EQUAL RIGHTS AMENDMENT PROJECT

CALIFORNIA
COMMISSION
ON THE STATUS
OF WOMEN

A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS

prepared for

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Equal Rights Amendment Project

by

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INTRODUCTION

The Equal Rights Amendment offers a legal solution to legal, social and cultural problems in our society. Because the ERA will create law--a new Amendment to the United States Constitution--and because it will have distinctly legal effects on existing state laws and institutions, an understanding of the legal need for the Amendment and the way in which the courts will or may interpret it is basic to understanding the role the Amendment will play.

Therefore, this chapter explains in some detail the history of the Supreme Court's treatment, under the fourteenth amendment equal protection clause, of statutes and governmental actions based solely on the sex of the persons affected. When that history is understood, the need for the Amendment as a matter of law will be clear.

The chapter then sets forth both the possible theories the Supreme Court may use in applying the Amendment to cases which come before it and the theories which have been adopted throughout this work to analyze the Amendment's effect on major areas of state law and state institutions.

THE NEED FOR A CONSTITUTIONAL AMENDMENT

Equal Protection Doctrine in the United States Supreme Court

Ratified in 1868, the fourteenth amendment to the United States Constitution contains the famous equal protection clause which provides:

> Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws.

In its interpretation of the equal protection clause, the United States Supreme Court traditionally has applied at least two tests: the "minimum scrutiny" or "reasonableness" test; and the "strict scrutiny" test. Each will be discussed below.

"Minimum Scrutiny" or the "Reasonableness" Test

While the equal protection clause's guarantee may appear to require that all laws apply "equally" to all persons, in fact in most cases the clause only requires that the legislature

have a "reasonable" basis for the classifications it uses in a statute. Under "minimum scrutiny," the Court will uphold a legislative act if two tests are met: (1) the purpose of the act is a valid one; and (2) the classifications made--or the persons to which the act applies--are "reasonably" related to the purpose for which the act was passed.

Under the minimum scrutiny test, the first requirement is almost invariably met: state governments and legislatures have extremely broad "police" powers under which they may enact a wide variety of laws. As for the second requirement under minimum scrutiny--that the classifications made be "reasonably" related to the purpose of the statute--if the Court can itself imagine any rational basis for the classifications made in a statute, the act will not be held to violate equal protection.

The result of the application of this extremely lenient standard of review is almost self-fulfilling. Because the Court can almost always hypothesize reasons which provide at least a minimum rational basis upon which a state legislature might have acted in passing a particular law, a state statute is almost always upheld against an equal protection attack, if a genuine minimum scrutiny test is applied. Because of this result Justice Holmes once labeled equal protection "the last refuge of the hopeless litigant."

"Strict Scrutiny" Test for "Suspect Classifications" or "Fundamental Interests"

In the last thirty years, the Court has developed a second test under the equal protection clause known as the "strict scrutiny" test. If this test is held to be applicable in a particular case, the burden of proof shifts to the state. This means the state must demonstrate that: (1) it had a "compelling state interest" for passing the law; and (2) the classification of persons to whom the law applies was necessary to accomplish the state's extremely important, or "compelling," purpose.

Strict scrutiny was first ennunciated by the Court in 1942 in Skinner v. Oklahoma, 316 U.S. 535; however, it was not fully accepted as a recognized constitutional doctrine until the mid-1950's, after the Court in Brown v. Board of Education, 347 U.S. 483 (1954), applied the test to racial classifications.

Just as the minimum scrutiny test almost always assures that a statute will be upheld if it is applied, application of the strict scrutiny test is tantamount to assurance that the challenged law will be stricken. In cases litigated under the strict scrutiny test, the only racial classification ever upheld was that made in sending Japanese-Americans to concentration camps during World War II. In the case of Korematsu v.

U.S., 323 U.S. 214 (1945), the Court said that the government had demonstrated the necessary "compelling state interest" because of the urgency of war; but most commentators believe that the decision was incorrect. Thus, if strict scrutiny is applied, the law in question will almost always be found to violate equal protection.

Equal Protection Doctrine and Sex Discrimination Cases

Until the Supreme Court's decision in Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court had never held that a statutory classification based on sex was unconstitutional. In fact, applying the minimum scrutiny test to the statutes involved in two famous earlier cases, Goesaert v. Cleary, 335 U.S. 464 (1948), and Hoyt v. Florida, 368 U.S. 57 (1961), the Court had held that legislative classifications based solely on sex were constitutional.

In Goesaert, the Michigan legislature had passed a statute which prohibited all women from serving as barmaids unless they were the wives or daughters of male bar owners. The statute was challenged by the Goesaerts, a mother and daughter who owned a bar and had made their livelihood by operating it. In determining whether the legislative classification used was reasonable, Justice Frankfurter said that the Michigan legislature *might* have rationally believed that women tending bar would be in danger unless a male relative--husband or father--were in the bar to protect them. This *possible* purpose, which was completely unsupported by any factual evidence,[1] served as the minimum "rational" basis which was sufficient to uphold the statute under the equal protection clause. In other words, the classification used, sex alone, was a "reasonable" one. This case is but one example of the almost automatic results which flow from application of the minimum rational basis, or minimum scrutiny, test.

In Hoyt v. Florida, a woman who had been convicted by an all-male jury of murdering her husband with a baseball bat in a fit of rage over his adultery challenged Florida's jury selection statutes as an unconstitutional denial of equal protection. The statutes in question required all men to serve on juries, but automatically exempted all women unless

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1. In fact, it is well documented, and was argued to the Court in Goesaert, that the all-male Bartenders Union had embarked on a successful campaign in 1945 to have state statutes enacted which prohibited women from tending bar. See B. Babcock, A. Freedman, E. Norton and S. Ross, Sex Discrimina- and the Law 93,n. 2 (1975).

they went through a registration process; as a result, juries in Florida were comprised of less than 5% women. The woman convicted in Hoyt believed that women on the jury might have been more sympathetic to her motivations than was the all-male jury. As late as 1961, when Hoyt was decided, the Supreme Court had no difficulty in finding that the Florida legislature clearly had a reasonable basis for imposing jury duties and giving exemptions from duty solely on the basis of a prospective juror's sex. The Court said:

> We cannot conclude that Florida's statute is not based on some reasonable classification. . . . Despite the enlightened emancipation of women from restrictions and protections of by-gone years, and their entry into many parts of community life formerly reserved to men, women are still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a state . . . 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 responsibilities. (368 U.S. 57, 61-62)

Thus, the gross overgeneralization based solely on sex used in the statute was held to be a "reasonable" classification which did not deny equal protection.

Until 1971, then, the Court had never held a classification based on sex to violate the equal protection clause. Applying the minimum scrutiny or "reasonableness" standard, it had always found sex-based classifications justified under the particular circumstances of the legislation in question.

During the 1960's, however, commentators and legal scholars had great hope that the Court would declare sex to be a "suspect" classification just as race had been in Brown v. Board of Education. Such a holding, they thought, would automatically invalidate any statute which used sex alone as a basis for classification. It was this hope which kept sincere supporters of equal rights from unifying behind the Equal Rights Amendment. With the Court's sex discrimination decisions in 1971, those hopes were dashed: supporters of equal rights realized that if the goal were to be realized, it would have to come through constitutional amendment.

The 1971 Decisions: Williams and Reed

In 1971, two cases challenging statutes which made sex-based distinctions were brought to the United States Supreme Court.