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SYMPOSIUM: THE NEW MEXICO EQUAL RIGHTS AMENDMENT— ASSESSING ITS IMPACT

THE NEW MEXICO EQUAL RIGHTS AMENDMENT: INTRODUCTION AND OVERVIEW

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In November, 1972, New Mexico voters will be asked to approve or disapprove an amendment to Article II, section 18 of the state constitution, which would, in express terms, prohibit discrimination based on sex. Specifically the amendment would add to the due process and equal protection guarantees of that section the following language: "Equality of rights under law shall not be denied on account of the sex of any person." If approved by the New Mexico electorate, the amendment will become effective on July 1, 1973.

At the same time, a proposed amendment to the United States Constitution will in all likelihood still be making its way through the ratification process. That federal constitutional amendment—if approved by three-fourths (38) of the fifty state legislatures—would add to the United States Constitution similar language which, in its crucial part, reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." As of July 19, 1972, (the 124th anniversary of the 1848 Seneca Falls Women's Rights Convention) twenty states had approved the federal amendment. It will become effective two years after its ratification by the requisite number of states.

The articles in this symposium examine the potential effects of the state amendment upon selected areas of New Mexico law.

The New Mexico amendment was approved by the state legislature and thus placed on the November ballot in the early

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part of 1972. At that time, the federal amendment had been approved in the United States House of Representatives by the necessary two-thirds vote. But, it seemed to be facing a difficult fight in the United States Senate because of the determined opposition of North Carolina's Sam Irvin among other United States Senators. Contemplating this determined opposition to the federal equal rights amendment and the possible seven-year delay in its ratification, New Mexico equal rights proponents concluded that immediate action was needed in New Mexico to assure prompt rewriting of state laws which continue to make arbitrary, biased, and harmful distinctions solely on the basis of sex.

Since the approval of the state amendment by the New Mexico legislature, the federal amendment has won approval in both houses of Congress. Indeed, when the amendment finally came to a vote in the United States Senate, the forecast opposition turned out to be illusory; the amendment was approved by an overwhelming vote of eighty-four to eight. Within a month after Senate approval, the legislatures of fifteen states had voted to approve the amendment. And, as noted above, by July 19, 1972, twenty states had approved the amendment, leaving only 18 more states required before it would become part of the United States Constitution. Thus, it appears that, barring any unforeseen complications, the federal amendment will be ratified long before the seven-year limit within which it must pass or fail.

Because the federal amendment would prohibit official sex discrimination not only at the federal level, but at the state level as well, the question arises whether any purpose is to be served by adopting a similar change in the New Mexico constitution. My answer, which will be explained below, is an unqualified yes. Many people, both lawyers and non-lawyers alike, may also ask why any amendment is needed in the light of the recent United States Supreme Court case of *Reed v. Reed*,¹ holding that a particular state's sex-based discrimination violated the Fourteenth Amendment's Equal Protection clause. The answer to that question is found in the history of the movement for amending both federal and state constitutions so as to guarantee equal rights without regard to sex.

The widespread existence of separate rules of law for men and

1. 404 U.S. 71 (1971).

women solely on the basis of sex has been chronicled elsewhere.² Not only have such separate rules existed at common law, but even under modern statutes they persist in many forms today. Many of these are examined in the following articles of this symposium.

Differences in the legal treatment accorded to men and women as such have been the subject of attacks in a large number of cases decided by the highest courts of the states as well as by the United States Supreme Court itself. Most such attacks have been based on assertions that particular sex-based distinctions in the law violate individual sections of the United States and state constitutions. The fate of such attacks—which, by and large, have been unsuccessful—is detailed in an earlier article of mine published in this law review.³ But, for purposes of clarity, I would like to summarize those failed attacks, and describe some recent developments on the constitutional law front.

Prior to the 1970's, the United States Supreme Court had decided a series of cases in which particular sex-discriminatory rules or practices had been challenged on constitutional grounds. Uniformly the Court held that each of the challenged sex-based disparities were constitutionally permissible. In 1872, the court decided in *Bradwell v. The State*⁴ that the privileges-and-immunities clauses of the United States Constitution did not prevent the state of Illinois from denying women the right to be licensed as attorneys in that state. In 1908, in the well-known case of *Muller v. Oregon*,⁵ the court held that separate labor legislation for women and men did not violate the due process guarantee of the Fourteenth Amendment. In 1954, in *Goesart v. Cleary*,⁶ the court upheld a Michigan law prohibiting women from serving as bartenders in certain establishments, unless those establishments were owned by the husbands or fathers of the women concerned. And, in 1961, in *Hoyt v. Florida*,⁷ the court held that the equal protection guarantee was not violated by a state provision under which women, without regard to their marital status or family situation, would not be required to serve on juries unless they

2. See, e.g. L. Kanowitz, *Women and the Law: The Unfinished Revolution* (1969).

3. Kanowitz, *The Equal Rights Amendment and the Overtime Illusion*, 1 N.M. L. Rev. 467 (1971).

4. 16 Wall. 130, 21 L.Ed. 442 (U.S. 1872).

5. 208 U.S. 412 (1908).

6. 335 U.S. 464 (1948).

7. 368 U.S. 57 (1961).

affirmatively indicated their desire to do so by registering with the clerk of the court, a privilege that was not available to men subject to jury service.

These and similar decisions at the state level caused equal rights proponents to seek a constitutional amendment that would specifically address the question of sex discrimination in the law. Since 1923, efforts have been made in Congress toward the adoption of such a constitutional amendment. Until this year, such efforts have proved unsuccessful, partly as a result of the unwillingness of crucial committee chairmen to hold hearings on the proposed amendment. In 1971, however, approval of the Equal Rights Amendment in Congress came closer than it ever had before, and success was finally achieved in 1972.

The essential problem with the earlier challenges to sex-discriminatory laws and practices was the acceptance by the United States Supreme Court of the principle that "sex is a reasonable basis for classification." The court thus rationalized separate treatment for men and women in a wide variety of situations without considering whether the attributes of individual men and women conformed to basic assumptions about the sexes generally. In the latter half of the 1960's, however, a series of decisions by state courts and lower federal courts began to cast some doubt upon the validity of that principle in particular situations. In 1966, a three-judge federal court in Alabama decided that the equal protection clause of the Fourteenth Amendment was violated by a state's absolute denial to women of their right to serve on juries.⁸ And in 1968 in *United States ex rel. Robinson v. York*,⁹ another federal court held that a state law requiring longer prison terms for women than for men who were convicted of the same crime also violated the equal protection guarantee of the Fourteenth Amendment.

During this period, not all challenges to official sex-discrimination reached the same result. For example, a state court ruling permitting husbands, but not wives, to sue for loss of consortium as a result of injury negligently inflicted upon their spouses was held not to violate the equal protection guarantee.¹⁰ Similarly, a three-judge federal court held that a state's maintenance of a

8. *White v. Crook*, 251 F.Supp. 401 (N.D. Ala. 1966).

9. 281 F.Supp. 8 (D.Conn. 1968).

10. *Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968), *cert. denied* 393 U.S. 1066 (1969).

women-only college to which men had been denied admission because of their sex, did not violate the equal protection guarantee—again invoking the ancient shibboleth that “sex is a reasonable basis for classification.”¹¹ Interestingly, in each of the last two cases, the United States Supreme Court denied certiorari. Though this is not a disposition on the merits, the denials indicated that the Court was going to choose carefully the case or cases in which it would give its latest thinking on sex discrimination and the Constitution.

In 1971, the Court finally decided on the merits a case attacking a particular species of sex discrimination as violating the equal protection clause of the United States Constitution. In that case, *Reed v. Reed*,¹² the court held an Idaho law preferring males to females, as administrators of estates, did in fact violate the equal protection clause of the Fourteenth Amendment. Significantly, however, though the court was asked in the briefs of the parties to hold that sex, like race, was a “suspect” classification, thereby requiring any state that would justify a sex-based distinction to establish the *necessity* for such distinction by “overwhelming” or “compelling” reasons,¹³ the court failed to enunciate this principle. Instead, *Reed* merely held that legislation which distinguished on the basis of sex would violate the equal protection guarantee if the distinction was arbitrary and unreasonable. Presumably, this meant that if there was *any* rational basis for the distinction, it would be upheld—which is the classic formula for testing state economic regulation against the equal protection clause.

Though the United States Supreme Court has not categorically rejected the suggestion that, for purposes of equal protection review, a state’s sex-based classification should be “suspect” like its racial classifications,¹⁴ a subsequent decision by the United States Supreme Court casts much doubt on the Court’s wil-

11. *Williams v. McNair*, 316 F.Supp. 134 (D.S.C. 1970), *aff’d* 401 U.S. 951 (1971).

12. *Supra* note 1.

13. See *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

14. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Mr. Justice Brennan, in footnote 7 of his opinion, made the following observations: “Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationaly related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967). But just as in *Reed v. Reed*, *supra*, we do not have to address the statute’s validity under that test because the law fails to satisfy even the more lenient equal protection standard.”

lingness to adopt that standard. In *Forbush v. Wallace*,¹⁵ a three-judge federal court had, in the face of an equal protection challenge, upheld Alabama's requirement that married women be registered with that state's motor vehicle bureau by their married names, and the state's common law rule requiring a married woman to assume her husband's surname as her legal name. Significantly, however, the three-judge court emphasized the easy availability under Alabama law of a means to change a married woman's name to some name other than her husband's (a right that does not appear to exist for married women in many other states).¹⁶ The United States Supreme Court, in a per curiam opinion, affirmed *Forbush v. Wallace*. Whether an affirmance without opinion by the United States Supreme Court is of any greater precedential value than a denial of certiorari is questionable. Equal rights proponents can still hope that the Court may in the future be persuaded to reconsider the *Forbush*-type problem and reach a different result.

Meanwhile the current posture of the United States Supreme Court with respect to equal protection challenges against official sex discrimination leaves much to be desired. Though, in *Reed*, the court for the first time struck down on equal protection grounds a state law which discriminated between the sexes, it treated the problem like one in the economic sphere rather than in the racial sphere as it had been urged to do. The court's affirmance without opinion in *Williams v. McNair*¹⁷ and its denial of certiorari in *Miskunas v. Union Carbide Corp.*,¹⁸ also suggest a go-slow attitude on its part.¹⁹ Finally the court's affirmance, albeit without opinion, in *Forbush v. Wallace* raises serious questions about its willingness to recognize, insofar as sex-based legal distinctions are concerned, the right of people to be treated as individuals rather than simply as members of a group whose general attributes do not necessarily correspond to their own individual characteristics.

15. 341 F.Supp. 217 (D.C. Ala. 1971); *aff'd* 407 U.S. 970 (1972).

16. *Supra* note 2, at 43-45.

17. *Supra* note 11.

18. *Supra* note 10.

19. *See also* *Stanley v. Illinois*, ____ U.S. ____, 92 S.Ct. 1208 (1972), deciding on due process rather than equal protection grounds, that a father of an illegitimate child cannot be bypassed in awarding custody of a child to strangers. Though the father in the case had urged a violation of the equal protection clause because mothers of illegitimate children were not accorded this kind of treatment, the court decided the case primarily as a due process violation because the child could be taken from him without a hearing.

Despite the Supreme Court's reluctance to move in this area, other courts have been less timid about applying the "suspect classification" analysis to classifications based on sex. An early case indicating a willingness to do this was the above-mentioned case of *Robinson v. York*, although in that case the court did not follow the logical implication of its theoretical construct to their fullest extent. By contrast, the California Supreme Court, in the landmark case of *Sail'er Inn v. Kirby*,²⁰ has wholeheartedly adopted the "suspect classification" analysis for classifications based on sex, thereby invalidating that state's law prohibiting women from serving as bartenders under certain circumstances.

Since the United States Supreme Court has often followed the lead of the California Supreme Court in developing new approaches to social and legal problems of the day,²¹ it is far from certain that it will never adopt the "suspect classification" rationale in the sex discrimination area, despite its demonstrated reluctance to take that step.

The fact remains, however, that the Court, as of this writing, has not adopted that analysis, and there is no guarantee that it will do so. Even were it to do so, the suspect classification test would not necessarily preclude classification based upon sex, since all it requires is a greater burden of justification for such a classification.²²

For these reasons, equal rights proponents have insisted upon the need for a constitutional amendment which (except in those very rare and narrowly defined circumstances where discernible sex-based biological differences clearly justify sex distinctions in the law) would prohibit any official discrimination or distinction based upon sex. It has been suggested that even under the Equal Rights Amendment certain distinctions based upon sex, such as a state's regulation of wet nurses and sperm donors, would continue to be permissible.²³ The reason for this is that these biological differences inhere in the very nature of the sexes. But if

20. 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

21. For a recent example, compare *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) with *Furman v. Georgia*, 40 U.S.L.W. 4923 (1972).

22. *But cf.* Chief Justice Burger's recent observation: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Dunn v. Blumstein*, _____ U.S. _____, 92 S.Ct. 995, 1013 (1972) (dissent).

23. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 893 (1971).

a state attempts to distinguish between the sexes merely on the basis of statistical probability or widespread generalization, it would violate the equal rights principle.

Thus, if and when the Equal Rights Amendment becomes part of the United States Constitution, it is clear, from its legislative history, that any state or federal distinction based upon sex, which is not inextricably linked to the biological characteristics of men and women and which does not exist in all men and all women, would be invalid. At the same time, it is clear that the Amendment would permit many individual men and women to continue to receive the same legal treatment they receive now. But such treatment would be accorded them because of their individual circumstances, and not because of any assumptions about them based on their sex. Because the language of New Mexico's equal rights amendment tracks that of the federal equal rights amendment it is equally clear that its interpretation would be comparable.

Why, then, is there any need for an amendment to the state constitution? For one thing, it is by no means certain that the federal Equal Rights Amendment would be ratified in the very near future—although at this writing, it seems likely that ratification will occur well within the seven-year period required under the congressional resolution sending the measure to the states. Should ratification of the federal amendment be delayed, the adoption of the New Mexico amendment would insure that, in New Mexico at least, the equal rights principle would be quickly implemented. (It is worth noting that equal rights amendments to state constitutions will be before the electorate of various other states in November, 1972, including Texas and Colorado. Pennsylvania adopted a similar state amendment in 1971.)²⁴

There is, moreover, another important difference between the federal amendment and that proposed for New Mexico. As mentioned earlier, the federal amendment would not go into effect until two years after its ratification. This delay was designed by Congress to give the states adequate opportunity to revise their own laws so as to implement the equal right principle enunciated in the amendment. Above all, Congress was concerned that any disparities based upon sex under state law should be

24. Pa. Const. art. I, §27 reads: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Adopted May 18, 1971.

corrected in the first instance by the legislative representatives of the states themselves, rather than by federal or state courts. By contrast, the New Mexico amendment, if approved by voters in November of 1972, would go into effect by July 1973, a delay of approximately seven months. As this symposium demonstrates, however, the shorter delay in the effective date for the New Mexico amendment should not seriously impede the ability of the New Mexico legislature to enact implementing legislation in the forthcoming 1973 session. In addition to the materials of this symposium, a committee of New Mexico Law School students, both male and female, has prepared a comprehensive memorandum suggesting alternative ways of curing present sex-based inequalities under New Mexico law, evaluating those alternatives, and recommending one or more approaches in a variety of fields.²⁵

But perhaps more important than the possibilities of earlier action under the state amendment than under the federal amendment is the symbolic significance of what many of us hope will be the positive approval of New Mexico voters this November. In contrast to the ratification process for the federal amendment, which requires action by state legislatures, the New Mexico amendment would require approval by a popular vote of ordinary New Mexican voters in an ordinary election. In some ways, this resembles the recent approval in Switzerland of women's right to vote in that country's federal elections. Though, in some respects, it was at best a minor accomplishment for the Swiss to approve this basic human right, it is significant that approval finally came by a popular vote of that country's male voters.

Ratification of the state Equal Rights Amendment by New Mexico voters would, therefore, be understood as an unequivocal commitment by ordinary men and women in our state to the ideal of equal treatment without regard to sex, and to the concomitant ideal that people ought to be treated in law and society as individual human beings and not merely as members of a "class" to which they might belong but whose general characteristics may or may not conform to their individual attributes.

All signs point to a positive vote on the state Equal Rights

25. See A Report on Possible Effects of the Equal Rights Amendment (April 5, 1972).

Amendment this November. Diverse organizations such as the League of Women Voters, the Business and Professional Women's Association, the Communications Workers of America and other labor organizations, student groups at the University of New Mexico and throughout the state, among others, have already voiced their approval and support of the state amendment.

The important point to keep in mind is that we are entering a new era in American life insofar as the legal and social status of the sexes are concerned. Older assumptions, unproven by fact or experience, concerning the general characteristics of men and women are being challenged because of the injustices they have caused to both sexes in our society. In numerous areas of contemporary life, a reevaluation of past practices and concepts is under way. Adoption of the state Equal Rights Amendment, along with the federal Equal Rights Amendment, will represent law's contribution to such a reevaluation.