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## THE PROTECTION OF GENDER EQUALITY IN THE UNITED STATES OF AMERICA: THE INTERACTION OF PUBLIC OPINION, THE CONSTITUTION AND THE LAW

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The protection of the equality of men and women in the United States shows the interplay of the actions of the courts, of Congress, and of administrative agencies. It demonstrates the interlocking roles that amendment and interpretation of the Constitution, the enactment of legislation, and administrative action play.

Women now play a public and highly significant role in American society. This role has evolved rapidly and decisively in the past 40 years. As in most societies, women's legal rights were restricted and their opportunities were limited through much of history. Women gained the right to own property separately from their husbands in the course of the nineteenth century; they were assured the right to vote by the 19th Amendment to the Constitution in 1920 (although they had held the right to vote in some parts of the country much earlier); their rights to gain and retain citizenship were put on a par with those of men in 1925. As late as the 1940's, the Supreme Court held that it was reasonable to prohibit women from working as barkeepers in places that served alcoholic beverages! It would be wrong to assume, however, that women had no role in American society. Despite the obstacles created by societal discrimination and legal barriers, some women played a significant role in a number of fields.

During World War II, women replaced men, who had gone to battle, in many of the traditional "men's jobs" in factories and in the professions. Although men generally reoccupied these jobs in 1945 and after, the ability of women to perform successfully in these ways was increasingly apparent. The end of the war brought with it more overt recognitions of the equal status of women. Both the United Nations Charter and the Universal Declaration on Human Rights proclaim equality of the genders as part of their aspirations. The issue of women's rights was largely sidetracked through much of the 1950's, however, by the struggle for racial equality in the United States. The movement for equal rights for women acquired substantial momentum in the 1960's.

While American law has now broadly recognized the principle of equal rights for women, gender equality has not been fully achieved. Women face a number of barriers in society and in the workplace, although many gains have been achieved. This paper presents a discussion of the interplay of constitutional doctrine, and legal and administrative actions in achieving these results.

It is really the interplay of four themes: (1) the evolution of constitutional law doctrines, especially the interpretation of the Equal Protection Clause of the 14th Amendment by the United States Supreme Court; (2) the influence of the Equal Rights Amendment, a proposed constitutional amendment that was not adopted, but that facilitated significant changes in attitudes and approaches, (3) the effects of laws providing for the protection of women's rights, especially in employment and education, (4) the role of administrative agencies in enforcing that legislation. We will see that these factors are closely interrelated.

<u>The evolution of constitutional law doctrine</u>

The Equal Protection Clause of the 14th Amendment provides:

> ". . . nor shall any state . . . deprive any person within its jurisdiction the equal protection of the laws." *U.S. Constitution, amendment XIV, sec. 1.*

This is the basic command of equality in American law. Notice its text. It only requires state governments and of their agencies, such as municipalities to an equivalent doctrine derived from

the 5th Amendment imposes similar, although less explicit, rules on actions of the federal government and its agencies. But the Constitution itself does not demand that private individuals provide equal treatment.

The fundamental issue has not been the equality principle--that has long been accepted. It is also accepted that there will be some classifications. For example, only medical doctors may perform surgery. The important legal question is what kind of a rationale is required before a governmental unit can create a valid classification. In a long series of cases culminating in *Railway Express v. New York, 336 U.S. 106 (1949),* the Supreme Court created the rule that a classification between different categories of people would be permitted if the legislature had a "rational basis" for doing so. The classification did not have to be an exact fit. Classifications could be based on generalizations, and then applied even if the generalization was not true in the specific case. One exception to that rule soon emerged. In *Brown v. Board of Education, 347 U.S. 483 (1954),* the Court found that classifications based on race were inherently suspect. It subsequently required a showing of a "compelling public purpose" to uphold a racial classification, a standard that was never met.

The Supreme Court had to struggle with the issue of which classification should be applied in the case of gender discrimination. Did it require only a "rational basis" or a "compelling public purpose." The one standard was almost always met, the other was almost never met. In earlier cases, the Court had held that a rational basis would be enough, but this view was increasingly subject to challenge.

In a series of cases beginning in the late 1960's the Supreme Court struggled with the question of whether this standard was sufficiently rigorous. In a case in the early 1970's the Court had to test the validity of a law that required that the father of a young man who had been killed in the Viet Nam War would have the right to administer and distribute his property, rather than the mother (they had been divorced). Some of the justices applied the "compelling interest" standard of *Brown* and said that such discrimination between parents could not be allowed; the courts would have to choose the administrator on some other ground; others said simply that there was no rational basis for the law at all. *Reed v. Reed, 404 U.S. 71 (1971).*

A series of cases during the 1970's and early 1980's refined this approach. In the ultimate analysis, the Court established the so-called "intermediate scrutiny" test. *Craig v. Boren, 429 U.S. 190 (1976).* In a sense, it was a "reverse discrimination" case. In Oklahoma, women could buy alcoholic beverages at age 18, but men had to be 21. The rationale was that men tended to drive cars and to be involved in fights while intoxicated, but women did not. The court found that this rationale was not a sufficiently "important" or significant government interest to justify the discrimination. From this case, the modern American law of gender discrimination was born. The current state of 14th amendment equal protection law is best understood if set out in graphic form. In order to uphold a statute that contains a classification, the Court now applied three different tests:

| If the classification is based on-- | then the state must show-- |
|---|---|
| race | a compelling public purpose and no less burdensome alternative |
| gender | an important (or substantial) purpose and a close relationship |
| other | some rational basis related to the classification |

The choice of an intermediate scrutiny apparently was driven by a number of concerns. It was simply assumed that the government could draft young men for military service, but choose not to conscript young women. Similarly it was assumed that it could choose to put only men in combat situations in the military.

Over the years, the Supreme Court cases have refined the standards in question. Each year, the review applied under the "intermediate scrutiny" test has become more and more stringent. The Virginia Military Institute case, *United States v. Virginia, 518 U.S. 515 (1996)*, which is provided in your documents, is one of the most recent examples. In it, Justice Ruth Ginsberg sets forth the history of the evolution of the constitutional standard. It is imposing a very strict standard of review on this gender classification. It also holds that the provision of separate alternative facilities is not an adequate solution to the question.

Over the past 25 years, the Supreme Court toughened the standards by which it tests gender discrimination. It did so without any formal constitutional amendment. The change did not take place in a vacuum. The Court was undoubtedly influenced by other factors that were occurring in society: an effort to enact constitutional amendment to ensure protection of gender equality, the enactment by Congress of laws protecting against discrimination in the private sector, and a clearly changing pattern of public opinion. The role of the courts in interpretation of this constitutional principle of equality has been intertwined with the interpretation and application of the anti-discrimination laws, a fact that will be discussed below.

A "failed" constitutional amendment

Throughout this period of development of the law, the country was considering a proposed constitutional amendment, the Equal Rights Amendment (ERA), that would expressly have guaranteed equal rights to women. It would have provided:

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

It was first considered in Congress in the 1960's (when the standard interpretation of the Equal Protection Clause still only required a "rational basis" for any classification that had an adverse impact upon women). The proposal received a 2/3 majority in both of the houses of Congress in 1972 (shortly after the *Reed v. Reed* case gave an ambiguous message about the appropriate standard). In order to become part of the Constitution, the proposed amendment needed approval by the legislatures in 3/4 of the states (38 of the 50 states). Within the time limit for ratification only 35 states had approved it, so it never became part of the Constitution. It had overwhelming support, however. More than 2/3 of Congress had supported it; most of the state legislatures had passed it with overwhelming majorities. It reflected a dramatic change in public opinion about the rights and status of women.

The Supreme Court's shift in its interpretation of the basic equal protection clause came during the time that the Equal Rights Amendment was under consideration. The Court clearly picked up on the message that the vast majority of the American population supported equality for women. Its interpretation of the constitutional requirement of "equal protection" quickly followed.

The ERA was a "failed" constitutional amendment only in form. In reality, the principles of the ERA became part of the interpretation of the 14th Amendment. By 1999, the Supreme

Court had interpreted other provisions to ensure that equality of rights would not be denied or abridged on account of sex.

Legislation--The Civil Rights Act of 1964

We should now turn to the role of Congress. In the middle of the American struggle for racial equality, Congress passed the Civil Rights Act of 1964. The law was passed under the power of Congress to regulate commercial activities, including labor relations. Title VII (7) of that law prohibited discrimination in employment. *42 U.S.C. §2000e and following.* The law provides simply:

> It shall be an unfair employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*42 U.S.C. §2000e--2(a).*

The original proponents of the law only sought to prohibit race discrimination, not gender discrimination. In the course of its consideration in Congress, an amendment was proposed by add sex discrimination to the list of prohibited activities. (The proposer of the amendment was not a friend of women's rights. He may have intended the addition of protections for women as an potentially divisive issue that would have stopped passage of the whole law. He was wrong. The women's rights provisions became an essential part of the legislation.

This law set up a federal administrative agency, the Equal Employment Opportunity Commission (EEOC) to protect these newly guaranteed rights. This institution was a compromise between those who believed that protection of employment rights (of women and of racial minorities) should be pursued in private law suits and those who believed a government agency should have the primary role. Under the law, a person who believes that he or she has suffered discrimination must first file a complaint with the EEOC. That agency has 180 days (6 months) in which to investigate the complaint and to seek a conciliation agreement with the offending employer or labor union. During that period, it may decide to file its own law suit against the offender. If it does so, it acts to enforce the law and also to provide a remedy for the individuals. If it decides not to proceed (or if it fails to act within the time limit), the individual may bring a private law suit against the employer for enforcement of the statute.

This legislation has been amazingly productive of results in the field of protection of women's right. Thousands of claims are filed each year.

Implementation of the law by EEOC and the courts

The EEOC has no authority to issue rules, but it does issues "guidelines" advising employers about issues that may subject them to liability. While the guidelines do not have the force of law, they do direct the EEOC's investigators and enforcement personnel in the performance of their duties. An employer who complies with the guidelines will not face an

intensive enforcement action by the EEOC's staff; one who defies the guidelines may see a case proceeding to trial, in which the conformity of his actions with the law (not with the guidelines) will be tested.

The Guidelines have proven instrumental in the interpretation and application of the law by the courts. Since the guidelines are not formal rules, the courts are not required to follow them. But, since they reflect the considered judgment of an agency that regularly must deal with the statute, courts give them great respect and deference. The law that the courts apply formally proceeds directly from the statute, but its interpretation is certainly shaped by the guidelines and other actions of the EEOC.

Two examples of situations in which the guidelines have played a significant role may be helpful to illustrate this. One involves "disparate impact" cases; the other involves "sexual harassment."

"Disparate impact" involves situations in which superficially neutral standards have a different impact on different groups of the population. For example, since men tend to be somewhat taller than women, a requirement that a person be of a certain minimum height would disqualify far more women than men. Physical strength would be another example. A physical strength standard would not disqualify all women, but it would disqualify a disproportionate percentage. Does imposition of a height or strength standard (or of some other superficially neutral standard that has a disparate impact) violate the law's command of gender equality. This question was first answered by EEOC guidelines that required the employer to show a good faith business purpose and also required the employer to use any "alternative employment practice" that would eliminate the impact. This can best be illustrated by an example. If an employer would hire only tall employees, this would disqualify a disproportionate number of women. The employer would need to show that height was somehow important to the job. The need to reach objects on a high shelf would satisfy that requirement, and thus satisfy the first part of the test. The woman applicant could, however, show that the use of a ladder (an "alternative employment practice") could offset the need for tall people, the requirement that employees be tall would violate the law.

The EEOC originally adopted the disparate impact provisions as a guideline. In 1971, in *Griggs v. Duke Power, 401 U.S. 424 (1971)*, a case involving disparate impact on the basis of race, the Supreme Court embraced the disparate impact rules. Additional cases over the years elaborated the rule, but in 1989, the Supreme Court appeared to shift one of the burdens back on to the complaining party. By this time, Congress was firmly committed to the protection of gender equality. It reenacted the old rule as a statutory rule. *42 U.S.C. §2000e--2(k)*. It is now part of the governing statutory law.

"Sexual harrassment" usually involves situations in which one employee make unwanted sexual advances to another employee. Through a series of guidelines an interpretations, the EEOC initially found that sexual harrassment would create a hostile work environment. *29 C.F.R. part 1104.11.* If the employer allows a hostile work environment to persist, the affected parties (usually women) would not want to work at that place. So, by tolerating the continuing conditions, the employer had created a "discrimination in the terms, conditions, or privileges of employment" that is a violation of the law. If the employer himself does the harrassment, there is automatically a violation. If it is a co-worker, the employer is liable only if the employer know or ought to have known that it was going on. Thus a kind of negligence standard is established. The employer must use care to keep the work place free of harrassment, but is not a guarantor. *Burlington Industries v. Ellereth, 524 U.S. 742 (1998).*

The concept began as part of the EEOC guidelines. It was then accepted an applied in a number of court cases that applied similar standards as the appropriate interpretation of the federal law. In *Faragher v. City of Boca Raton, 524 U.S. 775 (1998),* the Supreme Court found that the actions of a senior (male) lifeguard in touching and talking to a new (female) lifeguard at the city beaches could constitute sexual harrassment, and that the city was liable to the female lifeguard for "failure to exercise reasonable care" in stopping or punishing the actions of her superior. (Under ordinary civil liability principles, the senior lifeguard, but not his employer, would have been liable, since mistreatment of other employees is clearly outside of his assigned job.)

Once established as part of employment discrimination law, the harrassment standard spread to other fields. Sex discrimination is also prohibited in the field of education. *20 U.S.C. §1681(a).* The EEOC, however, deals only with employment cases, so it has nothing to do with the enforcement of this provision. In deciding sexual harrassment cases in the education area recently, the Supreme Court simply took the established jurisprudence from the employment area and transplanted it to the education area, applying very similar standards. *Davis v. Monroe County Board of Education, 119 S.Ct. 1661 (1999), Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).* In the *Davis* case, the school was alleged to have failed to have been indifferent to harrassment of one 10-year-old student by another, and thus could be held liable for damages for its failure to provide equal educational opportunity. In the *Gebser* case, the school was unaware of a sexual relationship between a teacher and a student and therefore could not be held responsible for damage resulting from it; the Court was quick to add the school would have been liable if it had know or had had reason to know of the illicit relationship.

These cases show an interrelationship of doctrines. Congress started by enacting a very simple law. The EEOC elaborated on the law, including its consequences in situations in which the impact on employment was only indirect. The courts accepted this interpretation and began to supply remedies in these cases. One could anticipate that, in the very near future, that broadening will continue and similar doctrines will apply in other fields of the law, including possible the interpretation of the constitutional mandate of equal protection as well.

Conclusions

Law is a complex set of interactions of governmental agencies and of people. The interpretation and application of law reflects the changes in the environment in which it exists. Thus, in the field of constitutional interpretation, the Supreme Court was able to move, over a very short period of time, from a rule that allowed most forms of gender discrimination to one in which gender discrimination was almost always prohibited. It applied the same constitutional provision but began to impose stricter standards because of recognized changes in social and legal expectations.

There are similarly close relationships between Congress, federal agencies, and the courts in interpreting and applying legislation intended to protect against gender discrimination. Congress enacted a fairly simple law prohibiting sex discrimination in employment, the administrative agency elaborated on it, the courts integrated that elaboration into the pattern of decisions, and eventually broadened those decisions to reach beyond the employment area entirely. So a law that started in 1964 as an effort to protect job opportunities for women and minorities had the consequence, 35 years later, of requiring a school board to stop 10-year-old boys from molesting 10-year-old girls on the school playground. These are not arbitrary or random events, but a consequence that flows from interpretation of the law.

These changes reflect also a changing view of the America public about gender equality. That view was shown by the overwhelming acceptance of the Equal Rights Amendment, even though it did not have the necessary votes to be enacted. Today, it is even more pronounced. Gender equality is now accepted doctrine.