

Equal rights: Stepping into the unknown

"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life..."

— Bradwell v. Illinois, 1872

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

— Proposed Amendment to the Constitution of the United States

The concept of women's inferiority is deeply rooted in our legal system. Under common law women were classified with children and imbeciles, presumed to be incapable of rational decision and in need of the constraints of a bindingly protective paternalism.

Many vestiges of this discriminatory treatment remain in the laws and institutions of the federal government and the states, preserving the separate and unequal status of women in education, employment, financial affairs, the military and marriage.

In the hope of providing a legal basis for equality, if not an actual, across-the-board remedy for this discrimination, Congress approved and sent to the states for ratification the Equal Rights for Men and Women Amendment (ERA). Although this Amendment passed both Houses of Congress by overwhelmingly lopsided margins, ratification by 38 states — the necessary three-quarters of the total 50 — is far from certain.

Just as groups such as the National Organization for Women (NOW), the American Civil Liberties Union, Common Cause and the National Women's Political Caucus are organized to lobby for ratification, many groups are now organized to lobby against it, such as the AFL-CIO,

method of constitutional amendment with other possible methods of eliminating sex discrimination in the law. It will then suggest the effects the Amendment would have in certain major areas, and conclude with a discussion of how ratification of the Amendment is faring to date.

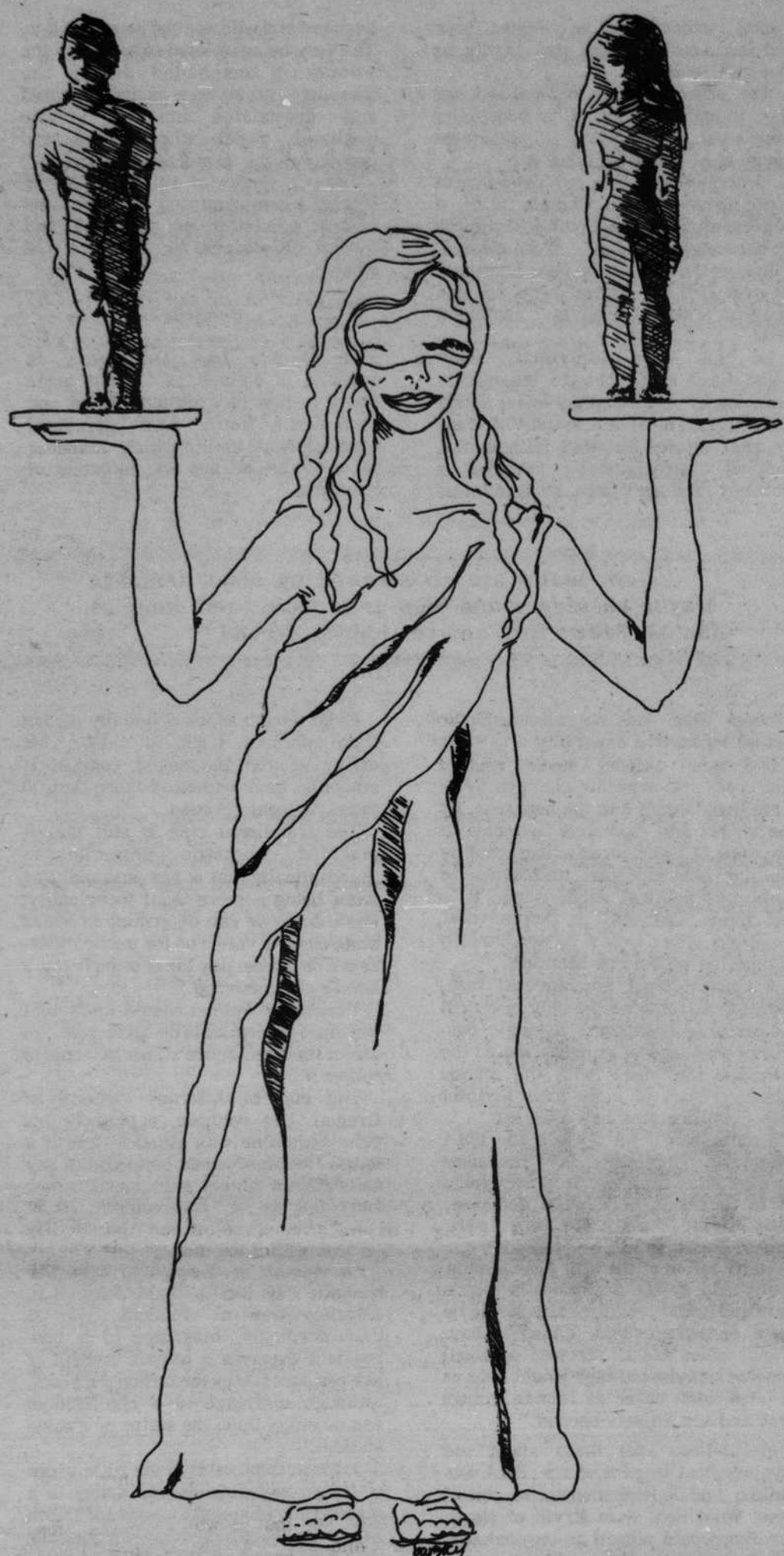
Is this amendment necessary?

There are many who admit that our legal structure supports an inferior status for women but feel that the ERA is not the best remedy. The proposed 27th Amendment is, they feel, not only too sweeping but also unnecessary. Less drastic methods of change include extending to sex discrimination the doctrines of strict judicial review under the equal protection clause of the 14th Amendment and revising, piecemeal, existing federal and state laws.

The equal protection and due process clauses of the 14th Amendment are certainly a substantial basis on which the courts could insist that men and women be evaluated in the law by their individual merits instead of their sex.

The 14th Amendment reads: "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Frohnmayr explained that there are



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Bell Telephone Company, Happiness of Womanhood (HOW), and unsuccessfully, the committee for the Preservation of Womanhood, an Oregon Group.

The interpretations of the proposed 27th Amendment offered by these different groups are as varied as they are often fantastic: one would think the ERA were the gold doubloon Captain Ahab nailed to the mast of the Pequod in *Moby Dick* — people see their own faces there.

Part of the confusion is understandable. It is impossible to predict with absolute certainty how the courts would interpret the Amendment if it were to be ratified. Barbara Aldave, University law professor, pointed out that many constitutional amendments have been construed in ways that would have surprised their drafters. David Frohnmayr, University law professor and legal advisor to University President Robert Clark, agreed, saying that the ERA is a "step into the unknown, to a large degree."

But even though the ultimate contours of the Amendment — those ways it will be translated into law — are necessarily vague, it seems there is no reason why intelligent speculation cannot be separated from what is foolish.

This analysis will compare the

two standards the Supreme Court has developed in considering whether laws that differentiate between classes of persons violate the constitutional guarantees embedded in this equal protection clause.

The "strict scrutiny" standard forces the state to prove that it has a "compelling interest" in making distinctions. The "permissive scrutiny" standard forces the individual challenging the classification to prove it unfair.

"Any law which discriminates between persons because of race, national origin or poverty, especially poverty in conjunction with criminal procedures, receives the strict scrutiny of the Court," Frohnmayr said, adding, "The courts have not yet seen fit to read a constitutional basis for giving sex this strict scrutiny."

Speaking in the U. S. House in 1970 Rep. Martha Griffiths, a chief proponent of the ERA, accused the courts of demonstrating sex prejudice by not applying the strict scrutiny doctrine to sex classifications.

"There was never a time when decisions of the Supreme Court could not have done everything we asked today," said Griffiths. "The Court has held for 98 years that women, as a class, are not entitled to equal protection of the laws. They are not

'persons' within the meaning of the Constitution."

The 101-year-old Court decision Griffiths referred to was *Bradwell v. Illinois*, 83 U.S. 130 (1872), which is quoted at the beginning of this analysis. In that case, the Court decided that women are not fit to be lawyers, but instead should fulfill the "noble and benign offices of wife and mother." While no recent decisions made by the Supreme Court are couched in such blatantly sexist phraseology, the Court still treats women as members of a class that should receive special treatment under the law.

In *Hoyt v. Florida*, 368 U.S. 57 (1961), a Florida statute excluding women from jury service unless they voluntarily applied was upheld. In the opinion written for the Court, Justice Harlan said, "... Woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of a general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." The assumption of a woman's "special place" in the home is still very much in evidence in this decision.

The more recent *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), is, certainly, on its face, more progressive. The courts held that an employer may not "in the absence of business necessity" refuse to hire women with pre-school age children. The Court expanded on its qualifying phrase, "in the absence of business necessity," as follows: "The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction (under title VII of the Civil Rights Act of 1964)."

In other words, if many more women are shown to have the main responsibility for the care of small children than men have, (this is obviously the case), then women as a class may be discriminated against.

The principal reason Frohnmayr said he favors the proposed Amendment is that it will "force the law to treat persons as individuals instead of members of a sex, providing explicit instead of just implicit prohibition against sex discrimination."

A recent article in the *Yale Law Journal*, (Vol. 80), concluded that the "present trend of judicial decisions, backed by a century of consistent dismissal of woman's claims for equal