingly elite professional women, economically independent and therefore without any need for family support.²⁶¹ The council stressed the ERA's vagueness and the uncertainty of what courts would do with it: "Since it is impossible to predict how a given court will interpret a given constitutional amendment, the proponents are not really assured of the objective they seek, that is, identity of treatment."²⁶²

The two most contested areas were sex-specific protectionist labor laws and family legislation. With respect to protectionist legislation, the disagreement was both normative and empirical: (1) whether different rules *should* apply to women and men in employment given women's reproductive role, domestic responsibilities, as well as physical differences between the sexes; and (2) whether protectionist legislation on the books in 1970 helped or hurt women workers.

Indiana and Kentucky Unit of the League for American Working Women); *id.* at 594 (statement of Olga M. Madar, Vice President of the United Auto Workers).

257. *See, e.g., id.* at 81-82 (statement of Mortimer Furay, Metropolitan Detroit AFL-CIO).

258. *See id.* at 619 (statement of Jacob S. Potofsky, General President, Amalgamated Clothing Workers of America).

259. *See id.* at 662-64 (statements of the National Council of Jewish Women and the National Council of Catholic Women).

260. *Id.* at 663 (statement of the National Council of Jewish Women).

261. *See id.*

262. *Id.* at 664.

With respect to family law rules in general, disagreement tended not to focus on the normative question of whether current sex-specific rules were ideal, which they clearly were not, but on the consequences of eliminating current laws. Supporters of the ERA believed that condescending and sexist family law rules would be replaced by sex-neutral rules recognizing the value of homemakers' contributions and protecting children and caretakers in a more equitable and less sexist manner.²⁶³ Opponents were concerned about eliminating sex-specific family law rules without knowing more.²⁶⁴

On child custody, even ERA supporters seem to have disagreed on the content of laws under the ERA. For example, Adele Weaver, President-Elect of the NAWL, testified that the ERA would not, in her opinion, have any effect "upon the existing law and practice" that based custody on the child's best interests with a presumption in many jurisdictions that "the best interests of a child of tender years are served by granting custo-

263. See *id.* at 502-03 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers). Weaver noted that:

While the amendment would make unconstitutional the award of alimony to a wife based simply on the ground of sex there would be no deterrent to an award of alimony on grounds such as the following: the wife's financial contributions or their equivalent in homemaking services to the marriage partnership, the years of duration of the marriage, the need for support based on the inability to be self-supporting, age, lack of education or training, lack of availability or need for the services that the dependent spouse is capable of performing.

Id. at 503. Rawalt quoted with approval from the Citizens' Advisory Council on the Status of Women's Task Force on Family recommendations on property rights:

Marriage as a partnership in which each spouse make [sic] a different but equally important contribution is increasingly recognized as a reality in this country and is already reflected in the laws of some other countries. During marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through these earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment, or death. Appropriate legislation should safeguard either spouse and protect the surviving spouse against improper alienation of property by the other. Surviving children as well . . . should be protected from disinheritance.").

Id. at 724 (Memorandum by Marguerite Rawalt on married women and property).

264. See *id.* at 663 (statement of the National Council of Jewish Women in Opposition).

dy to the mother.²⁶⁵ In contrast, as noted earlier, the Citizen's Advisory Council's Task Force on Family Law and Policy, chaired by Rawalt, came out in support of the ERA, recommending the elimination of the maternal preference for children of tender age.²⁶⁶ Opponents objected generally to the elimination of all sex-specific rules in family law, noting the great uncertainty as to how courts would interpret so vague a standard, but did not explicitly address custody standards.²⁶⁷

Opposition was minimal at the hearings. The greater depth of the analysis of proponents was a tactical advantage and the inevitable result of the fact that few organized groups still were opposed to the ERA. The hearings were an ERA rally, with the audience hissing opponents²⁶⁸ and applauding supporters.²⁶⁹ The vast majority of those testifying or submitting statements supported the ERA.

Momentum continued to build after the Senate subcommittee hearing. In June, the Women's Bureau convinced the Labor Department to reverse its long-standing position and to endorse the ERA.²⁷⁰ In August, the ERA passed the House, and in February, the Senate.²⁷¹ Its momentum seemed unstoppable. On that same day, the Hawaii legislature ratified the amendment and within two days, five more states had ratified it.²⁷² By the end of 1973, thirty states had ratified it,²⁷³ but opposition began building at this point, and four years later, only five more states had ratified the amendment for a total of thirty-five.²⁷⁴ No

265. *Id.* at 504 (statement of Mrs. Adele T. Weaver, President-Elect, National Association of Women Lawyers).

266. *See id.* at 137 (Report of the Task Force on Family Law and Policy).

267. *See id.* at 662-64 (statements of the National Council of Jewish Women and the National Council of Catholic Women).

268. *See id.* at 54 (statement of Mortimer Furay, Metropolitan Detroit AFL-CIO Council). Senator Bayh interrupted Mr. Furay, the first opponent of ERA to testify, and asked for courtesy. *See id.*

269. *See id.* at 491, 495 (noting applause for the statements of Betty Friedan).

270. *See* PATERSON, *supra* note 36, at 207.

271. *See id.* at 209, 226.

272. *See id.* at 227; Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 116 (1997).

273. *See* Held et al., *supra* note 272, at 116.

274. *See id.*

state ratified it thereafter and by 1982 the period of ratification had expired despite the efforts by feminists in campaigns in state after state.²⁷⁵

Opposition mounted for two reasons, both connected to the Supreme Court. Most important was the Supreme Court's 1973 decision in *Roe v. Wade*, holding that women had an absolute constitutional right to an abortion during the early stages of pregnancy.²⁷⁶ Abortion opponents immediately began to mobilize. These new activists tended to oppose not just abortion rights but changes in the status of women, including the ERA.²⁷⁷

The other difficulty was the success of Pauli Murray's idea: going to the courts for equality on the basis of sex under the Fourteenth Amendment to the Constitution. In 1971, Ruth Bader Ginsburg won the first of these cases for the Women's Rights Project in *Reed v. Reed*.²⁷⁸ The Supreme Court held unconstitutional under the Fourteenth Amendment a state statute preferring men over women for appointments as executors of the estates of deceased relatives.²⁷⁹ Another such case was decided in 1973, two more in 1974, four in 1975, and so on.²⁸⁰ As the Supreme Court struck much sex-specific legislation, it became harder and harder to argue that the ERA would make any difference outside the most controversial areas, such as the military and bathrooms.

A. Understanding the Shift

The sixties shift was virtually inevitable. Many sex-specific rules obviously were bad for women. For example, one of the earliest challenges to protectionist legislation was brought by Velma Mengelkoch, whose employer used state hours limits on

275. See PATERSON, *supra* note 36, at 238.

276. See *Roe v. Wade*, 410 U.S. 113 (1973).

277. See Elizabeth Pleck, *Failed Strategies; Renewed Hope*, in RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA 106, 110 (Joan Hoff-Wilson ed., 1986).

278. 404 U.S. 71 (1971).

279. See *id.* at 71-72, 77.

280. See Appendix A (listing cases won and lost on equal protection grounds).

women's employment to justify limiting positions and promotions open to women.²⁸¹

Even when sex-specific legislation was arguably good for women, such as family support laws obligating husbands to support their wives and children, it often was unnecessary, condescending, and demeaning. For example, women's right to support was justified not by women's contributions and domestic and reproductive labor during marriage, but by women's need and inability to support themselves.²⁸² The Task Force on Family Law recommended instead a partnership view of marriage, in which the breadwinner and homemaker would be seen as equal partners contributing in different but equivalent ways to the marital community.²⁸³

One of the traditional justifications for women's status was that women were not capable of assuming all of the rights and responsibilities of full citizenship.²⁸⁴ Feminists in the sixties naturally reacted by asserting that women, like men, should be liable for support of a dependent homemaker after divorce and for support of children.²⁸⁵

There also was the need to end stalemate and create some momentum for change in women's status. Feminists felt the real and pressing need of going forward on a common agenda rather than continuing to sit in the same places on the ERA checkerboard. Without unification behind a formal equality approach, some of the progress enjoyed today might never have occurred.

Finally, and perhaps most importantly, feminists in the sixties could not foresee the future. At the time feminists agreed on a formal equality approach (both an ERA and the Murray strategy, arguing for sex equality under the Fourteenth Amendment), all the race cases had been clearly and undeniably *good* for African-Americans.²⁸⁶ Those cases had helped dismantle Jim Crow.

281. See *supra* note 207 and accompanying text.

282. See, e.g., *Schilling v. Bedford County Mem'l Hosp.*, 303 S.E.2d 905, 907 (Va. 1983).

283. See *Hearings, supra* note 221, at 137, 146-51 (report of the Task Force on Family Law and Policy).

284. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140 (1872) (Bradley, J., concurring) (stating that "a married woman is incapable, without her husband's consent, of making contract which shall be binding on her or him").

285. See William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 525 (1996).

286. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (holding statute pro-

There had, as yet, been no affirmative action cases. The major problems now seen with formal equality, particularly the doubtful constitutionality of almost any affirmative action,²⁸⁷ were not even blips on feminist radar screens.

The PCSW fight over whether to go for an ERA or seek equality under the Fourteenth Amendment is a telling example of the inability to foresee the future. These were viewed as quite *different* approaches. The ERA would strike *all* sex-specific statutes and rules, whereas the Supreme Court interpreting the equality provision of the Fourteenth Amendment would be able to develop a more flexible approach, striking the bad and keeping the good. It would, however, be difficult to reconcile the twenty-nine Supreme Court constitutional sex-discrimination cases decided under the Murray strategy in terms of the flexible standards she suggested the Court could and would develop in her influential memorandum.²⁸⁸

The Court has been hostile to sex-specific laws reinforcing traditional sex roles and stereotypes in family law, though some of these laws arguably protect "maternal and family functions" of women, and Murray's memo predicted that laws protecting "maternal and family functions" could survive scrutiny under the Fourteenth Amendment.²⁸⁹ Over the years, the Supreme Court has decided ten sex discrimination cases under the Fourteenth Amendment in which the need to protect the maternal and family functions of women arguably justified the discrimination.²⁹⁰ This justification was successful in five cases, but two involved *temporary* social security provisions and two involved immigration provisions.²⁹¹ Only one involved a rule likely to af-

hibiting inter-racial couples from "habitually liv[ing] in and occupy[ing] in the nighttime the same room" unconstitutional); *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (holding that health regulations mandating separate bathroom facilities for each race violated Equal Protection Clause).

287. See, e.g., Jim Chin, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1854-55 (1996).

288. See Murray Memorandum, *supra* note 123, at 17.

289. *Id.* at 19.

290. See Appendix A (listing cases in which the protection of maternal and family functions was relevant).

291. See Appendix B (listing those cases in which the outcome is consistent with the "maternal and family function" argument). Even at the time of the decisions, the

fect permanently many people living within the United States, and whether that 1974 case would come out the same way if it were litigated today is very questionable. The current Supreme Court might well hold that a state cannot give an automatic \$500 per year property tax exemption for widows without also giving one to widowers.²⁹² Moreover, the Court has never suggested that legislation applicable only to women will withstand scrutiny if it meets the requirements outlined in Murray's memorandum, that is, if it is a "compensatory measure" protecting "maternal and family functions," limited in its operation to "that class of women who perform these functions," and "does not imply inferiority."²⁹³ As a result, courts have struck virtually all sex-specific family-related legislation as inconsistent with the Fourteenth Amendment.²⁹⁴ The Murray strategy of litigating under the Fourteenth Amendment has been more similar to an ERA approach in its results in family-related areas than feminists in the sixties predicted.

In a 1971 speech given just prior to the Supreme Court's decision in *Reed*, Ruth Bader Ginsburg predicted another difference between suspect class treatment under the Fourteenth Amendment and an ERA approach. Discussing how the ERA would "affect men," Ginsburg stated:

While the equal rights amendment has been supported principally by women, it is at least arguable that the right of men to equal protection will be better secured by the equal rights amendment than it is under the existing equal protection of the laws guarantee. Supporters of the amendment maintain that it declares sex a prohibited classification, not merely a

Social Security Act had been amended to eliminate the distinction at some point in the recent past or near future. *See id.*

292. *See Kahn v. Shevin*, 416 U.S. 351, 356 (1974) (allowing the state of Florida to grant a \$500 property tax exemption to widows, but not widowers).

293. Murray Memorandum, *supra* note 123, at 17.

294. *See, e.g., Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (holding alimony statute providing only for payments from ex-husbands to ex-wives unconstitutional); *Ex parte Devine*, 398 So. 2d 686, 695-96 (Ala. 1981) (holding tender-years presumption of maternal custody inconsistent with the equality standard in the Fourteenth Amendment to the Constitution as interpreted by the Supreme Court); *Pusey v. Pusey*, 728 P.2d 117, 119 (Utah 1986) (holding maternal preference unconstitutional under federal and state constitutions).

suspect classification. With few exceptions relating to personal privacy and physical characteristics unique to one sex, the constitutional mandate would be absolute if the amendment is adopted. Suspect classification, on the other hand, relates to the group that has borne the stigma of inferiority or second class treatment; it has not been used to shield the culture's dominant group from discrimination. Accordingly, the female sex could be aided by the suspect classification doctrine, while non-suspect status would be the lot of men. Thus laws discriminating against women might be subject to rigid scrutiny, while a disadvantage imposed by law on men would pass muster if supportable on any rational ground. A case considered by the Supreme Court last term suggests this differential. In *Williams v. McNair*, men sought admission to a women's college that was part of the state university system of South Carolina. A three-judge court dismissed the case finding that the exclusion of men was "not without any rational justification." The Supreme Court affirmed without hearing argument and without opinion.²⁹⁵

In this speech, Ginsburg indicated that men would be able to challenge sex discrimination under the ERA but not under suspect class analysis of the Fourteenth Amendment.²⁹⁶ As things have worked out, men have been able to use the Fourteenth Amendment to challenge sex-based classifications²⁹⁷ just as

295. Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347, 361-62 (1971) (citations omitted) [hereinafter Ginsburg, *Sex and Unequal Protection*]. In the footnote to *Williams v. McNair*, Ginsburg follows the cite to that case with: "But cf. *Kirstein v. Rector & Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's 'prestige' college)." *Id.* at 362 n.51. In light of this 1971 statement, it is interesting to speculate about what difference Ginsburg thinks strict scrutiny for sex would make in actual cases. The distinction described in the text cannot be it, because men have been able to use suspect class arguments since 1975. See Appendix A. Perhaps suspect class analysis would result in automatic unconstitutionality of all sex-based classifications, whereas some do survive under the current standard (intermediate scrutiny). It is difficult to imagine a sex-based classification Ginsburg would uphold under any standard. For example, Ginsburg opposes advantageous treatment of pregnant workers because such treatment is ultimately likely to hurt women. See Ruth Bader Ginsburg, *Roundtable Discussion: Where Do We Go From Here?*, 37 RUTGERS L. REV. 1107, 1110-11 (1985) [hereinafter Ginsburg, *Roundtable Discussion*].

296. See Ginsburg, *Sex and Unequal Protection*, *supra* note 295, at 361-62.

297. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

whites, in post-1971 cases, have been able to use the Fourteenth Amendment to challenge racial classifications.²⁹⁸ Indeed, most of the Supreme Court's sex discrimination cases under the Fourteenth Amendment have been brought by men.²⁹⁹

As discussed in the next section, many of the problems that have arisen under the Supreme Court's formal equality approach are the direct result of men successfully arguing that they were discriminated against by sex-based classifications. Ruth Bader Ginsburg, the person heading the litigation drive under the Murray strategy, did not foresee these results even after the drive was underway.

III. THE VIEW FROM 1998

Women's lives have improved in many ways as a result of the formal equality focus of the 1970s. Most sex-specific rules, many of which were only harmful to women, have been eliminated in family law, social security, dependents benefits for military personnel, and most employment. The military academies are now open to women, and women can serve in more military positions than in earlier eras, though they remain excluded from many positions, including combat. Employers no longer openly refuse to hire or promote women and women's labor force participation rates have sky-rocketed.³⁰⁰ Most mothers with children under the age of six work in the wage-labor market, though many work part-time.³⁰¹ Women are present in legislative bodies and elective office in far greater numbers than they were thirty years ago.³⁰² Despite much continuing overt discrimination in sports, girls today are far more likely to participate in team sports than were girls thirty years ago, and female players at all levels have many more opportunities than women had in the

298. See, e.g., *Shaw v. Hunt*, 517 U.S. 899 (1996).

299. See Appendix A.

300. See ARLIE HOSHSCHILD, *THE SECOND SHIFT 2* (1989). See generally *Gains for Working Women*, CHRISTIAN SCI. MONITOR, Jan. 8, 1998, at 20, available in 1998 WL 2365097 (discussing "[t]he progress American women have made toward gender equality over the past 25 years" in the employment arena).

301. See *Gains for Working Women*, *supra* note 300, at 20.

302. See, e.g., Lucy Soto, *Women Converge on Capitol: Groups Preparing for Calendar Full of Vital Legislation*, ATLANTA J. CONST., Jan. 11, 1997, at D04, available in 1997 WL 3948598 (discussing percentage of women holding public office in Georgia).

past.³⁰³

We are, however, far from equality. The wage gap, though narrower, persists. For full-time year round workers, on average, a woman worker earned 71.4% of what a male worker earned in 1995 (as opposed to 58.9% in 1977).³⁰⁴ In that same year, African-American women earned 64.2% of what white men earned and Hispanic women earned 53.4%.³⁰⁵ Most Americans continue to work at sex-segregated jobs: jobs held, at their workplace, either by only women or by only men.³⁰⁶ Men still hold most of the top jobs.³⁰⁷ Women continue to be primarily responsible for the "second shift" when both parents work for wages outside the home.³⁰⁸ Violence against women continues to be widespread, and women are still disbelieved when they complain of abuse or violence by men they know.³⁰⁹ Women and younger girls are taught to gauge their self worth by their ability to present themselves as objects attractive to men.³¹⁰ Women still are overtly excluded from clerical or rabbinical positions in many mainstream religions and from participation in many sports, including most professional team sports. The media also continue to present women and men quite differently.

Despite the fact that most voters are women,³¹¹ women in 1998 hold only 11.5% of the seats in the House of Representatives and 9% of the seats in the Senate.³¹² Women hold 21.6%

303. See Richard S. Clayton, *Female Athletes Find Popularity Soars*, SEATTLE TIMES, July 26, 1998, at D2, available in 1998 WL 3163874 ("[N]early a third of U.S. girls play sports in high school—a seven-fold increase since 1972.").

304. See *The Wage Gap: Women's and Men's Earnings* (visited Mar. 25, 1998) <<http://www.iwpr.org/wagegap>>.

305. See *id.*

306. See Rhonda Jennings Blackburn, *Comparable Worth and the Fair Pay Act of 1994*, 84 KY. L.J. 1277, 1279 (1995-1996).

307. For information on the "glass ceiling," see *The Glass Ceiling Commission* (visited Mar. 25, 1998) <http://www.ilr.cornell.edu/lib/bookshelf/e_archive/GlassCeiling>.

308. See HOSHSCHILD, *supra* note 300, at 6-7.

309. See, e.g., *Ugly Truth*, SALT LAKE TRIB., Nov. 17, 1997, at A8, available in 1997 WL 15236516.

310. See JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS xvii-xxxiii* (1997).

311. In the 1996 presidential election, for example, 56.1 million women and 48.9 million men reported voting. See Center for the American Woman and Politics, *Sex Differences in Voter Turnout* (visited May 2, 1998) <<http://www.rci.rutgers.edu/~cawp/sexdiff.html>>. Women were 53.4% of voters in that election.

312. See Center for the American Woman and Politics, *Fact Sheets* (visited Mar. 26,

of the positions in state legislatures.³¹³

Although women continue to be primary caretakers for most children, even when working full-time, women are at greater risk today than thirty years ago of losing custody at divorce if the husband fights for it. Furthermore, women often end up in poverty when they do get custody upon divorce. Long-term homemakers are less likely than they were thirty years ago to get permanent maintenance. Feminists who supported formal equality at the end of the sixties and during the seventies believed that if women bore their share of economic responsibility for children and families, men would bear their share of domestic and caretaking work in households with two working parents. Many feminists thought it appropriate, therefore, that *neither* parent have an autonomic edge for custody at divorce, as did the Taskforce on Family Law chaired by Marguerite Rawalt.³¹⁴ Men have not, however, assumed equal caretaking responsibility in households with two working parents. Instead, women are working a double-shift. A recent empirical study of family life and political activity finds that "domestic inequalities do have implications for political activity."³¹⁵ Husbands are advantaged by their "control over major financial decisions and autonomy in using small amounts of time."³¹⁶

Understandably, men are the obstacle to equality in the home. Roberta Sigel's *Ambition and Accommodation* provides an illustration. In a study of men and women in New Jersey using both telephone surveys and focus groups, she reported that men are generally aware of women's distress over continuing domestic gender inequities, but "consider it a fact of life which does not engage their interest, let alone their commitment."³¹⁷

1998) <<http://www.rci.rutgers.edu/~cawp/cawpfs.html>>.

313. *See id.*

314. *See Hearings, supra* note 221, at 137, 167 (Report of the Task Force on Family Law and Policy).

315. Nancy Burns et al., *The Public Consequences of Private Inequality: Family Life and Citizen Participation*, 91 AM. POL. SCI. REV. 373, 373 (1997).

316. *Id.*

317. ROBERTA S. SEIGEL, *AMBITION & ACCOMMODATION: HOW WOMEN VIEW GENDER RELATIONS* 143 (1996).

In the all-male or all-female focus groups in Siegel's study, the moderator began by discussing some neutral topic. In the all-women groups, the moderator never had to raise the topic of gender relations because "it arose spontaneously."³¹⁸ In the male groups, "the moderator was always the one to bring it up; nor did men show much inclination to linger over this topic."³¹⁹ One of the women's major complaints was the "inequitable division of labor in the household."³²⁰ For most men in the focus groups, the second shift was a nonproblem.³²¹ Although the "women related that the uneven division-of-labor [at home] was becoming a source of conflict between men and women," the male focus groups failed "to discuss the topic at even moderate length."³²² Male telephone respondents were asked specific questions.³²³ Although over two-thirds of the men surveyed in telephone interviews believed domestic labor should be evenly divided when both parents worked, only 14% of the men thought that equal sharing actually takes place.³²⁴

Arlie Hochschild's *The Second Shift* provides additional evidence. In this study of couples in the San Francisco bay area with two working parents and a child or children under six, Hochschild found little ideological commitment to equality between the sexes in working-class families.³²⁵ In the middle and upper class families, there was an overt commitment to equality in domestic responsibilities, but often that was interpreted as *his* being responsible for (for example) the garage and the dog while *she* was responsible for everything else.³²⁶ Men routinely came home and rested or engaged in hobbies while their wives worked the second shift.³²⁷ Hochschild found that, on average, the women in the families she studied worked an extra month a

318. *Id.* at 38.

319. *Id.*

320. *Id.* at 167.

321. *See id.*

322. *Id.*

323. *See id.* at 168.

324. *See id.*

325. *See* HOCHSCHILD, *supra* note 300, at 128.

326. *See id.* at 43-44.

327. *See id.* at 7.

year.³²⁸ In addition, women generally are more committed to equality in intimate relationships than are men.³²⁹

A related problem with respect to family law issues is that specific rules have not been replaced with ideal nonsexist rules applied in a non-biased fashion. The maternal preference, the presumption that a child of tender years will be best off in the custody of her or his mother, has been formally eliminated and replaced by either the best interests standard (most jurisdictions)³³⁰ or a primary caretaker standard (West Virginia).³³¹ Mothers, however, are routinely disadvantaged in custody fights under the best interests standard because of judicial double standards and *because* they have been their children's primary caretakers.³³² We all expect more of mothers than fathers; judges share this bias. In addition, a parent who has been a primary caretaker faces many disadvantages in a custody fight under the best interests standard. Perhaps most importantly, she is likely to have less money to litigate and to hire experts.³³³ Many factors taken into account under the best interests standard also will cut against her: economic stability and strength, possibility of remarriage with a stay-at-home homemaker,³³⁴ and quality of schools.³³⁵ These problems could have been avoided had judges and legislatures adopted a better sex-neutral rule, such as the West Virginia primary caretaker standard, and applied it in a fair and unbiased fashion. That has not happened.

328. *See id.* at 3.

329. This is true for women regardless of sexual orientation. Thus, women who have another woman as their partner are more likely to enjoy an equitable division of domestic responsibilities. *See* Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 206 (1998).

330. *See, e.g.,* Kinsella v. Kinsella, 696 A.2d 556, 577 (N.J. 1997) (quoting *In re Baby M.*, 537 A.2d 1227, 1263 (N.J. 1988)).

331. *See, e.g.,* Gorska v. McCoy, 278 S.E.2d 357, 362-63 (W. Va. 1981).

332. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175 (1992).

333. *See id.* at 174.

334. *See id.* at 178, 181.

335. *See, e.g.,* Lunsford v. Lunsford, 545 So. 2d 1279, 1282 (La. Ct. App. 1989) (overruling trial court that awarded custody to father who "offer[ed] children . . . a community that provides equal schools and equal or better living standards").

Formal equality has often reached farther than was expected in the sixties. In her 1971 speech quoted earlier, Ruth Bader Ginsburg predicted that men would not be able to challenge classifications under the Murray strategy.³³⁶ Within four years, however, the Supreme Court held for a male plaintiff in a Fourteenth Amendment case.³³⁷ Men also have challenged successfully many sex-specific family law rules favoring women, such as the primary caretaker presumption, causing the problem discussed above.³³⁸ sex-based rules arguably favoring women have not been replaced by ideal sex-neutral rules; instead, they often have been replaced by rules that disadvantage women as homemakers and caretakers.³³⁹

For another example of formal equality's reach beyond what was expected at the close of the sixties, recall Pauli Murray's discussion of what we today would call affirmative action. Murray did not expect formal equality to affect such classifications because they involve rights women need due to traditional disadvantages.³⁴⁰ The Supreme Court, however, increasingly uses strict scrutiny to strike racial affirmative action,³⁴¹ and it could take that same approach in cases involving sex-based affirmative action in the future, particularly in light of Ruth Bader Ginsburg's efforts to move the Court closer to strict scrutiny in sex discrimination cases.³⁴²

A closely related set of problems concerns differences between racial and sexual caste systems. When the Supreme Court began striking racial classifications, all such classifications were always and obviously discriminatory against minority groups, typically African-Americans. Racial classifications created and

336. See *supra* text accompanying note 295.

337. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

338. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (striking alimony statute imposing obligation only on husbands to support wives at divorce).

339. See *supra* notes 330-35 and accompanying text.

340. See Murray Memorandum, *supra* note 123, at 17.

341. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to federal affirmative action plan); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (using "heightened scrutiny" to evaluate local government race-based affirmative action plan).

342. See *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (suggesting that the Court might adopt strict scrutiny in future sex cases).

maintained Jim Crow segregation and were not, even arguably, affirmative action or good for racial minorities in any way. For example, anti-miscegenation laws were part of "White Supremacy," to use the language of the Supreme Court.³⁴³ Affirmative action policies did not appear until the 1970s. Initially, the Supreme Court tolerated racial classifications that arguably helped members of racial minorities, as long as they were temporary, narrowly tailored, and did not involve quotas,³⁴⁴ but the Court has become increasingly hostile to such policies.³⁴⁵

To be sure, any affirmative action plan has a downside for the group purportedly being "helped." As conservatives argue, affirmative action can stigmatize beneficiaries, lowering their own confidence levels as well as negatively affecting others' assessments of their abilities.³⁴⁶ Whether a specific affirmative action plan does more good or harm to the group it purports to help is an empirical question. Some plans will be hard to judge and others clearly will be good or bad. For example, the preference for minorities in city contracting adopted by the majority African-American Richmond City Council was a good affirmative action plan from the perspective of racial minorities, though the Court struck the plan as unconstitutional.³⁴⁷

With women, whether sex-specific classifications or preferences are good or bad is often murky, and this is true historically as well as today. Whereas racial classifications prior to *Brown* were always and only bad for minorities, many pre-second wave sex-specific rules were good for women relative to some alternatives. For example, the traditional maternal preference in custody disputes helped certain women in some circumstances, though it also reinforced the notion that women and only women were capable of caring for young children. Indeed, one can argue today that just as minority contractors in Richmond, Virginia need

343. See *Loving v. Virginia*, 388 U.S. 1, 25 (1967).

344. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 315 (1978).

345. See, e.g., *Adarand*, 515 U.S. at 227 (applying strict scrutiny to federal affirmative action plan); *Croson*, 488 U.S. at 495 (using strict scrutiny to evaluate local government race-based affirmative action plan).

346. See *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

347. See *Croson*, 488 U.S. at 511.

and benefit from the Richmond plan struck by the Supreme Court, so too women need and deserve a thumb on the scale in custody decisions given the biases they currently face in custody disputes. Yet it seems unlikely that the Supreme Court would see a maternal preference as a form of affirmative action. The Supreme Court has, after all, grounded its formal equality standard in the rejection of sex-role stereotypes, and any form of affirmative action protecting women who are performing traditional roles—even if necessary and appropriate in light of continuing biases—inevitably will reinforce traditional stereotypes.

A final problem with formal equality is one Professor MacKinnon pointed out in 1979: At best, formal equality can only get women who look like men the rights men enjoy.³⁴⁸ It cannot generate new rules that accommodate women's styles and lifestyles as well as men's.³⁴⁹ For example, in employment, formal equality can get women the right to compete with men for jobs under the standards worked out by and for breadwinners with stay-at-home wives. If men must bill 2800 hours a year at a law firm, formal equality entitles women to compete under a minimum billable hours rule of 2800 hours per year, but does nothing to help women combine being lawyers and primary caretakers of children. Where women's needs are not identical to men's because of the different roles they and their partners play in most families, formal equality does nothing.

IV. BACK TO THE FUTURE

Going full steam for formal equality through the courts and the Constitution may well have been the right decision, as well as the inevitable one, in the sixties. Now, however, we live in a far different world. Most overt forms of discrimination against women in employment and by government are gone, and the discrimination that remains does not seem vulnerable under formal equality.³⁵⁰

348. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 110 (1979).

349. See *id.* at 110-11.

350. Some continuing and widely-accepted forms of overt discrimination: many orga-

In this section, I suggest that as we look to the future from the vantage point we now enjoy, with much overt discrimination against women gone, we consider moving away from formal equality. In a recent article, Reva Siegel points out that when status hierarchies are contested, they evolve into less contested forms.³⁵¹ For example, laws giving the husband as patriarch all power, authority, and property in families were replaced, when contested during the nineteenth century, with rules premised on the assumption that the home was a private sphere beyond the reach of the state.³⁵² Work performed by the wife in this sphere was done for love, not pay, and she could not, therefore, sue for compensation in either tort or contract even if her husband had expressly agreed to compensate her in writing.³⁵³ The resiliency of status hierarchies should not be surprising:

Assuming that something of value is at stake in such a struggle, it is highly unlikely that the regime that emerges from reform will redistribute material and dignitary "goods" in a manner that significantly disadvantages the beneficiaries of the prior, contested regime. But if the reformed body of law is to reestablish its legitimacy, it must distribute social goods in a manner that can be differentiated from the prior, contested regime. Thus, lawmakers seeking to reestablish the legitimacy of a contested body of status law will begin to revise its

nizations continue to allow only men to work as priests, ministers, rabbis, clergy, and members of professional sports teams, and government routinely subsidizes these discriminatory operations. For a discussion of religious and government subsidations through tax exemptions, see Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. OF CHI. L. REV. 453 (1992). Municipalities routinely subsidize male sports teams by giving them various forms of aid in building arenas. School and extracurricular sports remain segregated by sex for the most part, with boys' teams and activities continuing to receive most of the money and limelight. Cheerleaders at many public high schools continue to be only girls and they cheer only for boys' teams. Many professional teams also hire only women as cheerleaders. The military continues to discriminate explicitly, closing all combat positions to women, even in peacetime, and allowing far fewer women than men to serve. Women in prison have fewer training opportunities than men and tend to be trained for lower-paying, typically-female jobs.

351. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1115-16 (1997).

352. See *id.* at 1118.

353. See *id.*

constitutive rules, and to justify the new body of law without overt recourse to the justificatory discourse of the prior, contested regime. . . . Analyzed from this vantage point, status-enforcing state action has no fixed or transhistorical form, but instead evolves in rule structure and justificatory rhetoric as it is contested.³⁵⁴

During the 1970s, as it became impermissible to discriminate overtly between women and men in many settings, inequality did not disappear. Prohibited sex-specific versions were replaced by neutral sounding rules tending to support patriarchy in more subtle ways. In part, of course, this *is* success. Women are better off in a world in which jobs cannot be limited to men only, but it does not follow that sex discrimination has been eliminated because many overt classifications based on sex have disappeared.

In thinking about how to approach the future, it is important to appreciate patriarchy's flexibility and core constituents. Patriarchy is a social system that can take feudal, capitalist, or socialist forms, but all patriarchal cultures are "male-dominated, male-identified, and male-centered,"³⁵⁵ as well as centered around "the core value of control and domination."³⁵⁶ As Allan Johnson described:

More than anything else, patriarchy is based on control as a core principle around which entire societies are organized. What drives patriarchy as a system—what fuels competition, aggression, and oppression—is a dynamic relationship between control and fear. Patriarchy encourages men to seek security, status, and other rewards through control; to fear other men's ability to control and harm them; and to identify being in control as both their best defense against loss and humiliation and the surest route to what they need and desire. In this sense, although we usually think of patriarchy in terms of women and men, it is more about what goes on *among men*. The oppression of women is certainly an impor-

354. *Id.* at 1119.

355. ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 84 (1997).

356. *Id.* at 85.

tant part of patriarchy, but, paradoxically, it may not be the *point* of patriarchy.³⁵⁷

A patriarchal culture is misogynist. It devalues women and justifies aggression against them because of their depraved natures. In a patriarchal culture, women "can't be trusted, especially when they're menstruating or accusing men of sexual misconduct."³⁵⁸ Women exist in such a culture to fill men's needs, compensating men at the bottom for their failure to climb higher. And women are trophies, signaling to other men the status of the man with the trophy on his arm. In a patriarchal culture, the legal system, whatever its form, will do a better job protecting men and meeting men's needs than protecting women and meeting women's needs.³⁵⁹

A key aspect of women's oppression stems from heterosexual relations that subordinate women to men's right to sexual access and control.³⁶⁰ The core of patriarchy is not the battle between the sexes.³⁶¹ Rather, it is a battle largely between men for power and control.³⁶² Men who do not conform to patriarchy's notion of masculinity pay an extremely high cost.

Women and men become invisible under different conditions in patriarchal culture.

In general, women are made invisible when they do something that might elevate their status, such as raising children into healthy adults or coming up with a brilliant idea at a business meeting. Men, however, are often made invisible when their behavior is socially undesirable and might raise questions about the appropriateness of male privilege.³⁶³

357. *Id.* at 26.

358. *Id.* at 86.

359. See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81-82 (1987).

360. See JOHNSON, *supra* note 355, at 70.

361. *But see* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 3-4 (1989) (describing heterosexuality as the key social structure to the subordination of women); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 5-8 (1987) (stating that the crux of sexual hierarchy is the sexualization of women's subordination and inferiority).

362. See JOHNSON, *supra* note 355, at 26.

363. *Id.* at 156.

Although patriarchy is "male-dominated, male-identified, and male-centered,"³⁶⁴ it easily can be supported by sex-neutral rules. For example, the neutral best interest standard for custody at divorce functions admirably in a patriarchal culture. In such a culture, when men do something good, such as function as good-enough fathers, their success is easily seen and readily appreciated. When women succeed by being good-enough mothers, they tend to remain invisible. Conversely, when men do something bad, such as abuse women or children, they tend to become invisible in the legal system and elsewhere. When women do something bad, such as abuse their children or kill their abusive spouse, they tend to be easily seen.³⁶⁵ These aspects of patriarchy are visible today in our legal system.

Sex-neutral rules supporting patriarchy are male-centered and male-identified, meeting men's needs more effectively than women's needs and valuing masculine traits over feminine traits. If our goal is greater equality between women and men, we must move towards a less patriarchal culture, one which does a better job of meeting women's needs and valuing feminine traits and women's labor as well as masculine traits and men's labor. Large legislative bodies allow for many people with diverse backgrounds, experiences, and perspectives to deliberate about and enact legislation.³⁶⁶ Unfortunately, most of the members of our legislative bodies are men; more diverse legislatures might do a better job of serving women's needs and valuing women's traits and labor.³⁶⁷ In light of this problem and the problems discussed earlier with the formal equality standard

364. See *supra* note 355 and accompanying text.

365. See Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 14-15 (1995) (stating that even when men are the abusers, mother of the child is more likely to be charged with neglect than the abuser).

366. See Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 635 (1995).

367. For discussions of how law contributes to the undervaluation of women's labor, see Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. (forthcoming October 1998); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 571 (1996).

applied by the Supreme Court in sex discrimination cases, I suggest two concrete changes—a new ERA and a Voting Rights Act for Women:

1. *A New ERA.* This ERA would have language more like the Fourteenth Amendment than either earlier ERA *and* would give ultimate authority on questions of sex equality to the federal Congress rather than to the Supreme Court. In addition, it would guarantee that one senator from each state be a woman.

Section 1. Neither any state nor the federal government shall deprive any woman or man of life, liberty, or property, without due process of law; nor deny to any woman or man within its jurisdiction the equal protection of the laws.

Section 2. Each state shall have at least one senator who is a woman. Congress shall, through appropriate legislation, establish laws to enforce this provision and may determine that it becomes effective only upon the retirement of male incumbents.

Section 3. Congress shall have the ultimate power to enforce this Amendment and to determine its scope and meaning.

2. *A Voting Rights Act for Women.* This Act would be designed to do what the Voting Rights Act did for racial minorities when it was at its most effective: ensure proportionate representation for women in legislative bodies. For example, parties might be encouraged through federal campaign contributions to run female candidates for races without an incumbent.³⁶⁸ Electoral systems might be changed to provide for multi-member districts with cumulative voting or proportionate representation.³⁶⁹

368. The single biggest disadvantage women face is that they are less likely than men to be incumbents, and incumbents win the vast majority of American elections. See Janet Clark, *Getting There: Women in Political Office*, 515 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (1991). One of incumbents' biggest advantages is in raising funds, and a Voting Rights Act for Women enacted pursuant to the proposed new ERA might be able to avoid *Buckley v. Valeo*, 424 U.S. 1 (1976), which found limits on individual campaign contributions unconstitutional.

369. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 119-156 (1994).

By including "woman" and "man," this ERA suggests that sometimes women and men might have different needs, so that different approaches might be appropriate to ensure equal protection of the laws. The refusal to protect women from marital rape, which is still the policy of many states in the absence of extreme violence, might well be a denial of equal protection to women under it.³⁷⁰

This Amendment would give ultimate enforcement authority to the Congress, rather than the Supreme Court and, in doing so, give this authority to a body, one of whose chambers would be at least fifty percent women. These women would be operating in a legislative setting, not the more conservative judicial setting, in which legitimacy is gauged by consistency with prior (often patriarchal) decisions.

Even without a Senate containing at least fifty women, the constitutional amendment I have proposed would be advisable. Because of problems in the non-ideal world in which we live, affirmative action for women often is necessary to offset not just past discrimination, but *continuing* patriarchal attitudes and values. Affirmative action may be appropriate with respect to child custody, for example, and in many employment settings, particularly those that regard masculine traits as essential for effective performance. Sex-specific rules might be appropriate in other areas as well. Perhaps, for example, we should encourage all-female schools, quotas of at least fifty percent women for various governmental entities, and an all-female all-volunteer combat unit.

A final set of advantages in giving the United States Congress the final say on the meaning of equality concerns the legislative process. Cultural and social changes are key to any meaningful shift in status hierarchies. The debates, at dinner tables as well as on the floor of Congress, sparked by legislative consideration of what equality between women and men means would be valuable both in terms of creating more of a consensus on this issue and in terms of changing social and cultural attitudes and patterns of behavior.³⁷¹

370. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45 (1990).

371. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to*

This ERA substitutes federal congressional supremacy for judicial review on sex discrimination issues. Legislative bodies can respond with far greater flexibility than the Supreme Court to changes in the formulation of justifications for a status hierarchy such as patriarchy. In the end, equality inevitably will depend on women's effective assertion of their political power because the Supreme Court, with its limited role, cannot implement equality between women and men. This ERA recognizes and is consistent with that reality.

Regardless of whether we can enact the new ERA and Voting Rights Act, our top priority should be getting women into legislative office in numbers proportionate to their numbers in the population so that they can make the kind of detailed legal changes necessary if the laws are to protect women as well as men, and to value caretaking as well as wage work. Europe and many other parts of the world are ahead of us on this point. Their approach is one that is unimaginable under the formal equality standard developed and enforced by the United States Supreme Court. It includes quotas and explicit preferences of various kinds for women in electoral office.³⁷²

We are so used to women's underrepresentation in elective office that we do not see it as undermining the legitimacy of our "democracy." If women were some other historically disadvantaged and still subordinate *majority* group with similar levels of representation in a purported democracy, we immediately would question the legitimacy of the electoral structure. Christine Boyle, a Canadian scholar, makes this point in the form of a hypothetical:

Imagine a country in which all or most of the women, but not the men, lived in one geographical area — for example, Ontario. One can then examine the laws applying to and the

Make Social Change, 72 N.Y.U. L. REV. 967, 990 (1997) (reflecting on experiences and concluding that the "culture-shifting" essential for social change is more likely to come through legislative change than through top-down constitutional pronouncements from the courts).

372. See Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of all Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 34 (1996) (noting, however, that many quota systems have been eliminated, causing a decline in the number of women holding office).

economic position of "Ontarians" from a neutral standpoint. It will be found that the position of Ontarians is not good in Canadian society. They have been systematically discriminated against throughout their history; for example, their property was taken from them without compensation, they had no rights to their children, enfranchisement was ridiculed and bitterly opposed, and they still rarely sit in Parliament or on the bench. They are subjected to assault and sexual abuse by non-Ontarians, and they largely work at menial tasks for which they are paid much less than non-Ontarians, or nothing. In addition, they are depicted ever more widely by various media as being less than human, as objects for the sexual gratification of non-Ontarians. One has only to attempt such an account to realize that there exist two fundamentally different groups in Canada (and, of course, elsewhere). It is submitted that an electoral system which does not reflect any confrontation of that fact is inadequate.³⁷³

Boyle goes on to suggest that we naturally would propose separate representation along geographic lines for the problem of the Ontarians.³⁷⁴ We tend to look at non-geographically based separate-representation schemes with great suspicion, however, particularly when the suggestion is separate representation for women and men. This is linked to another important difference between patriarchy and white supremacy—the much stronger need to deny conflicts of interest between women and men because of our integration in families and in intimate relationships.³⁷⁵ Requiring a minimum of one woman senator from each state might serve an important symbolic role in reminding us that women and men often have different experiences and perspectives and sometimes have conflicting interests.³⁷⁶ Whether a senate half of whose members were women would make a significant difference in substantive legislative outcomes

373. Christine Boyle, *Home Rule for Women: Power-Sharing Between Men and Women*, 7 DALHOUSIE L.J. 790, 796 (1983). For a discussion of why racial representation is as effective in representing groups as geographic representation, see GUINIER, *supra* note 369, at 137-155.

374. See Boyle, *supra* note 373, at 799.

375. See JOHNSON, *supra* note 355, at 21; Mary E. Becker, *Politics, Differences, and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 183-85.

376. See Becker, *supra* note 375, at 185.

is, of course, unclear. But given the different needs, perspectives, and experiences of many women and men, such a senate might well behave differently.³⁷⁷ We cannot, of course, know whether it would until it exists.³⁷⁸

As noted earlier, quotas and other forms of electoral preferences exist for women in many other countries. Indeed, electoral quotas for women are becoming the norm in Western European democracies,³⁷⁹ though most Americans would find them unimaginable and are unaware of how common they are elsewhere. Most countries in the world have parliamentary systems with some form of proportionate representation. This means that a party has the same proportion of members in the parliament as that party's share of the electoral vote.³⁸⁰ Thus, if Party A has 20% of the vote in the parliamentary election, 20% of the members of the parliament will be from Party A. In many countries, each party fields a list of candidates and which of the party's candidates are in the legislative body depends on the candidate's position on the list and the party's proportion of the vote. If the

377. One need not believe female and male representatives would behave differently because of essential differences between the sexes. See Mary Fainsod Katzenstein, *Feminism and the Meaning of the Vote*, 10 SIGNS 4, 24 (1984) (making this point in the context of an argument for a "full-scale feminist commitment to electoral politics").

378. The available empirical evidence suggests that women may have different priorities and commitments than other legislators. See SUE THOMAS, HOW WOMEN LEGISLATE 134 (1994); Susan J. Carroll, *The Politics of Difference: Women Public Officials as Agents of Change*, STAN. L. & POL'Y REV., Spring 1994, at 11, 12. We see separate representation as appropriate for different geographic regions without believing in essential differences between those who live in them. African-American voters vote differently from white voters in the South. See Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (book review). We do not, however, ascribe essentialist reasons to racial differences in voting. Note that because of women's majority status, the case for proportionate representation of women in elected office is simpler than the question whether districts should be drawn so as to maximize the number of African-American representatives, thereby lessening other representatives' (the majority) commitment to African-American communities. See *id.* I do not, however, recommend separate voting districts for women and men throughout the electoral systems of the United States, because the larger districts necessary for such a scheme would decrease the number of minority representatives.

379. See *infra* notes 382-395 and accompanying text.

380. See generally BRIAN THOMPSON, TEXTBOOK ON CONSTITUTIONAL & ADMINISTRATIVE LAW 146-48 (2d ed. 1995) (discussing the differences between the parliamentary systems in place in the United Kingdom and Northern Ireland).

parliament contains 200 seats, each party, including Party A, will publish a list of 200 candidates. If Party A gets 20% of the vote, 40 parliamentarians will be members of Party A, and they will be the first 40 individuals on Party A's list of 200 candidates. In general, women do better as candidates in proportionate representation electoral systems, such as the one just described, than in single-member district electoral schemes, such as those common in the United States.³⁸¹

Sweden leads the world with the highest proportion of women in parliament: 40.4%.³⁸² This result was achieved by a commitment from the five leading political parties that women and men alternate positions on party lists.³⁸³ Finland's parties adopted a 40% quota for women in 1995,³⁸⁴ and political parties in Norway regularly field 50% women candidates either by tradition or party rules.³⁸⁵ In Britain, the Labor Party has quotas requiring 40% women at all party levels and it ran women in 50% of the open or "winnable" seats, but this policy was struck by a court in a challenge from rejected male candidates who argued that it discriminated against men.³⁸⁶ In Spain, party quotas range between 25% and 50%.³⁸⁷ Other countries with party quotas in-

381. See R.E. Matland & M.M. Taylor, *Electoral System Effects on Women's Representation: Theoretical Arguments and Evidence from Costa Rica*, 30 COMP. POL. SYS. 186-210 (1998) (finding that women's representation is positively affected by party magnitude); Judy Mann, *Eastern Bloc Women's Time Has Come*, WASH. POST, Feb. 9, 1990, at C3 [hereinafter Mann, *Eastern Bloc*]; Judy Mann, *European Gender Gap*, WASH. POST, Oct. 26, 1988, at B3 [hereinafter Mann, *Gender Gap*].

382. See Gail Russell Chaddock, *Quotas Boost Women Pols*, CHRISTIAN SCI. MONITOR, May 14, 1997, at 1, available in 1997 WL 2801135.

383. See *id.*

384. See *id.*

385. See *id.*

386. See *id.* Nevertheless, the number of women in the Parliament nearly doubled in the May 1, 1997 election. See *id.* The ruling came after some candidates had been slated and many local parties resented the ruling and selected women in spite of it. See *id.*

387. See Pat Healy, *If It Won't Shift, Push It*, THE GUARDIAN, Oct. 27, 1993, at T12, available in 1993 WL 10812224. The Spanish Socialist Party took steps to ensure that 25% of its candidates were women; other parties were moving towards 50%. See *id.* The Spanish Parliament has since boosted female representation to 16%. See Chaddock, *supra* note 382, at 1.

clude Germany,³⁸⁸ Mexico,³⁸⁹ South Africa,³⁹⁰ France,³⁹¹ India,³⁹² and Egypt.³⁹³ Italian parties adopted quotas that the Italian Supreme Court subsequently declared unconstitutional.³⁹⁴ Belgium is the only country that has instituted quotas at the national, rather than party, level.³⁹⁵

388. Germany has increased its proportion of women in Parliament to 26.5% under the quota. See Chaddock, *supra* note 382, at 1. Germany actually uses party list seats to compensate for what happens in two single-member district seats, making the whole parliament proportional to party vote. See *Common Ground: Democratic Alternatives, Part II* (radio broadcast, Feb. 15, 1994) [hereinafter *Common Ground*].

389. See Chaddock, *supra* note 382, at 1. Like Argentina, the Mexican government has made quotas compulsory for all political parties. See *id.* In most countries, the quota decisions are left to the individual parties. See *France-Chabadabadz*, THE ECONOMIST, June 28, 1997, at 52, available in LEXIS, News Library, Econ File.

390. With the end of apartheid came the realization that the one-man, one-vote system was not enough to ensure representation. As every major faction supported the principle of proportional representation, it was incorporated into South Africa's new constitution. This was especially impressive because the African National Congress probably could have dominated a winner-take-all system election. See *Common Ground*, *supra* note 388.

391. Only the Socialist Party has a quota for women (approximately one-third of all seats) in France, but that single quota has doubled the number of women in parliament to 11%. See *France-Chabadabadz*, *supra* note 389, at 52. Until the June 1, 1997 vote, France ranked dead last in Europe in women's representation in parliament. See Gail Russell Chaddock, *Socialist Win Means 'Vive L'Egalite!': Recent Elections in France Highlight a Trend Toward Bringing More Women into Politics*, CHRISTIAN SCI. MONITOR, June 6, 1997, at 1, available in 1997 WL 2801716.

392. A 1993 amendment to India's constitution reserved "a third of the seats in local councils known as panchaya" for women. Kenneth Cooper, *Indian Mandate Boosts Women in Local Politics; Quotas Put Nearly a Million on Councils*, WASH. POST, Aug. 26, 1996, at A8.

393. The Egyptian quota system, which reserved a minimum number of parliamentary seats for women, survived for less than a decade. The system was revoked in 1987, mainly because it had no relevance in a country ruled by a powerful elite that had no commitment to democratic representation. Quotas were replaced by a new law that guaranteed a seat in each constituency to independent candidates, male or female. See *Women's Thorny Road to Political Equality in Egypt*, MONEYCLIPS, Feb. 17, 1994, available in LEXIS, News Library, Moclip File.

394. The Italian Parliament passed legislation setting mandatory quotas for women in elections in lieu of waiting for Italy's many parties to instigate their own policies. See *France-Chabadabadz*, *supra* note 389, at 52. In 1996, these quotas were declared unconstitutional. See *id.* Indeed, successful quota systems have often required an amendment or, in the case of newly emerging democracies, a new constitution. See *Common Ground*, *supra* note 388.

395. See *France-Chabadabadz*, *supra* note 389, at 52. By the end of the century, no more than two-thirds of the candidates found on Belgian electoral lists may be of the same sex. See *id.*

Although the United States sees itself as the world leader on sex equality, it has fallen behind other nations in its willingness to experiment with various ways to achieve electoral equality for women. The formal equality standard enforced by the Supreme Court is part of the problem, a palpable obstacle making it difficult even to imagine, let alone seriously discuss, the use of electoral quotas or other affirmative action for women in politics in the United States.³⁹⁶

CONCLUSION

During the 1960s, American feminists ended a forty year stalemate over which strategy to use to improve women's status and material conditions. By the end of the sixties, American feminists were all supporting formal equality, to be achieved either under the Fourteenth Amendment or through the ERA. Given the negative consequences for women of most sex-specific legislation at the time, and the need to end the stalemate be-

396. The Democratic and Republican Parties both have sex-specific quotas today: their national committees consist of a woman and a man from each state. See BECKER ET AL., *supra* note 1, at 911. At least some party actions are state action. See *Nixon v. Condon*, 286 U.S. 73 (1932) (holding that when Texas legislature delegated to the State Executive Committee of each party the ability to set eligibility requirements for participation in primary and Democratic State Executive Committee requiring whiteness, there was state action and a violation of the right of African-Americans to vote).

Several states have gender balance policies, providing that boards, commissions, committees, and councils of various kinds appointed by elected officials be gender balanced. See *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 701 (1993). At least two states have enacted legislation explicitly so providing. See IOWA CODE ANN. § 69.16A (West 1991); N.D. CENT. CODE § 54-06-19 (1989). Montana has a non-binding gender balance resolution. See MONT. CODE ANN. § 2-15-108 (1997). Iowa has a *mandatory* requirement that one woman and one man must be *elected* to the position of Judicial Nominating Commissioner from each district. See IOWA CODE ANN. § 46.4 (West 1991).

Several federal entities have quotas based on party affiliation. For example, the Federal Election Commission has six members, and no more than three are to "be affiliated with the same political party." 2 U.S.C. § 437c(a)(1) (1994). The Securities and Exchange Commission, the Federal Trade Commission, and the Commodity Futures Trading Commission, each consist of five members, no more than three to be "members of the same political party." 15 U.S.C. § 78d(a) (1994) (SEC); 15 U.S.C. § 41 (1994); 7 U.S.C.A. § 4a(a)(1) (West Supp. 1998) (CFTC). Similar rules apply to the Board of Directors of the Federal Deposit Insurance Corporation. See 12 U.S.C.A. § 1422a(b)(2) (West Supp. 1998).

tween feminist camps, this consensus is easy to understand and was perhaps the best available option at the time.

Today, however, we live in a different world. In this world, formal equality is a barrier to the flexibility and experimentation needed to combat the new, sex neutral ways in which law supports patriarchy. In this essay, I have suggested that it is time to think about what approaches would be effective in the future, given formal equality's important successes and its limitations, limitations which are obvious today but were unforeseeable in 1970.

I have suggested that we seek (1) a new ERA providing for equal protection of women and men under the laws, requiring that one senator from each state be a woman, and giving ultimate enforcement power to the Congress rather than the Supreme Court as well as (2) a Voting Rights Act for Women. Because patriarchy can be supported by sex-neutral rules, we need to increase the number of women in office beyond token numbers and give them the power to experiment with a variety of approaches as we attempt to move toward a culture that is less male-centered, male-identified, and male-dominated.

APPENDIX A

Equal Protection Sex-Discrimination Cases
from *Reed v. Reed* to May 1998

CASES FOLLOWED BY ***: DISCRIMINATION ARGUABLY PROTECTS
MATERNAL AND FAMILY FUNCTIONS.

1. *Reed v. Reed*, 404 U.S. 71 (1971) (female plaintiff wins; Court strikes state statute creating preference for male estate executors).

2. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (female plaintiff wins; Court strikes rule automatically giving benefits to spouses of men, but not spouses of women, in the Air Force).***

3. *Kahn v. Shevin*, 416 U.S. 351 (1974) (male plaintiff loses; upholding property tax exemption for widows).***

4. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (female plaintiff loses; Court holds pregnancy discrimination in state disability plan not sex discrimination).

5. *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (male plaintiff loses; Court upholds rule giving women two more years in rank under military officer up-or-out policy).

6. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (male plaintiff wins; Court holds that women must be included on juror roles).

7. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (male plaintiff wins; Court holds that widower must be given Social Security benefits available to the widow).***

8. *Stanton v. Stanton*, 421 U.S. 7 (1975) (female plaintiff wins; Court strikes statute creating different ages of majority for boys and girls).

9. *Craig v. Boren*, 429 U.S. 1 (1976) (male plaintiff wins; Court holds unconstitutional different rules on ability of young people to buy 3.2% beer).

10. *Califano v. Goldfarb*, 430 U.S. 199 (1977) (male plaintiff wins; Court holds unconstitutional differential social security benefits provided for widows and widowers).***

11. *Califano v. Webster*, 430 U.S. 313 (1977) (male plaintiff loses; Court upholds temporary provision giving women an ad-

vantage in calculating Social Security benefits upon retirement).***

12. *Fiallo v. Bell*, 430 U.S. 787 (1977) (male plaintiff loses; Court upholds provision of immigration law giving mothers and their illegitimate children a more privileged status than that accorded to fathers and their illegitimate children).***

13. *Orr v. Orr*, 440 U.S. 268 (1979) (male plaintiff wins; Court holds that alimony statute imposing obligation on husbands only to support wives after divorce under certain circumstances violates the Equal Protection Clause).***

14. *Parham v. Hughes*, 441 U.S. 347 (1979) (male plaintiff loses; Court upholds statute precluding father from suing for the wrongful death of his child if paternity had not been established prior to child's death).

15. *Caban v. Mohammed*, 441 U.S. 380 (1979) (male plaintiff wins; Court holds that unwed father's consent is needed for adoption when he has established relationship with child).

16. *Davis v. Passman*, 442 U.S. 228 (1979) (female plaintiff wins; Court holds that congressman who refuses to hire women for staff positions discriminates on the basis of sex in violation of Constitution).

17. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (female plaintiff loses; Court holds preference for veterans in state employment not sex discrimination).

18. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979) (male plaintiff loses; Court holds that rights created by Title VII cannot be asserted in an equal protection action under § 1985(3)).

19. *Califano v. Westcott*, 443 U.S. 76 (1979) (female plaintiff wins; Court strikes statute giving aid to low-income two-parent families when the father, but not the mother, was unemployed; Court extends program to two-parent families with unemployed mothers).

20. *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980) (male plaintiff wins; Court strikes workers' compensation law requiring widower, but not widow, to show incapacitation or dependence in order to receive death benefits).***

21. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (male plaintiff loses; Court upholds statutory rape law applicable only against males).

22. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (female plaintiff wins; Court strikes down community property law giving husband unilateral control of jointly owned marital property).

23. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (male plaintiff loses; Court upholds selective service registration limited to males).

24. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (male plaintiff wins; Court holds that Mississippi cannot offer only women a nursing school).

25. *Heckler v. Mathews*, 465 U.S. 728 (1984) (male plaintiff loses; Court upholds temporary, gender-based pension offset exception to Social Security survivor benefits).***

26. *Bray v. Alexandria Womens' Health Clinic*, 506 U.S. 263 (1993) (female plaintiff loses; Court holds that obstruction of abortion facilities by protesters is not sex discrimination).

27. *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (male plaintiff wins; Court holds unconstitutional peremptory challenges of prospective jurors based on sex (defendant's lawyer in paternity action had struck women from the jury)).

28. *U.S. v. Virginia*, 518 U.S. 515 (1996) (female plaintiff wins; Court holds that Virginia Military Institute cannot admit only men).

29. *Miller v. Albright*, 118 S. Ct. 1428 (1998) (plaintiff not a male but daughter of a male; six justices uphold refusal to extend her citizenship though, had her mother been the U.S. citizen rather than her father, she would have qualified for citizenship; of the six justices voting to dismiss the claim, two held that the daughter did not have standing to raise her father's claim of sex discrimination, two held that she had standing but the sex-based discrimination was permissible because serving important governmental interests, and two held that the Court lacked the power to grant the relief requested regardless of her standing and the merits of the claim).***

APPENDIX B

Equal Protection Sex-Discrimination Cases
from *Reed v. Reed* to May 1998 Involving Discrimination that
Arguably Protects Maternal and Family Functions

ARGUMENT WINS

1. *Kahn v. Shevin*, 416 U.S. 351 (1974) (male plaintiff loses; upholding property tax exemption for widows that was not also available to widowers).

2. *Califano v. Webster*, 430 U.S. 313 (1977) (male plaintiff loses; Court upholds provision giving women an advantage in calculating social security benefits upon retirement).

3. *Fiallo v. Bell*, 430 U.S. 787 (1977) (male plaintiff loses; Court upholds provision of immigration laws giving mothers and their illegitimate children a more privileged status than that accorded to fathers and their illegitimate children).

4. *Heckler v. Mathews*, 465 U.S. 728 (1984) (male plaintiff loses; Court upholds temporary, gender based pension offset exception to Social Security survivor benefits).

5. *Miller v. Albright*, 118 S. Ct. 1428 (1998) (plaintiff not a male but daughter of a male; six justices uphold refusal to extend her citizenship though, had her mother been the U.S. citizen rather than her father, she would have qualified for citizenship; of the six justices voting to dismiss the claim, two held that the daughter did not have standing to raise her father's claim of sex discrimination, two held that she had standing but the sex-based discrimination was permissible because serving important governmental interests, and two held that the Court lacked the power to grant the relief requested regardless of her standing and the merits of the claim).

ARGUMENT LOSES

1. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (female plaintiff wins; Court strikes rule automatically giving benefits to spouses of men, but not spouses of women, in the Air Force).

2. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (male plaintiff wins; Court holds that widower must be given Social Security benefits available to the widow).

3. *Califano v. Goldfarb*, 430 U.S. 199 (1977) (male plaintiff wins; Court holds unconstitutional differential social security benefits provided for widows and widowers).

4. *Orr v. Orr*, 440 U.S. 268 (1979) (male plaintiff wins; Court holds alimony statute imposing obligation on husbands only to support wives after divorce under certain circumstances violates Equal Protection Clause).

5. *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980) (male plaintiff wins; Court strikes workers' compensation law requiring widower, but not widow, to show incapacitation or dependence in order to receive death benefits).