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BRADWELL V. STATE: SOME REFLECTIONS PROMPTED BY MYRA BRADWELL’S HARD CASE THAT MADE “BAD LAW”

Charles E. Corker*

On April 14, 1873, the Supreme Court decided in the Slaughter-House Cases¹ that “privileges or immunities of citizens of the United States”² protected by the new fourteenth amendment did not include the right of New Orleans butchers to practice their trade free of the regulation imposed by a Louisiana statute.³ The following day, April 15, the Court decided in Bradwell v. State⁴ that neither the fourteenth amendment nor the state privileges and immunities clause, article IV, section 2, clause 1,⁵ compelled Illinois to admit Mrs. Myra Bradwell to the bar of that state, although she was qualified except for her sex and married status.

The Slaughter-House Cases are required reading for every serious student of American constitutional law. The decision has long been thought to explain, if anything can, why the fourteenth amendment’s privileges or immunities clause has never been significant. Bradwell v.

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The author’s colleague, Professor Marian Gallagher, was a collaborator at every stage in the preparation of this paper. Its plural “we” reflects the disappointed anticipation that she would permit herself to be identified as co-author. Because she is the doughty type, she has nevertheless agreed to accept full responsibility for all errors and omissions, and precisely 50.2% of the responsibility for the views expressed concerning the Equal Rights Amendment.

1. 83 U.S. (16 Wall.) 36 (1873).
4. 83 U.S. (16 Wall.) 130 (1873). See generally C. FAIRMAN, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, PART ONE (P. Freund ed. 1971). The Fairman work is a wealth of both facts and insights to this period of history, including but not limited to the dates of the two cases. His volume is a treasure house which would surely delight Oliver Wendell Holmes, Jr., whose devise made possible the gift of this scholarly work to the United States.
5. Reproduced at note 29 infra.
State, however, is read, if at all, only by students of the constitutional law of sex discrimination, for whom it serves only as a milestone from which to measure progress. Although the Slaughter-House Cases have indelibly marked the Constitution—the fourteenth amendment’s privileges or immunities clause failed meaningfully to survive the decision—Myra Bradwell’s case has been as thoroughly excised from the constitutional law of today as Dred Scott v. Sandford and its Pyrrhic victories for chattel slavery.

Even though Bradwell has absolutely no current precedential value, the case deserves study alongside the Slaughter-House Cases. Had it not been necessary to decide Bradwell the next day, the five-to-four majority in Slaughter-House probably would have been replaced by at least that large a majority the other way.

For the Slaughter-House majority, Bradwell was an easy case. If the citizens of the United States had no privileges or immunities protected by the fourteenth amendment, it followed that citizen Myra Bradwell had none either. But Bradwell was hard for those who dissented in Slaughter-House and yet concluded that Myra Bradwell had no constitutionally protected right to practice law. If, as the four Slaughter-House dissenters had strenuously insisted, the fourteenth amendment’s privileges or immunities clause protected a citizen’s right to pursue his calling, but Myra Bradwell had no similarly protected right to practice law, it became necessary to explain either how a butcher’s trade and a lawyer’s profession are different, or why a married woman is not qualified to practice law.

In his concurring opinion to Bradwell, joined by two of the other Slaughter-House dissenters, Justice Joseph P. Bradley declared that, under the “law of the Creator” and “the common law tradition,” a married woman has no place outside the home and is therefore fundamentally unqualified to practice law. His conspicuous failure to reconcile his positions in Slaughter-House and Bradwell with any credi-

7. 60 U.S. (19 How.) 393 (1857) (slave had no right to sue in federal court because he was neither citizen of state nor of United States). It is only a curiosity that Dred Scott was not expressly overruled until Downes v. Bidwell, 182 U.S. 244, 271–87 (1901). The most pejorative symbol Shepard’s Citations awards Bradwell is “e” for “explained.” Alexander v. Louisiana, 405 U.S. 625, 640 (1972) (Douglas, J., concurring).
8. 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). Field and Swayne, JJ., both joined the Bradley concurrence.
bility seriously weakened the dissenters' position in Slaughter-House for a majority of the Justices and their contemporaries.

Justice Bradley's resort to the "law of the Creator" weakened the Slaughter-House dissent in at least one other way. The Slaughter-House dissenters had powerfully argued that "privileges or immunities of citizens of the United States" included all fundamental rights. But in Bradwell, they demonstrated no better way to ascertain what "fundamental rights" are than to consult the "law of the Creator."9 Justice Bradley's reliance upon such subjective authority made Justice Miller's Slaughter-House opinion appear by comparison to be judicial statesmanship despite its having unnecessarily constricted the scope of fourteenth amendment protection.

Only Chief Justice Salmon P. Chase dissented in both cases. Unfortunately, the Justices did not have the benefit of his written opinion in reaching their decision—he was in poor health and died three weeks later.

Bradwell and Slaughter-House deserve study together for a second reason. These two decisions provide useful lessons for our time about the Equal Rights Amendment (ERA).10 They demonstrate that the consequences of a constitutional amendment—particularly one written in abstract and grand terms like the fourteenth amendment or the ERA—are unpredictable and dependent upon imponderables such as the sequence of cases on the Court's calendar.

I. THE INCREDIABILITY OF THE SLAUGHTER-HOUSE DECISION

The Supreme Court's decision in Slaughter-House seems altogether improbable and its survival for at least 104 years is incredible. The more closely the decision is examined, the more its continued validity challenges all ordinary explanations.

An accurate description of the Slaughter-House decision might have been written on April 14, 1873, under this headline: COURT STRIKES CENTRAL CLAUSE FROM CONSTITUTIONAL AMENDMENT.11 This hypothetical headline, however, would not

9. *Id.* at 141–42.
11. One must read the text of § 1 of the fourteenth amendment, pushing back
have accurately reflected what the majority said. Although the Court denied the claims of the New Orleans butchers that they had a constitutional right to practice their calling, it said that many privileges and immunities of United States citizens exist, and it offered a number of examples.\textsuperscript{12} Only the dissenters complained that the Court had made of the privileges or immunities clause "a vain and idle enactment, which accomplished nothing."\textsuperscript{13} These complaints could have been disregarded, however, as characteristic of exaggerations by dissenters who have lost a heated constitutional argument.\textsuperscript{14}

\textbf{A. The Death of the Privileges or Immunities Clause}

As it has turned out, \textit{Slaughter-House} was a final requiem for the fourteenth amendment's privileges or immunities clause. "Final," of course may yet prove to be an exaggeration.\textsuperscript{15} The clause beckons the

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\textsuperscript{12} 83 U.S. (16 Wall.) at 79–80.

\textsuperscript{13} \textit{Id.} at 96 (dissenting opinion of Field, J., joined by Chase, C.J., Swayne, & Bradley, JJ.).

\textsuperscript{14} The \textit{Slaughter-House Cases} were only a first skirmish. Justice Miller wrote again for the Court in upholding the 1879 amendment to the Louisiana constitution which abrogated special privileges of the Crescent City "monopoly" and all like it. Butcher's Union Co. v. Crescent City Co., 111 U.S. 746 (1884). Justice Field, \textit{Id.} at 754, and Justice Bradley, \textit{Id.} at 760, now joined by Harlan and Woods, JJ., restated their \textit{Slaughter-House} views with renewed vigor, though the Court remained divided on this issue five to four.

Although the dissenting Justices gave up eventually on the privileges or immunities clause, the due process clause served their purpose. In Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), a unanimous Court expressly approved Justice Bradley's \textit{Butcher's Union Co.} dissent: "The right to follow any of the common occupations of life is an inalienable right." 111 U.S. at 762. This inalienable right, denied to the New Orleans butchers, found a textual home in its identification with "liberty"—liberty of contract—in the due process clause of the fourteenth amendment.

\textsuperscript{15} The express overruling of Colgate v. Harvey, 296 U.S. 404 (1935) (right to transact business in any state free from discriminating taxes is protected by
Court in each generation to give it meaning and content. It has misled countless lawyers. Hopeless constitutional causes have been protracted by the illusion that the privileges or immunities clause must mean something significant. Good constitutional arguments have been threatened when lawyers have argued illusory privileges or immunities when they should have argued other parts of the Constitution. Because of the Court's reliance upon the due process and equal protection clauses of the fourteenth amendment to protect the fundamental rights which might have been protected by the privileges or immunities clause, and because the clause has been at the center of so many disappointed hopes and false starts, the possibility of its revival in the future now seems quite remote.

In 1918, Professor Dudley O. McGovney described the Court's Slaughter-House opinion as a judicial rewriting. The clause was ratified in this form:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...

According to McGovney, the Court in Slaughter-House rewrote the clause to say:

privileges or immunities clause) (6-3 decision), in Madden v. Kentucky, 309 U.S. 83 (1940) (7-2 decision), underscores the absence of present hope that the privileges or immunities clause may live again. Resurrection has been tried and has failed.

For a more optimistic view, see Benoit, The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?, 11 SUFFOLK L. REV. 61 (1976); Kurland, The Privileges or Immunities Clause: "Its Hour Come Round at Last?", 1972 WASH. L.Q. 405.

16. McGovney, Privileges or Immunities Clause—Fourteenth Amendment, 4 IOWA L. BULL. 219, 222-23 (1918), counted more than 40 Supreme Court cases and 300 state court cases in which the fourteenth amendment's privileges or immunities clause had been unsuccessfully and mistakenly argued.

17. Both the due process clause and the equal protection clause extend beyond "citizens of the United States" to "persons"—aliens and corporations. Anyone ready to dismiss rights of corporations as outside civil libertarian concerns needs to be reminded that most of the press protected by the first amendment is incorporated. E.g., New York Times Co. v. United States, 403 U.S. 713 (1971) ("Pentagon Papers" case). If the Slaughter-House Court had decided that "privileges or immunities" meant "fundamental rights," this deficiency would probably by now have been corrected. In Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844), the Court declared a corporation a state citizen for purposes of article III, and quite possibly a corporation would have been declared a citizen of the United States for purposes of "privileges or immunities" before now. Such action by the Court, however, would have been harder to justify for purposes of the fourteenth amendment than it would have been for purposes of article III because "citizen" and "person" are juxtaposed in the fourteenth amendment, implying that each means something different.

No State shall make or enforce any law which shall abridge any privilege or immunity conferred by this Constitution, the statutes or treaties of the United States upon any person who is a citizen of the United States.  

In effect, the rewritten version adds only repetition to the Constitution. "Privilege or immunity" must be found elsewhere in the Constitution, or in a statute or treaty. Although statutes and treaties do not create "constitutional rights" in a usual sense, the supremacy clause from the beginning placed federal statutes and treaties beyond state impairment. Thus, the Court would have been more realistic had it simply declared, "The privileges or immunities clause is hereby deleted from the Constitution."

Of course, such bold words would have caused not only headlines, but deserved suspicion of judicial usurpation. Justice Miller's Slaughter-House opinion for the Court avoided such headlines and suspicion while achieving the effective deletion of the clause by simply saying one thing and doing another. The Court explicitly acknowledged the limits of its function when, after ten pages of its opinion, it announced that it would construe the thirteenth and fourteenth amendments only "so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go." At that point in its opinion, the Court had gone quite as far as was necessary to decide the case before it. The Court had decided that Louisiana could regulate slaughterhouses for the promotion of public health and that the challenged regulation did not interfere with a privilege or immunity of a United States citizen, whatever such privileges or immunities were. In the remaining fifteen pages, the Court needlessly destroyed the fourteenth amendment's privileges or immunities clause as the source of any new or independent constitutional right.

B. The Validity of the Slaughter-House Statute

The issue resolved in the first ten pages of the Court's opinion was

20. U.S. CONST. art. VI provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."
22. Id. at 67–83.
the constitutional validity of a Louisiana statute which created the Crescent City Stock Landing and Slaughter-House Company, and gave it an exclusive right for twenty-five years to operate livestock landings, stockyards, and a slaughterhouse in the 1,154-square-mile area of the state which includes New Orleans. Louisiana butchers claimed that the Crescent City Company was a monopoly which violated the rights of butchers of New Orleans under the thirteenth amendment and all three clauses of the fourteenth amendment. The Court denied that the statute created a monopoly; the dissenters said it did. Clearly it did not with respect to the butchers' calling. Any butcher continued free to practice his trade in facilities provided by the Crescent City Company at charges fixed in the Louisiana legislation. Nevertheless, the statute imposed a restriction on the right of a butcher, or anyone else, to operate his own slaughterhouse, his own stockyard, or his own livestock landing in the three-parish area covered by the statute.

The Court viewed the creation of the corporation as a reasonable means to further the legitimate constitutional end of protecting public health:

If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation . . . would have been the same as it is now.

The dissenters disregarded this statement of the issue. For them, the case presented this broader question posed by Justice Bradley: "Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?"

23. See note 3 supra.

24. Reporter Wallace identified the butchers' position as the "argument against the monopoly." 83 U.S. (16 Wall.) at 44-56 (running head). This tilted sympathies toward the dissent not only because monopolies have few friends, but also because it was common knowledge that this monopoly was the corrupt creature of a venal, carpetbagging legislature. See C. Fairman, supra note 4, at 1321-24.

25. No attack was made on the reasonableness of the charges, although fixing prices for 25 years by statutory specification is not a sensible venture. For example, the statute fixed the price of slaughtering beeves at $1 each, hogs and calves at 50 cents each.

26. 83 U.S. (16 Wall.) at 64.

27. Id. at 112 (Bradley, J., dissenting).
By answering this question "no," the Court rendered irrelevant its determination that the Louisiana statute was a reasonable exercise of the state's police power. If United States citizens have no constitutionally protected right to pursue their callings, the reasonableness or unreasonableness of Louisiana's interference with that unprotected right simply could not matter. Thus, even if the challenged legislation had been totally unreasonable and oppressive—even if it had arbitrarily denied the butchers all right to be butchers—any federal remedy would have been beyond the constitutional power of Court or Congress. Alternatives by way of due process and equal protection were, in 1873, still beyond the horizon. The butchers made due process and equal protection arguments, but the Court peremptorily rejected them.28

C. The Sources of "Privileges or Immunities"

The Court and the dissenters turned to the same sources to discover what "privileges or immunities of citizens of the United States" means: article IV, section 2, clause 1 of the Constitution, which protects "Privileges and Immunities of Citizens in the several States";29 the gloss on the article IV clause provided by Justice Washington, on circuit in 1823, in Corfield v. Coryell;30 and article IV of the Articles of Confederation, the predecessor to the article IV clause of the Constitution.

For the majority, Justice Miller asserted that the privileges and immunities protected by article IV of the Constitution were intended to be the same as those protected by the Articles of Confederation. He assumed that the express guarantee to "the people of each State" of "free ingress and regress to and from any other State" in the Articles of Confederation's counterpart to the privileges or immunities clause was an example of these same privileges and immunities rather than a right supplementing such privileges and immunities. It should follow that free travel through the states is a privilege and immunity protected by article IV of the Constitution. Yet Justice Miller contradicted

28. Id. at 80-81.
29. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1.
30. 6 F. Cas. 546, 551-52 (C.C.W.D. Pa. 1823) (No. 3,230). The dictum is quoted by the Court, 83 U.S. (16 Wall.) at 76, and by Justices Field, id. at 97, and Bradley, id. at 117.
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this reasoning later in his opinion when he asserted that the right to free travel arises from the constitutionally implied guarantee of the citizens' right to travel, unimpeded by the states, to the seat of national government. 31 Thus, article IV of the Articles of Confederation had a broader effect than Justice Miller's Slaughter-House opinion recognized.

For the dissent, Justice Bradley found persuasive support for a "fundamental rights" interpretation in the words of the Constitution's article IV which protect rights of citizens "in the several States," not "of the several States." 32 The point was lost on Justice Miller. He misquoted article IV to read "citizens of the several States." 33

Justice Washington's dictum was relied upon by both the majority and dissent; it is perfectly ambivalent. Corfield v. Coryell decided that New Jersey could protect its oysters for its own citizens, and forbid their taking by sojourning citizens of neighboring states. "Privileges and immunities of citizens in the several States" are confined to fundamental rights, of which taking oysters is not one. 34 But Justice Washington did not say whether there are article IV privileges and immunities which a state must respect even in its own citizens. Whatever Justice Washington meant, it seems certain that members of Con-

31. Justice Miller wrote the Court's opinion in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), rendered several months before the fourteenth amendment was ratified, which recognizes the "right to travel" based solely on what Professor Charles Black, Jr., has taught us to call "structural" considerations. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The right to travel is one of the redundantly enumerated "privileges or immunities" in Justice Miller's catalogue of examples in Slaughter-House. Concurring opinions in Edwards v. California, 314 U.S. 160 (1941), by Justices Douglas (joined by Black and Murphy, JJ.) and Jackson, invoke the privileges or immunities clause, rather than the commerce clause, to reject California's attempt to stop indigent Okies and Arkies (no longer pejorative terms) at the state line. Id. at 177, 181.

The commerce clause is not adequate protection for the right vindicated in Crandall and Edwards because Congress can legislate to forbid interstate commerce, but neither is the privileges or immunities clause of the fourteenth amendment, so long as it is confined to "citizens." "Structure" is probably the best foundation, so long as Professor Black is available to explain why structure prevails as against the apparently intended distinction in the fourteenth amendment between "persons" and "citizens."

32. 83 U.S. (16 Wall.) at 117.

33. Id. at 75. Maybe reporter Wallace or a gremlin at Caxton Press of Sherman & Co., Philadelphia, was responsible for misquoting the Constitution. At any rate, the error has been generally reproduced and faithfully perpetuated.

34. According to McGovney, supra note 16, at 227, Justice Washington performed the service of explaining that "all Privileges and Immunities" means "some Privileges and Immunities." A central problem with both the article IV and the fourteenth amendment clauses is that both sets of words are too broad to be taken literally. The line between the fundamental and the nonfundamental is hard to draw when no criteria are provided.
gress who read the dictum to each other understood "privileges and immunities" to mean "fundamental rights." If anything less were protected by the fourteenth amendment, it would not serve the federal courts or Congress in protecting citizens of the United States against the states.

Both the Court and the dissenters may have been overly occupied by such niceties. The important considerations were the recent history and events which had occasioned the fourteenth amendment. All three post-Civil War amendments were designed to assure completion of the unfinished tasks of the abolition of slavery and the reconstruction of the Union. The first sentence of the fourteenth amendment conferred state and national citizenship upon "all persons born or naturalized in the United States." State citizenship assured all future litigants like Dred Scott access to federal courts, but the consequences of United States citizenship were specified in the Constitution, if at all, only in the privileges or immunities clause of the fourteenth amendment. If "privileges or immunities of citizens" meant only such privileges or immunities as citizens might have from other provisions of the Constitution, the clause was merely repetitious, creating confusion and false hopes.

Justice Miller's opinion for the Court was candidly resistant to the basic purpose of the fourteenth amendment—to increase federal power. Although he conceded that the amendment arose from the Civil War experience, which taught that the republic is in more danger from the states than from a usurping federal government, yet, wrote Justice Miller, it remained the Court's function to preserve a "balance between State and Federal power."36

Did this not overstep the judicial function? The post-Civil War amendments had been intended to change the preexisting federal-state balance. Abolition of slavery would be a disaster unless the fourteenth amendment were given full effect: former slaves were to be full citizens and the United States courts and Congress were to be invested with plenary authority to protect all citizens of the United States in their basic rights.

On April 14, 1873, the Slaughter-House dissenters had clearly the better of the arguments and they should have prevailed. They had a 35. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 412 (1857) (opinion of Taney, C.J.). Women and minors, by contrast, were recognized by the Court as citizens, although not permitted to vote. Id. at 422.
36. 83 U.S. (16 Wall.) at 82.
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constitutional text with the grandest words contained in the document. They had the history of the Civil War and they had the necessities of the nation in reconstruction supporting them. Why did the dissenters not prevail, if not in 1873, then soon thereafter? Bradwell v. State, decided the following day, provides the only plausible explanation.

II. **BRADWELL v. STATE—THE HARD CASE THAT MADE SLAUGHTER-HOUSE A PERMANENT LANDMARK**

Asked to choose up sides on the issues which divided the Court in Slaughter-House, the overwhelming majority of today's law students will side with the dissenters. The right to pursue a common calling or occupation is fundamental. Surely it should be protected as one of the "privileges or immunities of citizens of the United States." By comparison, today's law students unanimously agree that Bradwell was ludicrously wrong.

The paradox is that the narrowest of possible majorities in Slaughter-House produced an internally inconsistent opinion which still remains beyond peradventure the law of the land with respect to the fourteenth amendment's privileges or immunities clause. In contrast, Bradwell, an eight-to-one decision with no dissenting opinion, is today no more than an historic artifact, so thoroughly discredited that the Supreme Court could not now announce its overruling without being suspected of judicial frivolity. The explanation for this paradox lies in Justice Bradley's weak and subjective concurring opinion in Bradwell.

Justice Miller again wrote for the majority in Bradwell. The only authority cited in his opinion to support the Court's position that the fourteenth amendment did not protect Myra Bradwell's right to practice law was the Slaughter-House Cases. Justice Bradley's answer to the Court's Slaughter-House argument, that the privileges or immunities clause was meant to protect fundamental rights, was persuasive, but it would have led to a dissent in Bradwell had he not abandoned his principle under the guise of applying "the law of the Creator." Justice Bradley's explanation, in unblushing prose, why "privileges or immunities of citizens of the United States" protected butchers in
their common calling, but not a qualified woman lawyer in the practice of her profession, is as follows:

It certainly cannot be affirmed, as an historical fact, that [the right of women citizens to pursue any lawful employment including the practice of law] has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.37

The Chicago Legal News, Myra Bradwell, editor, commented on Bradwell v. State in an editorial captioned The XIV Amendment and Our Case.38 While respectfully disagreeing with the Court's construction of the privileges or immunities clause, the editorial regarded Justice Bradley's concurring opinion to be in serious conflict with his Slaughter-House dissent:

If, as [Justice Bradley] says, the liberty of pursuit [of lawful employment] is one of the fundamental privileges of an American citizen, how can he then, and be consistent, deprive an American citizen of the

37. 83 U.S. (16 Wall.) at 141-42 (emphasis added). The emphasized phrase, "privileges and immunities of the sex," deserves a grade below passing in the art of question begging. The fourteenth amendment says "citizens" and "persons," not "sex." "Race" and "color" do not appear either. Moreover, the amendment was not adopted merely to reaffirm established dogma, but to secure or to ratify change. If the amendment were to be given the construction implicit in Justice Bradley's "privileges and immunities of the sex," all its purposes would have been frustrated, including the protections for Blacks. Before emancipation, Blacks had enjoyed no "privileges or immunities" protected by the United States Constitution, and this was the central reason for the fourteenth amendment.

38. 5 CHICAGO LEGAL NEWS 390 (May 10, 1873).
right to follow any calling or profession under laws, rules and regulations that shall operate equally upon all, simply because such citizen is a woman?  

How indeed? Justice Bradley's attempt to answer that question was a manifest failure: "the law of the Creator," without further support from case or statute, is simply not credible authority for a temporal court. Critics of natural law would say that Justice Bradley's resort to "the law of the Creator" exemplifies all that is wrong with natural law, in whatever version or manifestation. There is simply no way to determine what it is except through divine revelation, of which we are deprived in matters of government by the first amendment if not by God's refusal to answer His mail. Supporters of natural law would today, at least, charge Justice Bradley with having caricatured natural law in his inappropriate ipse dixit. Justice Bradley's spurious reasoning did not defend, but rather was fatal to, the Slaughter-House dissents.

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39. *Id.* (emphasis in original). The editorial found Justice Bradley's Bradwell concurrence to be especially inconsistent with the statements he made in Live-Stock Ass'n v. Crescent City Live-Stock Co., 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408) (Bradley, Circuit Justice & Woods, Circuit Judge):

> There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

> . . .

> . . . Public policy may require that these pursuits should be regulated and supervised by the local authorities, in order to promote the public health, the public order and the general well being. But they are open to all proper applicants, and none are rejected except those who fail to exhibit the requisite qualifications . . . .

> All of these systems of regulation are useful and entirely competent to the governing power; and are not at all inconsistent with the great right of liberty of pursuit, which is one of the fundamental privileges of an American citizen.


40. Justice Bradley might have found an abundance of theological citations, pro and con, in R. CALLIS, SEWERS 250–55 (2d ed. 1685), where the learned author dis cursoed at length on whether the Countess of Warwick was qualified to be Commissioner of Sewers. E.g., "For Debra was Judge of Israel, and Judged the people as the fourth of Judges hath it." *Ibid.* at 251 (italics in original).

> Yet the Statute of Justices of the Peace is like to Jethro's counsel to Moses, for there they speak of men to be Justices, and seemeth thereby to exclude women; But our Statute of Sewers is, Commission of Sewers shall be granted by the King to such person and persons as the said Lord should appoint; So the word persons stands indifferently for either Sex; And therefore although by the weakness of their Sex they are unfit to travel, and they be for the most part incapable of learning to direct in matters of Judicature, for which causes they have been discretely spared, yet I am of opinion . . . that this honorable Countess being put into Commission of the Sewers, the same is warrantable by the Law; and the Ordinances and Decrees of Sewers made by her and the other Commissioners of Sewers, are not to be impeached for that cause of her Sex."

Slaughter-House and Bradwell were far from the victories that Myra Bradwell had hoped for and sought—a broad reading of the fourteenth amendment's privileges or immunities clause to protect butchers and women. Nevertheless, her editorial response to the Bradwell decision demonstrated that no Justice of the United States Supreme Court could provide any real basis for distinguishing between privileges or immunities enjoyed by men and those enjoyed by women except by a most childish rhetoric.

Even before her case was argued before the Supreme Court, Myra Bradwell had already won her cause in Illinois. On March 22, 1872, the Illinois legislature passed the following act:

[N]o person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex: Provided, that this act shall not be construed to affect the eligibility of any person to an elective office.

... Nothing in this act shall be construed as requiring any female to work on streets or roads, or serve on juries.41

Had Justice Bradley known that the Illinois legislature had mooted Myra Bradwell's case, he might have avoided proclaiming the "law of the Creator" to be contrary to the law then in force in Illinois.

Myra Bradwell applied twice to the Illinois supreme court for admission to the bar and argued her own case in that court.42 Although she never applied a third time, she was admitted twenty years later on

42. Myra Bradwell's application to the Illinois supreme court was accompanied by a certificate, pursuant to rules of court, by an inferior court judge and the state's attorney that they had examined her, found her qualified, and recommended that a license should be issued to her. Her sponsor's motion was accompanied by an application, which she prepared, citing an Illinois statute which read: "When any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included." 2 ILL. STAT. ch. 90, § 28 (Purple 1856). Unless this statutory principle were applied, women would not have existed for any of the purposes of the Chancery Code of the state because woman, female, she, her, or any other feminine pronouns were not to be found therein. The Clerk was instructed by the court to advise her that she could not be admitted "by reason of the disability imposed by your married condition—it being assumed that you are a married woman" until the disability might be removed by legislation. She renewed her application with an additional brief which is much the best filed on either side of her case in either the Supreme Court of Illinois or of the United States. The only opposing brief, as a matter of fact, is the opinion of the Illinois supreme court denying her admission. In re Bradwell, 55 Ill. 535 (1869).

All these matters are reported verbatim in 2 CHICAGO LEGAL NEWS 145-47 (Feb. 5, 1870).
the Illinois supreme court's own motion; she was admitted to practice before the Supreme Court of the United States in 1892.\footnote{37} Seven years after her death in 1894, her victory was explained:

Discussion of the Myra Bradwell case had the inevitable effect of letting sunlight through many cobwebbed windows. It is not so much by abstract reasoning as by visible examples that reformations come and Mrs. Bradwell offered herself as a living example of the injustice of the law. A woman of learning, genius, industry and high character, editor of the first law journal in the west, forbidden by law to practice law, was too much for the public conscience, tough as that conscience is.\footnote{38}

III. LESSONS FOR OUR TIME?

The Slaughter-House Cases and Bradwell v. State support one truism we need not belabor: freedom and equality are indivisible. Unless their judicial protection by the Constitution flows from principled decisions, a constitutionally protected right of butchers to pursue their calling is unlikely to be more secure than the right of a woman lawyer to pursue hers. Principle—articulated and widely understood—is more important to the law of the Constitution than the voting major-

\footnote{37} 1 THE BENCH & BAR OF ILLINOIS 279 (J. Palmer ed. 1899).

Myra Bradwell is remembered in Illinois as she should be throughout the nation. The state bar journal recently described her as "doughty." Kogan, The Illinois State Bar Association: Its First Fifty Years, 65 ILL. B.J. 270, 270 (1977). One dictionary describes the word as meaning "marked by fearless resolution and by stoutness in contest or struggle." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 680 (1961). Doubtless she was all that. But the dictionary's Illustrations of the word's usage indicate a trait she did not have: "[T]he doughty little man had not a hand's breadth on hand or arm without its scar." "[H]e was a soldier's soldier—rough, tough, and doughty." \textit{Id.} Myra Bradwell, however, was neither rough, tough, nor scarred, yet her determination, her work, and her life eventually, though belatedly, carried the day. She thoroughly discredited the gratuitous insult delivered by Justice Bradley in his Bradwell concurrence. The Bench and Bar of Illinois described her as follows: "A noble refutation of the oftentimes expressed belief that the entrance of women in public life tends to lessen their distinctively womanly character, she was a most devoted wife and mother, her home being ideal in its love and harmony." \textit{1 The Bench & Bar of Illinois} 281 (J. Palmer ed. 1899).

\footnote{38} Quoted from an unidentified source in \textit{Note, Death of Mrs. Myra Bradwell}, 28 AM. L. REV. 278, 280 (1894), which described her legal journal, the \textit{Chicago Legal News}, as "one of the best legal periodicals in the United States." \textit{Id.} The \textit{Chicago Legal News} was founded by Myra Bradwell in 1863 and its publication was continued after her death in 1894 by her husband, James, and their daughter, Bessie Helmer. Following James Bradwell's death in 1907, Bessie Helmer carried on as editor and publisher through the final issue on July 16, 1925. Specter, \textit{Woman Against the Law: Myra Bradwell's Struggle for Admission to the Illinois Bar}, 68 ILL. Hist. Soc'y 228, 242 n.44 (1975).
ty on any particular day among the Justices. The most persuasive and careful judicial opinion filed on April 14 can be destroyed on April 15 by its signers' abandonment of principle. So much for the self-evident. 45

As March 22, 1979 approaches, the last day on which the ERA submitted by Congress in 1972 may be ratified, 46 a number of questions that would have been deeply interesting to Myra Bradwell are being considered: Would ratification of the ERA add significantly to the substance of the Constitution? Would a failure of the requisite thirty-eight states to ratify the amendment threaten Congress' power to enact legislation protective of women's rights? Would such a failure affect the evolving case law concerning sex discrimination under the equal protection clause? If the Constitution must explicitly say "sex" to forbid discrimination against women, is it not likewise necessary that it say "race," "religion," "nationality," "illegitimacy," and a great many other things? Myra Bradwell's experience with the privileges or immunities clause may shed light.

A. Ratification of the ERA is Unlikely To Significantly Affect Constitutional Protection of Women's Rights

Slaughter-House and Bradwell—and constitutional development in the intervening 104 years—are compelling evidence that the consequence of amending the Constitution by adding words of high level abstraction is unpredictable. 47 "Privileges or immunities of citizens of

45. See generally Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1977), for an impressive attempt to articulate the basis for a workable distinction between the judicial and the legislative function, between "principle" and "policy." Contrast the pragmatic realism of Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).

46. H.R.J. Res. 208, 86 Stat. 1523 (1972), passed the Senate on March 22, 1972. 86 Stat. at 1524. The resolution requires ratification within seven years, and article V of the Constitution specifies that three-fourths of the states must approve. With the rejection by the Florida legislature in April 1977, the count among the states stands at 35 to 15, with a total of 38 states required. Nonratifying states are, in the West, Nevada, Arizona, and Utah; in the South, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Virginia; in the Midwest, Missouri and Illinois. Nebraska, Tennessee, and Idaho have repealed earlier ratification. The effect, if any, of repeal presumably may be determined by Congress, possibly by the Supreme Court, or conceivably by the General Services Administration. See Coleman v. Miller, 307 U.S. 433 (1938). Dates of ratifications are listed in [1977] U.S. CODE CONG. & AD. NEWS 1015, 1015. Only North Dakota and Indiana have ratified since 1974.

47. One can conjecture that the absence of any former slave as a party to the Slaughter-House and Bradwell cases, and any issue in the case about slavery, its abolition, or about reconstruction, made it easier for the Court to hold that the

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the United States,” instead of having been construed as something similar to “fundamental rights,” has so far turned out to mean nothing at all significant. Nevertheless, we hazard this prediction: the ERA, which becomes effective two years after its ratification, is likely to alter no recent decision of the Supreme Court based upon the Constitution, nor is it likely to change the course of future judicial decisions in sex discrimination cases in any ascertainable way. The ERA will add only repetition, and possibly confusion, to the Constitution.

The words of the ERA are these:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.⁴⁸

We believe it proper and probable that the Supreme Court will read those words as saying in another way what the fourteenth amendment has said since 1868:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.⁴⁹

We can find no principle of constitutional construction by which force and effectiveness are added to whatever the Constitution says twice. Such a principle, if invented and recognized, would subtract force and effectiveness from what the Constitution says only once.

The ERA would add only two clear textual changes to the equal protection clause of the fourteenth amendment. First, the ERA explicitly bars sex discrimination by the United States as well as sex discrimination by a state. Second, the ERA says “sex” explicitly instead of implicitly.⁵⁰

Civil War amendments had not changed the pre-Civil War federal-state constitutional balance in any important way. Even so, it took 101 years from the time of the surrender at Appomattox until the Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973p (1970), was upheld by the Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301 (1966), effectively to enforce equality under the laws with respect to voting by all races which the fifteenth amendment expressly commanded in 1870. Black voters have since been an effective voting minority which no major political party is likely to alienate. Women have constituted a majority of the legal voters of the nation, without widespread interference or intimidation, since soon after the ratification of the nineteenth amendment in 1920.

⁴⁹. Section 1 of the fourteenth amendment is quoted in full at note 11 supra.
⁵⁰. “Gender” is more appropriate for grammatical classifications than for those of sex:

Gender may have been based on physical distinctions originally, but it is hard to say what they were . . . Some languages have more genders than others. French, for example, has two and the Bantu languages have twenty. In any case,
The first addition has no apparent consequence since *Bolling v. Sharpe*,51 companion case to *Brown v. Board of Education*,52 invoked the fifth amendment due process clause to desegregate the public schools of the District of Columbia. If there is any reason to doubt this conclusion, Congress has urgent reason to submit immediately a constitutional amendment to make the equal protection clause applicable to protect both citizens and other persons from action by the United States. Watergate should serve as a reminder that the forces of justice are not invariably centered in the United States Department of Justice under the direction of the Attorney General.

The ERA's second textual addition of substance is probably equally inconsequential. Explicit reference to "sex" adds nothing to what is already clearly implied. In 1873, the Court acknowledged that a primary purpose of the fourteenth amendment was to provide or to clarify the power of Congress and the federal courts to protect citizens and others from discrimination on account of race. Yet the fourteenth amendment does not explicitly say "race."53

If the failure of the fourteenth amendment explicitly to say "race" was originally a defect, it has long been overcome. We think it a strength, however, not a defect. In the Constitution, as in every other human communication, the most important things may be those gender is not a grammatical reflection of sex. In Old English, which had three genders, *wife* was neuter, *woman* masculine, *moon* masculine, and *sun* feminine. B. Evans & C. Evans, *A Dictionary of Contemporary American Usage* 195 (1957) (italics in original).

Peter Farb, whose expertise is in anthropological linguistics, recognizes the sexual chauvinism of English. He tells us, however, that because language responds to its own rules, efforts at language reform are unlikely to do much good. He comforts us with the assurance that "sexism" in language has little correlation with "sexism" in society. He notes as examples Turkey and the Ozark Mountains of Missouri where the language is nonsexist but where the culture is backward with respect to the status of women. P. Farb, *Word Play* 160–64 (Bantam ed. 1975).

Serious proposals to take gender-based language out of the United States Code by substituting "sibling" for "brother" and "sister," "human race" for "mankind," and "child" for "daughter" or "son" have been associated—regrettably in our view—with issues of sex discrimination which the law and lawmakers should take seriously. See U.S. Commission on Civil Rights, *Sex Bias in the U.S. Code* 15–16 (April 1977). It is not true, however, as this publication asserts, that "no appropriate sex-neutral term is available" for "aunts, uncles." Id. at 119. "Parents' siblings" serves the purpose, because "siblings" would be the replacement for "brothers, sisters." Id.

53. Justice Harlan, a severe critic of the "compelling interest" doctrine, embraced race as the subject of strict scrutiny because of the historic purposes of the equal protection clause. Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).
which are not expressly stated. They go without saying. The original Constitution protected racial slavery, without saying "race" or "slavery," until the thirteenth amendment abolished the institution. The Civil War produced three constitutional amendments, but not one of them says that no state may secede from the Union. That proposition has gone without saying since Lee's surrender at Appomattox, and has at least as solid a constitutional foundation as if a post-Civil War Congress had struggled to amend the Constitution to say that no state may ever leave the Union, alone or in combination with other states, regardless of reasons or grievances.54

Recognition of the "goes-without-saying" principle is essential to a functioning Constitution.55 If this principle were excised from the Constitution, the institution of judicial review itself might not survive. If it were to be excised from the fourteenth amendment only, sex would be only one item on a long list of invidious discriminations for which a constitutional amendment would be needed: religion, political beliefs, legitimacy, poverty, national origin, age, youth, handicaps, and so forth. The case for the ERA is unavoidably a case for amendomania of possibly fatal magnitude. Article V, we might well be reminded, limits constitutional amendments to occasions when two-thirds of the House and Senate "deem it necessary," and whether these words speak only to Congress and the people, rather than to the federal courts, they are important.56

Of course, "denied or abridged" in the ERA may be a stronger imprecation than "deny" in the equal protection clause. Furthermore, the ERA has immense symbolic importance. Perhaps it has more symbolism than any prior constitutional amendment because, at present,

54. United States v. White, 74 U.S. (7 Wall.) 700 (1869), could be cited for the proposition, which we would label dictum, that states cannot—and the Confederate States of America legally did not—secede.

55. Perhaps the principle needs a label (and maybe it has one which we have overlooked). Chief Justice Marshall was perhaps reaching for it in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). We are cautious about labels because they stultify thought. What cannot be labeled, indexed, and catalogued must be reinvented on each occasion. The necessity to restate stimulates thought. Handcrafted judicial decisions, whatever else may be the prospects for mass production, will never be replaced by the computer.

56. This argument was rejected in National Prohibition Cases, 253 U.S. 350 (1920), without the Court even addressing it. Justice Clarke's dissent in those cases recalled with apparent wistfulness the Slaughter-House Cases, when the Court saw its duty as one owed to the federal Union as originally constructed, a recent amendment to the Constitution to the contrary notwithstanding. Id. at 411.
it would add so little substance. Who can predict the strength or weakness of such a symbol?

B. The ERA's Probable Effect Upon the Course of Judicial Decision in Sex Discrimination Cases

A doctrinal argument to show need for the ERA is that its ratification may persuade a majority of the Justices to declare what a plurality of four Justices were willing to say in *Frontiero v. Richardson* in

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57. The ERA was submitted to the states exactly one hundred years after the Illinois legislature acted to admit women to the bar. Closing "arguments" by the ERA supporters were made by Senator John Sherman Cooper, distinguished Kentucky Republican, and Senator Robert C. Byrd, Democratic Whip. Said Senator Cooper:

I must say that I believe we could secure by statute practically any question to assure women necessary protection against discrimination. Some groups with whom I have talked do not understand all of the grave questions raised about their own protection and their own privileges. But they want, more than anything else, the Congress of the United States, the people of the United States to declare through a constitutional amendment they are equal to men and entitled to all possible rights.

I must say that it is a compelling argument.

... I am hopeful and I believe we have enough faith in our courts and in the Supreme Court to interpret it in such a way that it will guarantee full rights, and at the same time it will not remove women from the protections they need. 118 CONG. REC. 9597 (1972).

Senator Byrd followed, saying that he shared many of the concerns of Senator Sam Ervin of North Carolina (the most articulate of the ERA opponents) and of Senator Cooper, but he would vote for the amendment. *Id.* at 9598.

Roll was called, but before the vote was announced the galleries were admonished to observe the Senate rule against demonstration. The vote was 84 to 8. "[Demonstrations in the galleries.]" *Id.* Contrast the 56 to 25 vote (54 required) which submitted the nineteenth amendment to the states on June 4, 1919: "[Applause on the floor and in the galleries.]" 58 CONG. REC. 635 (1919).

58. Symbolism, if universally perceived as such, should be unobjectionable. The nineteenth amendment assuring women's suffrage was submitted to the states in 1919 and proclaimed a part of the Constitution on August 26, 1920. Thus, ratifications by Virginia in 1952, Alabama in 1953, Florida in 1969, Georgia and Louisiana in 1970, Constitution of the United States of America Annotated, S. Doc. No. 92–82, 92d Cong., 2d Sess. 36 n.11 (1973), were fully as innocuous although less exciting than would have been the posthumous award of a general's commission in the National Guard of those states to General William T. Sherman.

Our Appendix sets forth the Senate Judiciary Committee's statement of reasons why the ERA was thought necessary. All of the five Supreme Court decisions cited therein are clearly no longer law.

59. 411 U.S. 677 (1973). In his concurring opinion, Justice Powell found it unnecessary to decide whether sex is an "inherently suspect" classification. *Id.* at 691. He gave some support to the belief that ratification of the ERA will make it so when he said that the ERA's adoption would resolve "this precise question." *Id.* at 692. He neither stated the premise for this view nor the significance of its resolution. Chief Justice Burger and Justice Blackmun joined his opinion.

*Trimble v. Gordon,* 430 U.S. 762 (1977), demonstrates that any vigil to await an answer from the ERA is at best unnecessary and at worst futile. *Trimble* addressed
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1973: that sex is a "suspect classification" which requires a "compelling state interest" for constitutional justification. The prediction is not implausible as predictions go, but its major premise—that explicit identification in constitutional text is the touchstone of strict scrutiny—lacks visible support. In *Graham v. Richardson*, the Court declared that classifications based upon alienage, a criterion not expressly identified in the Constitution, are "inherently suspect." Furthermore, the fifteenth amendment expressly bars racial discrimination in voting rights, but it has not by reason of its specificity displaced the fourteenth amendment as a first choice in dealing with racial discrimination in voting.

More important, however, is that even if sex were to become a "suspect classification"—with or without the influence of the ERA—the consequences would be by no means clear. Persuasive evidence that the suspect label makes no significant difference is found in the issue whether Illinois could permit an illegitimate child to inherit from her mother, but not from her father. Justice Powell, writing for a five-Justice majority, said no, based on the conclusion that although illegitimacy is a classification calling for "'less than strict scrutiny,'" the proper standard was "'not . . . toothless.'" *Id.* at 767 (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). It was unnecessary for the Court to attempt to describe the scrutiny appropriate to sex as a classification. Four Justices joined in a dissent on the ground that they found the case "constitutionally indistinguishable from *Labine v. Vincent*, 401 U.S. 532 (1971)." *Id.* at 777. Chief Justice Burger and Justices Stewart and Blackmun joined Justice Rehnquist's separate dissent, which would have upheld the Illinois statute because it was "not mindless and patently irrational." *Id.* at 786.

Conceivably, the ERA might have affected the mode of analysis, but quite clearly, it would not have affected the result. Classifying degrees of scrutiny and weighing the quality and quantity of the interest required to satisfy each degree has become an exercise of less and less utility in predicting what a fragmented Court is likely to do. Although it is a 5–4 decision, *Trimble* will remain a decision binding on all other courts until expressly or impliedly overruled. It would not be overruled by even a unanimous opinion of the Court explicating strictness of scrutiny with respect to illegitimacy or sex in abstract terms.

60. In *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968), the Court emphasized the specificity of the first amendment's establishment clause in upholding a taxpayer's standing to challenge expenditures in violation thereof, but no principle beyond that clause was announced. Whether and how many other such specific prohibitions there may be was left to future decision. Justice Stone's opinion in *United States v. Darby*, 312 U.S. 100 (1941), might be cited to support an opposite principle—that repetition by amendment of what is implicit in the body of the Constitution adds nothing. In *Darby*, the court stated, "The [tenth] amendment states but a truism that all is retained which has not been surrendered." *Id.* at 124.


62. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). There was no dissent from the conclusion that gerrymandering Tuskegee, Alabama, to exclude black residents from city elections was unconstitutional, but only Justice Whittaker's concurring opinion would have rested the case on the fifteenth amendment rather than on the equal protection clause of the fourteenth amendment. *Id.* at 349.
in two contrasting descriptions by Justice Brennan in 1972 and 1973 of what the Court had decided about the strictness of its scrutiny in *Reed v. Reed*, a unanimous opinion on sex discrimination by Chief Justice Burger.

It was widely observed in 1971 that the Chief Justice's rhetoric was a departure from the received opinion that, absent a suspect classification or impairment of a fundamental right, any rational basis will sustain a legislative judgment. In *Reed v. Reed*, the Court conceded that the challenged statute, which preferred a male relative to a female relative of equal closeness in the appointment of administrator of a decedent's estate, served a minimally useful purpose by making it unnecessary for the judge to make a choice. This rational basis, however, was not enough to sustain the statute.

In 1972, in his opinion for the Court in *Eisenstadt v. Baird*, a decision holding a Massachusetts birth control statute unconstitutional, Justice Brennan declared:

> Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold* [v. Connecticut, 381 U.S. 379 (1965)], the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a compelling state interest... But just as in *Reed v. Reed*... 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.

In contrast, in writing for a plurality in *Frontiero v. Richardson* in 1973, Justice Brennan had persuaded himself—and not implausibly—that *Reed v. Reed* was, but for the express use of labels, an example of close scrutiny:

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63. 404 U.S. 71 (1971). Disappointment among supporters of the successful litigants in *Reed* was widespread. "Invocation of traditional equal protection language to invalidate a sexually discriminatory law is hardly progressive." 1972 Wis. L. Rev. 626, 632. See 43 Miss. L. Rev. 418 (1972); 25 Vand. L. Rev. 412 (1972). The "strict scrutiny" hoped for is illustrated by the opinion of the late Justice Ray Peters in Sailer Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). A bit longer perspective might have resulted in greater emphasis on the origin of "suspect categories" in Korematsu v. United States, 323 U.S. 214 (1944). That decision upheld exclusion from their homes of American citizens of Japanese ancestry on the grounds that military authorities, empowered by executive order, had concluded that such exclusion was a military imperative. There is no credible evidence now, and there was none in 1944, of the military necessity for Japanese relocation, confinement, and curfews.

64. 405 U.S. 438 (1972).

65. *id.* at 447 n.7 (emphasis in original) (citations omitted).
At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed...66

In view of Justice Brennan's opinions in Eisenstadt and Frontiero, can there be any doubt that an important determinant of whether a classification is to be suspect is the linguistic preference of the opinion writer?67 If all opinions on sex discrimination for thirty years were to come from the same hand, and to be written for a unanimous Court, the labels might become vested with great usefulness for prediction. That condition is unlikely to prevail, however, and we should not lament the prospect. Fresh rhetoric quickly becomes cliché. The cliché not only kills thought, it conceals the fact of death.

Washington State has had its version of the ERA in its constitution

66. 411 U.S. at 682 (footnotes and citation omitted). See Stanton v. Stanton, 421 U.S. 7, 13 (1975) (Blackmun, J.): "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect." Stanton held that Utah may not make the age of majority 18 for women, but 21 for men.


The Virginia court construed VA. CONST. art. I, § 11 ("[T]he right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.") to permit Virginia statutes to excuse women responsible for the care of children under 17 from jury duty. The court applied a rational basis formulation, and said of the ERA provision: "It is no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." 194 S.E.2d at 711.

The Texas court construed TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.") to apply strict scrutiny under an explicit "two-tier" analysis, but recognized the state's compelling interest in autonomy for school authorities which permits them to apply haircut regulations to boys but not to girls.

Justice Stevens, concurring in Craig v. Boren, 429 U.S. 190 (1976), wrote persuasively concerning strictness of scrutiny:

There is only one Equal Protection Clause... I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.

Id. at 211–12.
Washington's experience may be enlightening for the nation. Justice Charles J. Horowitz recently wrote an opinion for the majority of a divided Washington Supreme Court in *Gaylord v. Tacoma School District No. 10*, upholding the power of a public school to discharge an otherwise competent high school teacher on the ground that his effectiveness was impaired by his students' knowledge that their teacher was an active homosexual. This confounds the prediction of student editors of the *Yale Law Journal* that the federal ERA would "almost certainly" reverse a Minnesota supreme court decision rejecting a claim to constitutional protection for a right to licensed homosexual marriage. It is noteworthy that in *Gaylord*, the Washington Supreme Court—the majority and the dissenters—was neither helped nor hindered by the state's ERA in reaching what was obviously a difficult decision: the ERA simply was not discussed.

The Washington ERA has not, however, been without some apparent influence. Justice Horowitz in 1975 wrote the majority opinion in *Darrin v. Gould*, upholding the right of two girls in public high school to engage in interscholastic football. He produced a balanced, scholarly, and persuasive opinion, although this was not a case which necessarily decided itself. He said that the court would reach the same result whether it invoked strict scrutiny or followed Professor

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68. "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1.
70. Comment, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973). For the implicitly contrary view, see Brown, Emerson, Falk, & Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 912 (1971). In a most comprehensive survey of the ERA's probable effects, Professor Thomas Emerson and three Yale students conclude that the ERA is compatible with principles of the uniform law on marriage and divorce, which recognizes that implicit in "marriage" is a relationship of two sexes. "[M]arriage is required to be between a man and a woman." *Uniform Marriage and Divorce Act* § 201 (Commissioners' Note).
73. The larger of the two girls was 14 years old, 5 feet, 9 inches tall, and weighed 212 pounds. It is not clear whether the court adequately considered the hazard to the young male psyche from the effects of playing opposite her in the line.
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Gerald Gunther's analysis (not associated with the ERA) of decisions of the 1971 Term of the Supreme Court. The Washington court found it unnecessary to decide any question under the federal equal protection clause.

The ERA's worst hazard is illustrated by the concurring opinion in *Darrin v. Gould*, which was joined by four Justices. We quote that opinion in its entirety:

> With some qualms I concur in the result reached by the majority. I do so, however, exclusively upon the basis that the result is dictated by the broad and mandatory language of Const. art. 31, § 1, Washington's Equal Rights Amendment (ERA). Whether the people in enacting the ERA fully contemplated and appreciated the result here reached, coupled with its prospective variations, may be questionable. Nevertheless, in sweeping language they embedded the principle of the ERA in our constitution, and it is beyond the authority of this court to modify the people's will. So be it.75

To conclude that Washington's citizens wrote sweeping language into the state constitution beyond their capacity to understand, but which has a remorseless compulsion over judges, forcing them dolorously to say, "They knew not what they did; but so be it," is not only wrong, but dangerous.76 On that premise, a stultifying form of constitutionalism has taken over, a nightmare which de Tocqueville might have inspired, but which even he did not predict.77 Such premise would lead

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75. 85 Wn. 2d at 878, 540 P.2d at 893 (Hamilton, J., concurring).

76. *Darrin* has not brought floods of girls to Washington gridirons. A similar but more difficult question was presented in *Cape v. Tennessee Secondary School Athletic Ass'n*, 424 F. Supp. 732 (E.D. Tenn. 1976). In that decision, the court had only the 109-year-old equal protection clause with which to hold unconstitutional Tennessee high schools' use of girls' rules for girls' basketball. The successful plaintiff argued that she was prejudiced by playing girls' rules in her expected career beyond high school. ERA supporters might well be on the other side of such an argument, because the decision might result in so few players and teams willing to play that a girl would be effectively foreclosed from playing any high school basketball with girls from other schools.

77. The French commentator wrote:

> An American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs.

> ... There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. A. De Tocqueville, *Democracy in America* 247–48 (J. Mayer & M. Lerner eds. 1966).
to the absurd result that the people are powerless to adopt an amendment which might reject cases like *Goesaert v. Cleary*,\(^7\) which in the dark ages upheld a Michigan statute barring a woman from tending bar unless she was the wife or daughter of the owner, without risking the constitutionality of every classification based upon sex. Marriage—the heterosexual kind—has something to do with sex, and often quite explicitly. Does anyone seriously think that the ERA may render unconstitutional the institution of marriage and all its supporting laws? Will it require a "compelling state interest" to save it? If there are words of sweeping implication in our language which may be slipped unsuspected into the Constitution, they are more dangerous than the iceberg which sank the Titanic. Our hope and conviction is that the standard of interpretation of a new constitutional amendment must be related to something the people adopting it might have had in mind. If not, our constitutional system is out of control.

C. The ERA Will Have No Effect on Congress' Power To Enact Legislation Protective of Women's Rights

Supporters of the ERA do not deny that much of what they hope it accomplishes will be by legislation. Indeed, the enforcement clauses of the ERA and the fourteenth amendment are identical, word for word, comma for comma.

Professor Ruth Bader Ginsburg wrote in January 1977, "With the E.R.A. on the books, we may expect Congress and state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. History should teach that the entire job is not likely to be done until the E.R.A. supplies the signal."\(^7\)

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\(^7\) This is still an accurate description. It will become the prescription for disaster if constitutions by the people are written in language which only judges, and not the people, understand.

\(^7\) 335 U.S. 464 (1948), said to be overruled so far as inconsistent in Craig v. Boren, 429 U.S. 190 (1976), which held unconstitutional an Oklahoma statute forbidding boys to drink beer until age 21, but allowing girls to drink at age 18, despite a record supported by evidence that girls have better driving records. Did the Oklahoma legislature really think that boys will stand around and thirstily watch girls drink beer?


A good journalistic assessment of the lack of rationality in the rising opposition to
Equal Rights Amendment

We are confident that Professor Ginsburg did not intend to suggest that any new legislation against sex discrimination should await the effective date of the ERA. Because the ERA becomes effective two years after it is ratified, that date may be as late as March 22, 1981. What changes if any the amendment will make in constitutional case law await Supreme Court decisions much farther down the road. Nevertheless, we know of no legislation, federal or state, now held up by a rational doubt about its present constitutionality which ratification of the ERA would dispel. To be sure, some ERA opponents and a few ERA supporters have predicted that the ERA will bring surprising results—constitutionally compelled recognition of homosexual marriage, conscription of women for infantry combat units in wartime, prohibition of separate toilets for men and women. Such possibilities merit little attention, because it is unlikely that any legislature will wish to consider these proposals seriously. The possibility that the Supreme Court might reach any such result without legislation is even more remote. A member of Congress fearing these possibilities should be now pressing for an amendment to repeal the fourteenth.

While it is not altogether clear what Professor Ginsburg would include in “the entire job,” it is clear that even a minimum job within the present national consensus requires legislation. She may have intended only to predict that Congress and state legislatures will procrastinate, but such an emphasis on the ERA risks an inference that delay in enacting remedial legislation is inevitable, necessary, or justifiable. Such delay is none of these. Furthermore, we are not persuaded that the prophecy that ERA ratification will stimulate legislatures to act is necessarily accurate.

Ratification of the ERA would mean many things to many people, but to some it would mean that both sexes have achieved equal rights under the supreme law of the land. A legislature firmly of that belief might be expected to do no more than give thanks and declare a hol-

the ERA is found in Lear, ‘You'll Probably Think I'm Stupid,’ N.Y. Times, Apr. 11, 1976, § 6 (Magazine) at 30. The missing ingredient in most such appraisals, however, is the basis for an affirmative belief to support the author's conclusion: “Change is coming anyway, with or without an E.R.A. With, it will come faster and far easier. Without, it will simply come.” Id. at 121. This assertion is plausible if one reads “with” literally, to mean “accompanying,” and accepts the premise that the ability to amend the Constitution measures the effectiveness of the “women's movement.” We find the assertion implausible if it suggests that the ERA will have a causal relationship to change beyond its symbolism.

80. See note 46 and accompanying text supra.
81. See notes 70–71 and accompanying text supra.
day. Even a legislature in some doubt might recall that it is emphatically the province and the duty of the judicial department to say what the law is,82 and thereby escape the crossfire from conflicting demands by constituents.

When Professor Paul Freund wrote in 1971 that the ERA is not the way to achieve equal rights for women,83 he had an uphill burden of persuasion. The constitutional law of sex discrimination was then less developed than the law of race discrimination before Brown v. Board of Education in 1954.84 In 1978, however, any doubt that any remedy desired lies with Congress and state legislatures has been dispelled. Although some recent Supreme Court decisions have been disappointing, both in construction of federal statutes85 and in lack of consistency in describing the appropriate standard of judicial scrutiny,86 Congress has the responsibility to correct the Court's federal statutory construction. Verbal formulas by which the Court describes standards of scrutiny are most unlikely to be clarified or much affected by an amendment which says nothing at all on that subject.

83. Freund, The Equal Rights Amendment Is Not the Way, 6 HARV. C.R.-C.L. L. REV. 234 (1971), made the case for legislation to achieve the objectives of the amendment. That course of action has encountered no constitutional obstacles in the years since he wrote.
84. 347 U.S. 483 (1954). See Appendix, infra, for a brief review of the state of the law in 1972, contained in the Senate report on the joint resolution submitting the ERA.
85. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Court held that Title VII of the Civil Rights Act of 1964 does not forbid an employer from excluding pregnancy benefits from an employee's health insurance. Although this case was decided only two years ago, its precedential value has been recently rendered uncertain. A bill amending Title VII of the Civil Rights Act to reverse General Electric recently passed the Senate by a vote of 75 (78 counting views of absent Senators formally announced prior to the vote) to 11. S. 995, 95th Cong., 1st Sess., 123 CONG. REC. S15,059 (daily ed. Sept. 16, 1977).
86. Scrutiny under a statute is no less difficult to describe abstractly than constitutional scrutiny. The opinion of the Court in Dothard v. Rawlinson, 97 S. Ct. 2720 (1977), held that the bona fide occupational qualification in Title VII, which permits valid sex qualifications, is "extremely narrow." How narrow "extremely" is, however, is principally revealed to readers of the opinion by the facts of the case, in which a woman applicant failed to meet height and weight requirements prescribed for employment in an all-male Alabama prison, as well as an explicit sex requirement adopted during the litigation. When the issue relates to legislative interpretation, the ultimate responsibility is legislative. When it relates to the Constitution, ultimate responsibility is judicial.
In 1978, with ratification uncertain, it seems a poor time to load the ERA with added emotional cargo. It seems a good time to announce a victory for the equal rights of women—not the ultimate victory when all weapons may be beaten into plowshares, but an impressive interim victory nonetheless. The consensus is that equal protection of the laws now includes equal rights for women and men and that equal protection extends to both federal and state action. Who and where are the doubters? Let the signal for needed legislation now sound.

Congressional submission of the ERA to the states, and thirty-five state ratifications of the ERA, is one manifestation of victory. The fifteen abstaining states are not the bellwethers of the nation87 and should not be allowed to appear so. Furthermore, it is not necessary to renounce the ERA, either the achievements of its sponsors or the ERA’s prospects for the future.88

A strong argument for the ERA’s ratification may be made on the grounds (1) that to many it has become an all-important symbol, (2) that the cause which the ERA symbolizes is just, and (3) that it is unlikely to do harm. This is a fair assessment even though it is not a theme for which Julia Ward Howe could write words to the tune of “John Brown’s Body” and inspire a Union Army.

If it were widely understood that the ERA is only declaratory and symbolic, we would have little cause for concern. That perception, however, is not widely shared. Rather, it is contradicted by the ERA’s most vigorous supporters and by its most vehement opponents. Whether the ERA is only symbolic will not be clear on the day of ratification and it may remain unclear for one hundred years thereafter if the fourteenth amendment’s privileges or immunities clause is any indication.

If the effect of the ratification of the ERA turns out to be more than declaratory and symbolic, it might prove harmful. It might weaken the protection which the fourteenth amendment gives against discrim-

87. The fifteen nonratifying states are mostly in the South and have a disproportionately small population. See note 46 supra.
88. Legislation could be enacted to become effective only on the ERA’s ratification. It would be better to make any legislation effective immediately, with a severability provision reciting that should the legislation be held unconstitutional in whole or in part prior to the effective date of the ERA, it is the intent of Congress that the legislation shall become fully effective to the extent that the ERA removes any constitutional obstacles, on the effective date of the amendment.
ination unrelated to sex—race, religion, alienage, nationality, illegitimacy, political beliefs, political associations, handicaps, age, youth, or poverty. If explicit constitutional text is required to produce effective remedial legislation or the most rigorous judicial scrutiny against these discriminations—and our list is only illustrative—each classification identifies a group which does not qualify. If women, who are a majority of the nation’s population eligible to vote, have a claim to a constitutional amendment (whether or not the amendment is more than symbolic), which among these minorities should be denied and for what reasons? All are more insular than women and some are surely as discrete.89

John Marshall called on us always to remember that “it is a constitution we are expounding.”90 Justice Frankfurter called this “the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending.”91 Surely the principle comprehends that it is a constitution when we are asked to amend it. There are better places for the symbols, the medals, the campaign ribbons, and the slogans.

IV. CONCLUSION: SOUNDING BRASS VERSUS TINKLING SYMBOLISM?

As of early 1978, the easily demonstrable case against adopting the ERA is that it is not needed. Equal rights for women have either been achieved already, or achievement will require enactment of new statutes and their enforcement. The federal ERA does not purport to compel Congress to legislate, and it authorizes no federal statute not authorized by the Constitution without amendment. The ERA might provide impetus to persuade the Court to reverse some case it has decided in the last six years, but that case cannot be identified. In any event, it would almost surely be a case the result of which Congress can now change without the ERA.

The ERA was clearly needed in 1873, when only Chief Justice Chase voted to sustain Myra Bradwell’s constitutional claim. A good case could be made that the ERA was needed in 1972, when Congress

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submitted it to the states. In 1972, the Supreme Court's constitutional law of sex discrimination consisted only of Reed v. Reed and some derelict decisions out of the past. Only a few lonely voices, principally that of Paul Freund, identified the derelicts for what they were and asserted the now demonstrable truth that legislation must be the way. That part of his conclusion remains true without regard to whether the ERA becomes part of the Constitution's text.

The important rights of women not yet realized are in employment—equal opportunities for jobs, and equal pay (including fringe benefits) for equal work. Most of the remaining discrimination is now in private and not government employment, but the ERA forbids only discrimination "by the United States or by any State." Without federal legislation, which the commerce clause is fully as adequate to authorize as the enforcement clause of the ERA or of the fourteenth amendment, the ERA does not itself forbid discrimination by a private employer.

The ineffectiveness of the ERA, except as a symbol, has been overlooked in the increasingly shrill forecasts—and necessary rebuttals to the forecasts—of frightening or unwanted changes in society or the family that the amendment may produce. Some of the forecast changes may indeed take place. They may be cause for alarm or for gratification. In any event, public discussion of all such possibilities should be welcomed. However, any possibility that ratification of the ERA will produce those changes, or that nonratification will prevent them, is almost beyond rational discourse.

This leaves an important and unique issue on which reasonable men and women may differ. If a constitutional amendment will make no change in the law, but is deeply desired as a symbol, is there any adequate reason to oppose it?

Our answer to that question should not be overstated, lest overstatement contribute to the possibility of harm that we fear from even a clearly symbolic amendment. Nevertheless, we would assert that the Constitution should never be amended except when there are identifiable and necessary changes to be made in constitutional law. There are two reasons.

First, an insistence upon achieving a result through the Constitution rather than by statute, ordinance, or regulation tends to stultify and to bypass the legislative function. It is familiar wisdom—but wisdom nonetheless—that judicial decisions should not be based upon
constitutional interpretation if a nonconstitutional basis for the decision is readily available. All of the same reasons apply when the choice is between achieving a result by a statute or by amending the Constitution. Legislation is easier to enact, easier to improve, and more certain to achieve the desired results.

Second, the most serious danger from an unnecessary, though symbolic, amendment to the Constitution is that such an amendment would itself set a constitutional precedent. Once such precedent exists, can sex long continue to be the only cause for discrimination which the Constitution explicitly forbids? Symbolic amendment is a harmful precedent because the amendment process itself produces diversionary arguments filled with predictions, prophecies, and fantasies, all at the expense of analysis of real problems and the search for the best solutions.

Neither of these reasons for opposing a purely symbolic amendment to the United States Constitution applies to ERA counterparts in state constitutions. State constitutions are different. They are longer than the United States Constitution, they are usually much easier to amend, and they are already filled with the detritus from causes and struggles, many of them long since forgotten.92 One reason for the differences is that state constitutions are charters for governments whose functions span the whole broad range of law not delegated to the Congress of the United States. Another reason is that any advocate of legislation is likely to prefer to put his proposal in the constitution, if possible, because the constitution cannot be amended as easily as a statute.

Irreversibility is not an adequate reason for the ERA. The eighteenth amendment to the United States Constitution is a good reminder why. Although prohibition became effective in 1920, it lasted less than fourteen years. The twenty-first amendment which repealed it was ratified by the states less than a year after it was submitted.93 Be-

93. The eighteenth amendment was submitted to the states in December 1917; ratification was completed in January 1919; and it became effective in January 1920. S. Doc. No. 92-82, 92d Cong., 2d Sess. 35 (1973). Ratification of the twenty-first amendment was even faster, with submission in February 1933, and ratification by December 1933. Id. at 38–39.

Today, a constitutional amendment would be unnecessary if Congress, for the first time, wished to prohibit liquor by statute. Its power under the commerce clause would be adequate, except for § 2 of the twenty-first amendment, which has been held to give the states an autonomy which they have with respect to no product except liquor. E.g.,
cause the decisions were at constitutional level, there was little opportunity for intermediate choices. Constitutionalizing the noble exper-
iment probably had a great deal to do with making whiskey our national drink, rather than light wine and beer.

As of early 1978, there is a national consensus that men and women should have equal rights. The best prescription for irreversi-
ility of that consensus is to recognize that additional words in the Constitution are quite unnecessary to secure the full enjoyment of those rights. Whether or not the ERA becomes the twenty-seventh amendment, equality of rights for men and women is now an historic fact in the progress of mankind. It should not be confused with an un-
certain political event which has not yet happened—ratification of the ERA. Any representation that the ERA is needed for some constitutional purpose, other than symbolic, is flatly wrong. It is a basic mis-
perception of the function of the Constitution of the United States. The success of the Constitution depends on people who support it and amend it knowing how their Constitution works. The full enjoyment of equality of rights for men and women depends on recognizing suc-
cesses as they come.

The Constitution has probably done as much as any words in a constitutional text can do to eliminate sex discrimination. This is cer-
tainly true of the words which the ERA would add, aside from the possibility of emanations from the ERA as a symbol. That possibility is at once so remote and so totally unpredictable that no extended argu-
ment against symbolic constitutional amendment is necessary. For success, there are now symbols enough.


This does not suggest that the eighteenth amendment was purely symbolic, or that prohibition could in 1917 have been adopted by statute without amendment, although wartime prohibition to conserve foodstuffs was upheld as a war measure. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919).
Senator Birch Bayh submitted Senate Report No. 689\textsuperscript{94} a week before the Senate passed the House Resolution which submitted the Equal Rights Amendment to the states. For some unaccountable reason, the 1972 United States Code Congressional and Administrative News did not reproduce it, and hence it is not readily available to many lawyers. We here reproduce, with our own footnotes added, the section captioned Inadequacy of Legislative or Judicial Relief.\textsuperscript{95}

It is sometimes argued that all of the discriminatory laws and practices which exist could be eliminated without a constitutional amendment. If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding state interest", then part of the reason for the Amendment would disappear. But the Court has persistently refused so to hold. Indeed, the Court has upheld many laws which plainly discriminate against women.

Its first significant case involving sex discrimination was \textit{Bradwell v. Illinois}, 83 U.S. 130 (1872),\textsuperscript{96} in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. The Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, to uphold the law.\textsuperscript{97} Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in \textit{Minor v. Happersett}, 88 U.S. 162 (1874),\textsuperscript{98} a position which stood until ratification of the Suffrage Amendment in 1920.

Later, the Court began to apply a standard of "reasonableness" to laws which discriminated on the basis of sex. This test was employed

\textsuperscript{94} S. REP. No. 689, 92d Cong., 2d Sess. (1972).
\textsuperscript{95} Id. at 9-11.
\textsuperscript{96} Sic. The 1872 date frequently assigned is the December 1872 Term, reported in the United States Reports. Bradwell v. State, 21 L. Ed. 442, gives January 18, 1873, as the date of argument, and April 15, 1873, the date of decision. Without accuracy of dates, the relationship between \textit{Slaughter-House} and \textit{Bradwell} is easy to overlook.
\textsuperscript{97} It is altogether inaccurate to say that "the Court relied on the Privileges and [sic] Immunities Clause." Myra Bradwell relied, unsuccessfully, on that clause. The Court relied on the constitutional principle redundantly stated in the tenth amendment, held to be unaltered by the fourteenth amendment.
\textsuperscript{98} Sic. 21 Wall. 162 gives the date of decision as March 29, 1875. A unanimous Court reaffirmed that women are indeed citizens, but noted that they had not been permitted to vote since New Jersey abolished that right in 1807.
to uphold against constitutional attack labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart v. Cleary*, 335 U.S. 464 (1948),\(^9\) in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied.

More recently, in *Hoyt v. Florida*, 386 U.S. 57 (1967), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible [sic] under the Fourteenth Amendment, since it was reasonable...

...for a state, acting in pursuit of the 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.

Last year the Supreme Court for the first time struck down a law which discriminated against women. In *Reed v. Reed*, ________ U.S. ________, 40 U.S.L.W. 4013 (1971),\(^1\) the Court invalidated a State law which arbitrarily favored men over women as administrators of estates. But the Court did not overrule such cases as *Goesart* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the Fourteenth Amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimina-

\(^9\) *Sic.* *Goesaert v. Cleary* was overruled in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976). *Shepard's Citations* may not use its "o" for "overruled" symbol, because this portion of Justice Brennan's opinion is adhered to by only a four-Justice plurality. Lower federal courts, however, had long recognized that the decision is discredited. Even the three dissenting Justices, who objected to discriminating between women who are and those who are not related to the bar owner, wrote an opinion which will hold no water.

\(^1\) *Sic.* *Hoyt v. Florida*, correctly cited as 368 U.S. 57 (1967), was overruled in all but the use of that word ("[W]e cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida."") in *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). Only Justice Rehnquist dissented in *Taylor*, but he recognized that the Louisiana system which excused women from juries unless they waived their exemption "is in fact an anachronism." *Id.* at 542.

\(^1\) 404 U.S. 71 (1971). Chief Justice Burger's opinion for a unanimous Court was a demonstration that unanimity may be purchased at a price. In *Reed*, however, the price may have been worth it. The mechanistic two-tier jurisprudence of "strict scrutiny" or "rational basis" review has lost whatever semblance of reliability it may have had in the years before *Reed.*
tion is "unreasonable". And that is a difficult burden to carry, indeed. As the Association of the Bar of the City of New York pointed out in its recent report "[t]he 1971 Reed case indicated no substantial change in judicial attitude." Passage of the Equal Rights Amendment will make it clear that the burden is not on each woman plaintiff to show sex discrimination is "unreasonable"; the Amendment will, instead, assure all men and women the right to be free from discrimination based on sex.

Of course, it would theoretically be possible for Congress and each State to revise their laws and eliminate those which discriminate against women. But without the impetus of the Equal Rights Amendment, that process would be far too haphazard and much too slow to be acceptable. We cannot afford to wait any longer for Congress and each of the 50 State legislatures to find the time to debate and revise their laws. As in other areas where the Constitution has been amended, there is an imperative for immediate action. The Nation has waited too long already—it has been 49 years since the Equal Rights Amendment was first introduced. Only a constitutional amendment can provide the legal and practical basis for the necessary changes.

Finally, we cannot overlook the immense symbolic importance of the Equal Rights Amendment. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land.

The Committee concludes that because of the pervasive legal sex discrimination which now exists, and because of the inadequacy of legislative and judicial remedies, there is a clear and undeniable need for the Equal Rights Amendment.102

Victory has been well said to have a thousand fathers [sic], and hence it is hard to trace causation of developments since 1972 to the ERA, but whatever the cause or causes, it is clear that the spring of 1972 was long, long ago. The Constitution of 1972 has, in effect, already been amended.

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102. The ERA applies only to discrimination by the United States or by a state— not to discrimination which is not the product of state or federal action. If some reform sought by sponsors of the ERA is beyond the reach of federal and state legislation, for which it is unnecessary to wait for two years after the ERA's ratification, we have not discovered it.