

EQUAL RIGHTS FOR MEN AND WOMEN

JULY 14, 1971.—Referred to the House Calendar

and ordered to be printed

Mr. Brooks, from the Committee on the Judiciary,
submitted the following

REPORT

together with

SEPARATE AND MINORITY VIEWS

[To accompany H.J. Res. 208]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women, having considered the same, report favorably thereon with amendments and recommend that the joint resolution do pass.

The amendments are as follows:

AMENDMENT NO. 1

On page 2, line 2, after the word "rights" insert the following: "of any person".

AMENDMENT NO. 2

On page 2, following line 4, insert the following new section 2 and redesignate section "2" and section "3" as section "3" and section "4", respectively:

SEC. 2. This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.

PURPOSE OF THE AMENDMENTS

Amendment No. 1 makes it clear that the rights referred to in the proposed Constitutional amendment are the rights of people, including both citizens and non-citizens.

Amendment No. 2 makes it clear that Congress can exempt women from compulsory military service.

The amendment also makes it clear that Congress and the State legislatures can take differences between the sexes into account in enacting laws which reasonably promote the health and safety of the people.

PURPOSE OF THE AMENDED JOINT RESOLUTION

The purpose of the proposed joint resolution as amended by your Committee is to submit to the State legislatures an amendment to the Constitution of the United States which, if adopted, would insure that women and men receive equal protection under the laws of the United States and of the States.

STATEMENT

In recommending the proposed amendment to the Constitution, your Committee recognizes that our legal system currently contains the vestiges of a variety of ancient common law principles which discriminate unfairly against women. Some of these discriminatory principles are based on the old common law doctrine of "coverture" which treated the husband and wife as a single legal entity, but which regarded the husband alone as "the one". Other discriminatory principles still discernible in our legal system are based on an invidious and outmoded double-standard which affords men a greater freedom than women to depart from conventional moral standards. Still other forms of discriminatory laws have their origins in obsolete and often irrational notions of chivalry which in a modern context regard women in a patronizing or condescending light. Regardless of the historical antecedents of these varieties of sex discrimination, they are in many cases without rational justification and are no longer relevant to our modern democratic institutions. Their persistence even in vestigial form creates disharmony between the sexes. Therefore, we strongly recommend that all irrational discrimination on the basis of sex be eliminated.

These discriminatory features of our legal system could be eliminated without amending our Constitution if the Supreme Court were eventually to accord women the full benefit of the equal protection clause of the 14th Amendment. However, to date the case law in this area has not been thoroughly developed. As a result, it is your Committee's view that the proposed Constitutional amendment would be a means of articulating a National policy against sex discrimination which is needed and has not yet been fully articulated by the judicial system.

During the course of your Committee's extensive deliberations on this proposal, thorough consideration was given to the record of the hearings conducted by Subcommittee No. 4 in March and April of this year, as well as to the lengthy legislative history of similar proposals in past years. That consideration has led us to the conclusion that, in the form in which it was introduced, House Joint Resolution 208 would create a substantial amount of confusion for our courts. To a large extent this confusion emanates from the fact that there is widespread disagreement among the proponents of the original text of House Joint Resolution 208 concerning its legal effects. These dis-

agreements are so great as to create a substantial danger of judicial chaos if the original text is enacted. Although some of the proponents of the original language argue that the original text would permit both the Congress and State legislatures to make reasonable legal classifications into which sex is taken into account, other proponents argue strenuously that the use of the word "equality" in the original text is intended to assure that men and women are given "identical" legal treatment. In your Committee's view the latter construction would compel the courts to interpret the new amendment as a mandate to sweep away all statutory sex distinctions per se. Such a per se rule would be undesirably rigid because it would leave no room to retain statutes which may reasonably reflect differences between the sexes.

The rigidity of interpretation advocated by many of the proponents of the original text of House Joint Resolution 208 could produce a number of very undesirable results. For example, not only would women, including mothers, be subject to the draft but the military would be compelled to place them in combat units alongside of men. The same rigid interpretation could also require that work protective laws reasonably designed to protect the health and safety of women be invalidated; it could prohibit governmental financial assistance to such beneficial activities as summer camp programs in which boys are treated differently than girls; in some cases it could relieve the fathers of the primary responsibility for the support of even infant children, as well as the support of the mothers of such children and cast doubt on the validity of the millions of support decrees presently in existence. These are only a few examples of the undesirable effects that could be produced by the enactment of the original text of House Joint Resolution 208.

To obviate the possibility of such effects and of judicial chaos, your Committee has recommended that the proposal be amended in such a way as to make it clear that Congress could exempt women from compulsory military service and that neither Congress nor State legislatures would be paralyzed from taking differences between the sexes into account when necessary to promote the health and safety of our people. This amendment to House Joint Resolution 208 is embodied in Committee Amendment No. 2 described above.

In recommending Committee Amendment No. 2, we are cognizant of the fact that in previous Congresses efforts have been made to attach to various Equal Rights proposals the so-called "Hayden Rider", which provided that the Equal Rights Amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex."

We wish to emphasize that our Committee Amendment No. 2 differs significantly from the "Hayden Rider". Our amendment does not automatically embrace all laws that differentiate between men and women as would the "Hayden Rider". To the contrary, it would exempt only those laws, be they domestic, labor or criminal, that "... reasonably promote the health and safety of the people" and strike down those laws that arbitrarily and unreasonably set women apart from men. *Under our amendment sex alone would not be a valid basis for classification.*

The "Hayden Rider" language has been criticized as exempting laws from its coverage merely because they provide some type of

benefit for women. Some have said that this language could be interpreted as "freezing" into the Constitution those laws that are supposedly beneficial to women and consequently incapacitate the legislative process in this area. Many of these so-called "protective laws" are today being struck down by the courts as violations of the 1964 Civil Rights Act. However, the "Hayden Rider" could seriously impair the validity of the 1964 Civil Rights Act and other Federal statutes which are responsible for invalidating much of the so-called "beneficial legislation" for women.

On the other hand, the Committee Amendment No. 2 would avoid these pitfalls. It would, for example, allow us to retain reasonable laws designed to protect the health and safety of women, while striking down those laws based solely on sex that inhibit women in their efforts to seek gainful employment.

This Committee amendment is not a grant of authority to Congress or to the States. It does not, for example, grant to the Federal government a police power that it has not heretofore possessed. This amendment merely permits the Congress and the States and ultimately the courts to review the present law and reevaluate that law under the new Constitutional principle.

Under the text of the proposed Constitutional amendment as amended by your Committee, the courts would be directed to eliminate all unfair and irrational sex distinctions. Just as statutes classifying by race are subject to a very strict standard of equal protection scrutiny under the 14th Amendment, so too any State or Federal statute classifying by sex would likewise be subject to a strict standard of scrutiny under the proposed new Constitutional amendment. Under such a strict standard a heavy burden would be placed on the State to show that any legal distinction between the sexes was compelled by some fundamental interest of the State in the health and safety of people. Yet while being strict the court could also apply rules of reason in those cases in which an overriding State interest relating to the draft or to health and safety calls for judicial recognition of the differences that do, in fact, exist between the sexes.

In your Committee's view, the final effect of the Constitutional amendment that we propose would accord with basic notions of fairness and with logic. The proposed amendment would invalidate those invidious laws which discriminate improperly on the basis of sex. At the same time, however, it would permit us to retain those laws which realistically and rationally take sex into account and which equitably bring benefits to the majority of our citizens of both sexes.

COMMITTEE VOTE

On June 22, 1971, the full Committee on the Judiciary approved House Joint Resolution 208 in executive session and ordered it favorably reported with amendments by a vote of 32 yeas, 3 nays.

COST OF THE RESOLUTION

Any cost of the resolution to the United States relates solely to the processing of the proposed new article of amendment by the Administrator of General Services who forwards certified copies to the

Governor of each State and certifies that ratification has occurred. The Assistant Administrator of General Services has advised that: "The function is performed on rare occasions, and requires no addition to our regular staff and does not affect GSA's budgetary requirements." (Letter from General Services Administration to Chairman Emanuel Celler, dated March 4, 1971.)

No other costs to the United States are anticipated.

SEPARATE VIEWS

We are as strongly in favor of House Joint Resolution 208 as originally introduced by Representative Martha Griffiths as we are opposed to the Wiggins amendment—which was added by the full Committee on the Judiciary by a close vote of 19 to 16. In noting our opposition to the Wiggins amendment, we want to emphasize that a substantial majority of the Members of Subcommittee No. 4 who personally heard the testimony for and against the proposal supported this measure in its original form.

In our view the Wiggins amendment is completely unacceptable, not only because of its refusal to grant full equality to women but also because it does violence to the concept of equality itself. During the course of the Committee's deliberations, proponents of the Wiggins amendment argued strenuously against the use of the word "equality" in the Equal Rights Amendment. The Wiggins amendment has as its avowed purpose a qualification of "equality". Its proponents argue that such qualification is "reasonably" necessary because of considerations of "health and safety" or because of military considerations.

Throughout history whenever one group of people has sought supremacy over another, it has rationalized its actions as necessary to attain "reasonable" objectives. Invariably the form of this rationalization corresponds in one way or another to the form of the Wiggins amendment. Invariably those who assert the superiority of their own group argue that discrimination is justifiable if it has as its avowed purpose the protection of the health and safety of its victims or serves some military objective.

Essentially the concept of a qualified form of "equality" runs counter to the basic principle of democracy that is currently enshrined in the Equal Protection Clause of the 14th Amendment to our Constitution. Although proponents of the Wiggins amendment candidly admit that the Supreme Court has to date failed to afford women the full benefit of the Equal Protection Clause, their candor is not coupled with a real effort to promote equality between men and women.

The fact that the Wiggins amendment does not represent an acceptable effort to eliminate sex discrimination is obvious from even a cursory review of the hearings held in this Congress by Subcommittee No. 4. Those hearings established beyond dispute that women as a group are the victims of a wide variety of discriminatory laws which would not only be retained under the Wiggins amendment, but would in some cases actually be strengthened.

In every State, women are denied educational opportunities equal to those of men. In many States, a woman cannot manage or own separate property in the same manner as her husband. In some States, she cannot engage in business or pursue a profession or occupation as

freely as can a member of the male sex. Women are classified separately for purposes of jury service in many States. Some community-property States do not vest in the wife the property rights that her husband enjoys. In a number of States, restrictive work laws, which purport to protect women, actually result in discrimination in the employment of women by making it more burdensome for employers to hire a woman than a man.

These are only a few of the types of discrimination that Subcommittee No. 4 found, without dispute, to exist in the United States. Rather than remedy these types of discrimination, the Wiggins amendment would sanction each of them whenever a Federal, state, or local governmental body declared in its legislative findings that their avowed purpose was to protect "health and safety." In addition, by sanctioning discrimination when related to "health and safety" the Wiggins amendment would also substantially weaken Title 7 of the Civil Rights Act of 1964 which currently prohibits sex discrimination in employment. Obviously, these effects would represent a step backwards in our efforts to eliminate sex discrimination.

The fact that the Wiggins amendment is not a real effort to remedy sex discrimination is also clear from the failure of any of the groups of women who testified before Subcommittee No. 4 to endorse the Wiggins approach. Even those witnesses who represented women's groups in opposition to Mrs. Griffiths' proposals did not advocate the placing in our Constitution of the qualified form of equality that is embodied in the Wiggins amendment.

The plain and simple fact is that the Wiggins amendment has as its purpose the ultimate defeat of any effective constitutional amendment to provide equal rights for men and women.

The need for an effective constitutional amendment is clear; it is also clear that to be at all effective a constitutional amendment must be in the form in which House Joint Resolution 208 was originally introduced by Representative Martha Griffiths.

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

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

The main reason underlying the basic concept of the original text derives from both theoretical and practical considerations. The Equal Rights Amendment as proposed by Mrs. Griffiths embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society with the

individual, and with the right of each individual to develop his own potentiality.

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

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

Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

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

It should also be noted that opponents of Mrs. Griffiths' original text suggest that the Griffiths resolution would require equal treatment of men and women for purposes of compulsory military service. As pointed out by the report of the Senate Judiciary Committee which considered that question carefully in 1964:

This is no more true than that all men are treated equally for purposes of military duty. Differences in physical abilities among all persons would continue to be a material factor. It could be expected that women will be equally subject to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the government would not require that women serve where they are not fitted just as men with physical defects are utilized in special capacities, if at all.

Finally, we would like again to emphasize that the primary argument of the proponents of the Wiggins amendment is based on the assertion that the use of the unqualified word "equality" is perplexing, is beyond legal definition, and would lead to chaos if strictly construed by the courts. We believe that Congress should vigorously reject that argument.

"Equality" is perhaps the one word which more than any other challenges our Government to fulfill its constitutional commitments to all of our people. Because it is a symbolic word, and not a technical term, its enshrinement in the Equal Rights Amendment is consistent with our Nation's view of the Constitution as a living, dynamic document. Until now the concept of a qualified form of equality—of an equality that can be abridged so long as a suitable rationalization can be found—has been repugnant to our Constitution.

In our view "equality" can only be soiled by qualification. The Wiggins amendment should be totally rejected.

DON EDWARDS,
 PETER RODINO,
 ABNER J. MIKVA,
 JOHN F. SEIBERLING,
 JIM ABOUREZK,
 ROBERT F. DRINAN,
 JEROME R. WALDIE,
 ROBERT W. KASTENMEIER,
 EDWIN EDWARDS,
 WILLIAM F. RYAN,
 JOHN CONYERS, JR.,
 PAUL SARBANES,
 ANDREW JACOBS, JR.,
 JOSHUA EILBERG.

SEPARATE VIEWS OF THE HONORABLE ROBERT M'CLORY

The Equal Rights Amendment to the Federal Constitution has been introduced in every Congress since 1923. The purpose of this proposed constitutional change is to forbid Federal and State laws which discriminate on the basis of sex.

In 1950 and again in 1953, the proposed Equal Rights Amendment was adopted by the Senate after being amended by the so-called Hayden rider. This qualification of the "equal rights" amendment had the announced purpose of "protecting" women, and the unannounced effect of assuring inequality—and defeating the very purpose contemplated by the proposed constitutional change.

It was not until 1970 that the U.S. House adopted the Equal Rights Amendment by a margin of 350 to 15—after a discharge petition had dislodged the measure from the House Judiciary Committee. Thereafter, the Equal Rights Amendment was amended in the other body by the so-called Ervin Amendment which had basically the same purpose and effect as the Hayden rider.

This year, after weeks of hearings, the subcommittee that heard the testimony recommended adoption of the Equal Rights Amendment substantially in its traditional and recognized form, as follows:

Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex. (H.J. Res. 208)

Nevertheless, the full committee, after defeating a closely similar amendment on a tie vote, adopted by a vote of 19 to 16 an updated equivalent of the Hayden rider in this language:

SEC. 2. This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.

In voting to report out the Equal Rights Amendment—as thus amended—my purpose has been to work to delete from the proposed constitutional amendment the crippling, self-defeating qualification which would permit *all* women to be exempted from any and all compulsory military service laws—and would sanction any and all State and Federal laws which discriminated on the basis of sex provided only that they had some "reasonable" relationship to health and safety.

There was no compelling testimony in the Committee hearings which suggested the need for such an obvious contradiction in the Equal Rights Amendment. Indeed, the women witnesses—in general—insisted that they did not want an exemption from compulsory military service laws. In addition, they were adamant in their desire to be released from the so-called "protective" laws limiting their hours and days of work, protecting them against heavy lifting (10 to 25 lbs.) and other artificial barriers which have served to deprive women of various types of employment.

As to the current draft law, it is doubtful that it would be affected by the Committee's attempt to exempt women from its provisions as the present draft law is scheduled to expire in 2 years (at the latest)—and the Equal Rights Amendment would not become effective until 2 years after its final ratification—which will be some years hence.

Insofar as some future draft law is concerned, it should be pointed out that an exemption of one parent would not be barred by the Equal Rights Amendment. Furthermore, assignments to particular types of combat or non-combat duty—after induction—would be unaffected by this constitutional change.

Modern warfare deals quite indiscriminately with men and women—civilians as well as military. Women as infantrymen are a possibility almost too remote to contemplate. In fact, less than 15 percent of the men presently serving in the Armed Forces are involved in actual combat service. What is more—women themselves do not seek any such exemption as the "gutting" amendment would provide.

On the contrary, many who, in fact, oppose the adoption of a constitutional guarantee of equality of rights to women are satisfied to continue to subordinate women by barring them from an equal role in our national security—and by references to women's health and safety as excuses for discriminating against them in employment.

The subject of the drafting of women has been considered specifically at two important conferences held earlier this year.

(1) In March, the University of Kansas Commission on the Status of Women held hearings on the Equal Rights Amendment, centering on the question, "Should Women Be Drafted?" In a report on this conference received by the Subcommittee and reported on page 600 of the Hearings, the following appeared:

Those women students of draftable age who testified at the hearings felt that as long as a draft existed, women as well as men should be equally eligible for the draft. * * * The passage of the equal rights amendment should result in the same qualifications for men and women, thereby giving women the same opportunity as men to serve their country as well as learn useful skills. One other question which was discussed was whether or not women should be assigned to combat duty in the same manner that men are assigned? The general consensus was that there are many women who would like to serve in combat duty, either as infantry line-men or as pilots, and that these women should be given that opportunity. Studies have shown that almost nine out of 10 jobs done by servicemen are civilian jobs. Therefore, many men and women are needed to serve their country in capacities which do not require combat training. Again, if men and women are accepted and drafted into the armed services on an equal basis, they could be assigned to the duties they are most capable and willing to handle regardless of sex.

(2) The hearings disclose also that in the Resolution of the Intercollegiate Association of Women Students adopted at its national convention in Colorado in March, 1971, the organization endorsed the Equal Rights Amendment in the form as approved by the subcommittee. The IAWS also adopted a resolution regarding the draft, in part, as follows:

Whereas the major issue concerning the equal rights amendment is the question of women's involvement with the draft, therefore, be it,

Resolved, That given whatever selective service system prevails, IAWS supports the involvement of women equally with men in the responsibilities, requirements, and rights inherent in that system;

The witnesses before the subcommittee, Karen Keesling, Executive Director, and Katherine Eike, National President of the IAWS, concluded their statement with this plea:

Women are willing to accept the responsibilities that equal rights imply. * * * We urge this subcommittee of the House Judiciary Committee to endorse the equal rights amendment without any crippling draft amendment which would deny to young women the opportunity to carry their full share of responsibility for service to our country.

I concur in this plea, and urge the House to reject all qualifying language, and to adopt the proposed Constitutional amendment as set forth in H.J. Res. 208 to grant full equality of rights without discrimination on account of sex. In this way we can assure to all of our citizens equal justice under law.

ROBERT McCLORY.

Discrimination against women does exist. Of that there is no denial. Let it be understood that opposition to the Equal Rights Amendment is not to be equated with condoning practices or patterns of discrimination. The dissent runs not against the purpose of the Equal Rights Amendment but against the method.

Equality of opportunity for women can be achieved. We can by statute sharply outline the areas of discrimination, supplying specific remedies to specific wrongs instead of venturing into a "quicksand" of phraseology, guilty of imprecision, ambiguity, and highly susceptible to contradictory definitions.

I stress we are dealing with a constitutional amendment. Every word thereof should have exacting scrutiny. It would be irresponsible to dismiss the language as a mere declaration of policy without consideration of the possible injurious effects that could flow therefrom. In all the swirling arguments and differing interpretations of the language of the proposal, there has been very little thought given to the triple role most women play in life, namely, that of wife, mother and worker. This is a heavy role indeed, and to wipe away the sustaining laws which help tip the scales in favor of women is to do injustice to millions of women who have chosen to marry, to make a home, to bear children, and to engage in gainful employment as well. For example, in most States the primary duty to support rests upon the husband. One possible effect of the Equal Rights Amendment would be to remove that primary legal obligation. The primary obligation to support is the foundation of the household. I refuse to allow the glad-sounding ring of an easy slogan to victimize millions of women and children. As one witness put it in hearings before the Committee:

It is very doubtful that women would agree that a family support law is a curtailment of rights. Divorced, separated, or deserted wives struggling to support themselves and their children may find claims to support even harder to enforce than they are right now. * * *

It has even been suggested by a proponent of the Equal Rights Amendment that the "underlying social reality of the male as provider and the female as child bearer and rearer has changed." May I, in turn, ask who is bearing the children and who is rearing them? As far as I know the Fallopian tube has not become vestigial.

It should be of interest to the Members to read the testimony of the Department of Justice in the hearings before this Committee. Though appearing in support of the amendment, the spokesman for the Department was less than enthusiastic. I quote a portion of that testimony.

Hearings before the Senate Judiciary Committee last year have highlighted the extraordinary breadth of construction urged by some of the amendment's supporters. While the President, the administration, and undoubtedly most of the Nation are united in their desire to achieve equality for women, as that term has been commonly understood, there is some question as to whether the broadest possible construction of the amendment may not go substantially beyond that common understanding. We would have some doubt as

to whether there is a national consensus for compelling all levels of government to treat men and women across the board as if they were identical human beings. Certainly many people feel that publicly maintained restrooms should continue to be separate, that differing ages of consent and majority are, under some circumstances, justifiable, and that laws which are adopted with the genuine purpose of protecting women, rather than as a disguise for discriminating against them, are likewise permissible. Even if one were to determine for himself that all of these differences in treatment ought to be abandoned, under a Federal system such as ours, the question would remain as to whether a unitary rule should be promulgated by constitutional amendment which would deny to each State the right to choose for itself among rational alternative policies.

A host of questions would surround us should the Equal Rights Amendment be adopted which relate to State laws on the age of consent to marry, domicile, courtesy and dower rights, to cite but a few. These questions at this point are unanswerable. They become, with the adoption of this amendment, litigable issues bringing the Federal courts into the delicate fabric of domestic relations.

The testimony before the Committee clearly reveals disagreement among the proponents as to whether the language will permit reasonable classifications according to sex or whether it calls for identical treatment of every sphere of human endeavor. If we adhere to the interpretation of responsible classification according to sex, then it is admitted by some of the proponents of the Equal Rights Amendment that the Fourteenth Amendment would suffice.

Certainly we can by statute act to remove untenable patterns of discrimination, deriving our authority from the Fourteenth Amendment. I concur with the views expressed by the Department of Justice in its testimony before this Committee. I set forth a significant question and answer:

Mr. WIGGINS. Let's directly confront the question. Do you feel the constitutional amendment is necessary to implement the Federal policy you have enunciated, that is, no discrimination on the basis of sex?

Mr. REHNQUIST (Assistant Attorney General). No, I don't. I think one could do it by statute.

I would most vigorously support a bill that called for (1) comparable salaries for comparable work; (2) extension of the Fair Labor Standards Act to professional administrative personnel as well as to domestic and other workers not presently covered; (3) elimination of discriminatory promotion practices in government and industry; (4) equality of treatment of our Social Security and tax laws; (5) elimination of discrimination based on sex in admissions to colleges and professional schools; (6) securing the rights of women to control their own financial and commercial interests, and (7) remove any sex discrimination in the sale, rental, and financing of houses. There are other provisions which could be included and, thus, the issue of sex discrimination would be joined with clarity, specificity, and directness.

The Wiggins amendment adopted by the Committee:

This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people,

is an attempt to limit somewhat the overwhelming scope of the Equal Rights Amendment, as introduced. While it may act to save some of the protective labor laws of the States, which set working conditions for women, and while the amendment exempts women from compulsory military service, it does not cure the basic defect of the Equal Rights Amendment, and that is the confusion of interpretation of the language of the amendment which can call for unitary treatment of all persons regardless of fact or circumstance. Would separateness based on sex be a violation of the Equal Rights Amendment in such federally, as well as State and locally assisted or maintained institutions, such as universities, prisons, and congressionally chartered groups? Would such unitary treatment be in the best public interest? It would take years before any definitive answers could be forthcoming.

There will be no righting of wrongs if wrongfully done.

EMANUEL CELLER.

MINORITY VIEWS OF HONORABLE EDWARD HUTCHINSON

The proponents of this joint resolution would write into the Constitution the following words, and they oppose any change in them:

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

These are word of limitation against the legislative power. Congress should exercise utmost caution in proposing amendments to the Constitution, especially when they restrict the legislative power. The preservation of the legislative branch of government as co-equal assumes that the Congress will jealously retain the legislative power with which it has been vested and that State legislatures will be equally alert to any diminution of the power to legislate.

Legislative power already exists to strike down every vestige of inequality between the sexes. A constitutional amendment is not needed either to create that power, to extend it, or to perfect it. If inequality between the sexes still exists in the law and public policy demands complete equality, then why not remove those inequalities legislatively?

The proponents of a Constitutional amendment answer that question by expressing their impatience with the piecemeal approach of the legislative process. They want to remove all inequality at one time by denying the power of government to recognize any inequality. But what they apparently fail to see is that they are simply trading one piecemeal approach for another. Instead of working with State legislatures and the Congress to write laws, amend laws, and repeal laws to remove such vestigial inequalities as yet remain, they will be suing in the courts to define the word equality, case by litigated case. All they will have accomplished is to change the forum, from the legisla-

ture to the courts. They will transfer the power to determine public policy in this important and rather fundamental area out of the legislative branch of government, the branch most directly responsive to the public will, and place it in the judiciary, the branch least responsive, and the Federal judiciary is not reachable by the people at all. My deep concern and, I trust, knowledge of the rightful and proper relationship between the legislative and judicial functions persuade me that the public interest will be best served if the legislative power is not diminished and if the courts are not imposed upon to do the legislature's work of deciding public policy.

Far different than enacting a statute which may be amended to reflect the changing times or to correct court interpretations of it, once Congress assents to the placing of language in the Constitution it puts that language beyond its reach. The language then becomes the tool of the Supreme Court to interpret as it will, and that Court has been known to find meanings and powers in Constitutional amendments undreamed of and unintended by the Congresses which proposed them and the State legislatures which ratified them. In the light of this history, Congress should painstakingly and exhaustively inquire into and even speculate upon all possible interpretations the Court may place upon the language if it would truly understand the scope of the restriction upon legislative power this proposed amendment encompasses.

Nor should the Congress content itself that statements of legislative intent in a committee report or legislative history made during floor debate will carry much if any weight in the Court's interpretation of Constitutional language. Judges have observed that a Constitutional amendment is not an act of Congress alone, but is a joint act of Congressional proposal and State ratification. A statement of Congressional intent does not express the intent of the State legislatures, most of which are totally unfamiliar with the debate in Congress on the subject at the time their resolutions of ratification are adopted. Therefore, the Court does not find itself bound or even necessarily influenced by any so-called legislative history in the adoption of a constitutional amendment.

The phrase "Equality of rights under the law" will mean whatever the Supreme Court says it means, and that meaning may change from time to time as the membership of the Court changes. Within whatever meaning the Court may give that phrase, Congress is empowered by the second section of the article to make laws enforcing it.

Without this amendment, the States may legislate within the limits of the equal protection and due process clauses of the Fourteenth Amendment. With this amendment, the states may not legislate at all on the subject of rights under the law, except as the Supreme Court may find their laws free of sexual inequality.

Without this amendment, the Congress may legislate within the limits of the due process clause of the Fifth Amendment and with the powers granted to it under the fifth section of the Fourteenth Amendment. With this amendment, the Congress may continue to legislate, but only within the meaning given by the Court to the phrase "Equality of rights under the law". In fact, it is not beyond the realm of possibility that the Court may find, sometime in the future, that by this amendment, particularly the second section thereof, Congress was vested with power to take from the States the whole body of

domestic relations law and perhaps part of their property law as well. These vast powers, further destroying the strength of our Federal system, would of course be exercisable by Congress only under the definitions given by the Court to the "Equality of rights" phrase.

The proponents say this amendment will not reach nongovernmental action because the denial of equal rights is prohibited to the United States and any State. Under the Fourteenth Amendment only State action is prohibited, and still the Court has stretched the language to reach private covenants and trusts. The thing was accomplished by a holding that the courts could not be used to enforce such covenants and trusts. Similarly under this amendment the Court may hold that a private school for girls cannot use the courts to enforce its contracts, or that a testamentary trust cannot be set up wherein a father may direct the distribution of the corpus to his daughters at a different age than to his sons. Would the Court compel a private military school for boys to admit girls, or a summer camp for girls to take the boys along? I am satisfied that the Court would have no difficulty in extending this Constitutional amendment into the nongovernmental sector and will probably do so.

The committee hearings confirm that one effect of this Constitutional amendment would be to deny Congress the power to subject only men to the military draft. Some proponents argue that because women are not subject to the draft they are denied veterans benefits. This does not follow. Women may enlist in the military service, and those who join the military do so with all benefits accruing. The draft would bring women into the military against their will, and the hearings point out the difficulties and complexities which would spring from subjecting young mothers to the draft so long as young fathers are subject. The committee therefore amended the proposal to save to Congress its present discretionary power over the draft. Of course, Congress has the present power to draft women but the proposal in its original form would compel Congress to draft women if men are drafted.

The committee further amended the proposal to save to the States and the Congress legislative power over health and safety, but being of opinion that better public policy dictates no Constitutional provision at all, these amendments were insufficient to win my support for the joint resolution as amended.

The hearings also establish that there can be no inequality on account of sex in public institutions supported in whole or in part by governmental funds. The question of sexual segregation in prisons and penitentiaries, in educational institutions, and in medical and mental hospitals arises. Proponents say the requirement for equality of rights between the sexes will not destroy the right of privacy. I would hope they are right on that, but once the words are written into the Constitution it would be up to the courts to say. The right of privacy is not clear in the law at the present time. Until now it has been asserted only as a personal right. Could the legislative power make it a criminal offense to violate the segregation of sexes in institutions if consenting persons chose to waive their personal rights of privacy? Proponents want to leave all these policy decisions to the courts. I believe they should be left in the legislatures and in the Congress, and the way to leave them here is to defeat this amendment.

I am apprehensive the courts may in the future find within this amendment Constitutional power to effect a revolutionary change in the institution of the family, a change to which I am opposed.

Men and women are already equal under the law and I believe that whatever vestiges of inequality discriminatory against women still remain should be removed. I believe they can be removed legislatively and favor the legislature over the courts to accomplish that goal.

EDWARD HUTCHINSON.

MINORITY VIEWS OF THE HONORABLE DAVID W. DENNIS

I concur in the views of my colleague, Mr. Hutchinson of Michigan, which are so well and so thoroughly expressed as to leave no necessity for any extended discussion on my part.

I will add only one or two brief observations.

To begin with, there is at least a very good possibility that the Fourteenth Amendment already operates to prevent any invidious discrimination based upon sex on the part of the several States, and as I understand it, cases are now pending before the Supreme Court of the United States which may, at least to a substantial degree, decide this question. In the event that the Court holds that the Fourteenth Amendment does bar any such discrimination the proposed equal rights amendment will become even more unnecessary than, in my judgment, it already is.

Again, the proposed amendment, in its original form, quite clearly operates to subject women to the military draft. This would make for a fundamental change in American society which I would regard as highly undesirable and which, I am well satisfied, a clear majority of the American people does not desire.

In like manner I see no good reason why Congress, or the Legislatures of the several States, should not retain full power to enact reasonable legislation to safeguard the health and safety of the people, including that reasonably designed to protect the health and safety of women.

The amendment as revised and reported out by the Committee (and this revised form is opposed by most of the supporters of the amendment as originally proposed) corrects the two points last discussed, but it remains, in my judgment, and for all of the reasons set forth by Mr. Hutchinson and hereinabove, a totally unnecessary and undesirable provision with which we ought not encumber the Constitution of the United States.

DAVID W. DENNIS.