THE NEED FOR THE EQUAL RIGHTS AMENDMENT

By Ruth Bader Ginsburg*

The notion that men and women stand as equals before the law was not the original understanding, nor was it the understanding of the Congress that framed the Civil War amendments. Thomas Jefferson put it this way:

> Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.[1]

Midnineteenth century feminists, many of them diligent workers in the cause of abolition, looked to Congress after the Civil War for an express guarantee of equal rights for men and women. But the text of the Fourteenth Amendment appalled the proponents of a sex equality guarantee. Their concern centered on the abortive second section of the amendment, which placed in the Constitution for the first time the word "male." Threefold use of the word "male," always in conjunction with the term "citizen," caused concern that the grand phrases of the first section of the Fourteenth Amendment - due process and equal protection of the laws - would have, at best, qualified application to women.[2]

After close to a century's effort, the suffrage amendment was ratified, according to female citizens the right to vote. The most vigorous proponents of that amendment saw it as a beginning, not as a terminal point. Three years after the ratification of the Nineteenth Amendment, the National Women's Party succeeded in putting before Congress the equal rights amendment that has been reintroduced in every Congress since 1923. On the occasion of the amendment's initial introduction, the executive secretary of the National Women's Party explained:

> [A]s we were working for the national suffrage amendment . . . it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step . . . toward gaining this equality.[3]

Persons unacquainted with the history of the amendment deplore its generality and the absence of investigation concerning its impact. The models of the due process and equal protection clauses should suffice to indicate that the wording of the amendment is a thoroughly responsible way of embodying fundamental principle in the Constitution. Before the amendment was proposed, the National Women's Party, with the aid of a staff of lawyers and expert consultants, tabulated state and federal legislation and court decisions relating to the status of women. Advisory councils were formed, composed of different economic and professional groups of women - industrial workers, homemakers, teachers and students, federal employees. Each council conducted studies of the desirability of equal rights and responsibilities for men and women. Reading debates on the amendment in the law journals of the 1920s is enlightening. The objections still voiced in 1973 were solidly answered then.[4]

Opponents of the amendment suggest the pursuit of alternate routes: particularized statutes through the regular legislative process in Congress and in the states, and test case litigation under the Fourteenth Amendment.[5] Only those who have failed to learn the lessons of the past can accept that counsel.

On the legislative side the cupboard was bare until 1963 when Congress passed the Equal Pay Act. That legislation was hardly innovative. An equal pay requirement was in force during World War II and then quietly retired when there was no longer a need to encourage women to join the labor force.[6] Equal pay was the subject of a 1951 International Labor Organization convention and was mandated by the Rome Treaty that launched the European Economic Community in 1958. Most significantly, mixed motives spurred congressional action. Some congressmen were sold on the bill by this argument: equal pay protects against male unemployment; without access to female labor at bargain prices, employers will prefer to hire men.[7]

The next year, sex was included along with race, religion, and national origin in Title VII of the Civil Rights Act of 1964. This was a significant advance, for Title VII is a most potent weapon against employment discrimination. But sex was added to Title VII via the back door. A Southern congressman, steadfast in his opposition to Title VII, introduced the amendment that added sex to the catalogue of prohibited discrimination. His motive was apparent, but his tactic backfired.[8]

In 1972, in Title IX of the Education Amendments of that year, Congress banned federal assistance to educational institutions that discriminate on the basis of sex. Title IX contains several exceptions, for example, admissions to all private and some public undergraduate schools are exempt, and its enforcement mechanism is weak.

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