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FEDERAL LEGISLATION TO END DISCRIMINATION AGAINST WOMEN

Patsy T. Mink*

INTRODUCTION

The movement for equality of the sexes or "women's liberation," as it has popularly been called, has been outstanding in terms of the publicity received. The results, however, measured by federal legislation and state response to federal initiative, have been less than spectacular. Since 1961 when President John F. Kennedy established by executive order the President's Commission on the Status of Women, 1 similar state commissions have been established in all the states. 2 Between 1964 and 1968, four national conferences of commissions on the status of women were held. 3 In 1969, President Richard M. Nixon fashioned a Citizens' Advisory Council on the Status of Women and created the Task Force on Women's Rights and Responsibilities. 4 These national commissions and conferences, while they have documented discrepancies between the status of American men and women, have had little impact on the patterns of discrimination which caused their concern. Perhaps their most beneficial contribution has been the recommendation of both legislative and executive action that should be taken on the federal and state levels to correct the evils of sexual discrimination. 5 It is the purpose of this article to outline specific legislative changes needed to attain the goal of equal opportunity for women.

APPROACHES TO COMBAT DISCRIMINATION

Studies and discussions have evolved three general approaches for combating discrimination based on sex: 1) adoption of an equal rights amendment to the United States Constitution, 2) judicial expansion of the equal protection clause under the fifth and fourteenth amendments

* United States Representative from Hawaii.
4. Steile, supra note 2.
and 3) passage of federal and state legislation to prohibit overt discrimination and to eliminate situations which are discriminatory in effect. While most publicity recently seems to have been given to the equal rights amendment, it is the writer’s belief that more immediate progress is attainable through direct legislative enactments.

The Equal Rights Amendment

A debate on the merits of the equal rights amendment raged throughout 1970. That this perennial visitor to Congress suddenly became a “live” issue surprised many in Congress who had been accustomed to introducing it every session with appropriate local publicity and with the assurance that the potentially troublesome measure would be safely tucked away in committee. These assurances were justified; the equal rights amendment, introduced in every session since 1923, has rarely embarrassed a Senator or Representative by requiring his vote. It has emerged from committee infrequently.

The routine of introduction and neglect was abruptly interrupted in 1970 when equal rights proponents used the unusual legislative device of a discharge petition to pry the measure loose from committee. Representatives, not wanting to vote against a measure that they had been routinely introducing and, thereby, becoming susceptible to criticism for opposing women’s rights, passed the amendment overwhelmingly on August 10. Since some 79 Senators had become sponsors as early as the preceding May, final congressional adoption seemed assured.

The rosy predictions of passage did not reckon with the true state of mind of the Senate. The amendment became ensnarled in a Senatorial

6. In the 89th Congress, 128 resolutions proposing an equal rights amendment were introduced. 111 CONG. REC. pt. 22, at 1169 (1965); 112 CONG. REC. pt. 22, at 1014 (1966). In the 90th Congress 153 such resolutions were introduced. 113 CONG. REC. pt. 28, at 1498 (1967); 114 CONG. REC. pt. 25, at 1031 (1968).


tangle of amendments and counter-proposals with the result that sup-
porters finally gave up in despair. The failure illustrated both the
difficulty in changing the nation's historic concept of the role of women
and also the shortcomings in the equal rights amendment approach to
obtaining immediate affirmative changes.

As adopted by the House, the equal rights amendment states:

Equality of rights under the law shall not be denied or abridged
by the United States or any state on account of sex. Congress
and the several states shall have power, within their respective
jurisdictions, to enforce this article by appropriate legislation.11

Thus, the language of the amendment itself admits that adoption per se
will not accomplish all of the desired results and that new legislation is
envisioned. Moreover, the language fails to specify how the goal of
equality is to be achieved. When a law sets forth different standards of
treatment for men and women, equality can be gained by either lowering
the standard for one sex or raising that of the other. California, for
example, has a minimum wage law for women but none for men.12

"Equality" under the equal rights amendment could result in the elimina-
tion of minimum wages for women. A better solution would be to
state affirmatively in the amendment that equality will be obtained by
extending to both sexes the right or benefit now possessed by one sex.
In the California example, the minimum wage law would be extended to
men as well as women. In cases where the law in question is offensive,18
swift repeal could be expected. Until proponents of the equal rights
amendment draft language to achieve the exact goals on which the
required majority of national and state legislators can agree, not only
will the outlook for adoption of such an amendment remain in doubt,
but also, even if the amendment were adopted, its goal could be subverted
by unsympathetic interpretation.14

Judicial Protection Under The Equal Protection Clause

If reliance upon an equal rights amendments seems dubious, the

has been introduced in the 92d Congress. S.J. Res. 8, 92d Cong., 1st Sess. (1971).
13. E.g., ch. 69, [1894] Miss. Laws (repealed 1968), which excluded women from
juries in Mississippi courts. Such exclusion has not been held to violate the fourteenth
amendment. Reed v. State, 199 So. 2d 803 (Miss. 1967), appeal dismissed & cert.
denied, 390 U.S. 413 (1968). For the present Mississippi statute which is non-discrimin-
atory, see Miss. Code Ann. § 1762 (Supp. 1968).
14. The early history of the fourteenth amendment is a prime example. See R.
prospects for remedial judicial action seem equally remote. It is the failure of the courts to apply the existing equal protection clause of the Constitution to women which has brought about the current demands for reform. Throughout our history, the Supreme Court has never faced the issue of whether the fourteenth amendment protects women as equals. Signs are now appearing that the Supreme Court will finally take a firm position as to the applicability of the fourteenth amendment to sex-based discrimination. Not the least important of these signs are numerous instances of the past few years in which lower courts have answered the question of applicability in the affirmative.

The Supreme Court has before it a case firmly in point. An Idaho statute giving preference to male relatives over female relatives of the same class as administrators of intestate estates is being challenged on the basis that the statute is unconstitutional under the equal protection clause of the fourteenth amendment. The outcome of this case is being closely watched by both opponents and proponents of the equal rights amendment. However, even if the Court finds sex to be an unreasonable classification, it will nevertheless be unsatisfactory to have issues of discrimination adjudicated on a case-by-case basis.

Passage of Specific Legislation

The three approaches mentioned may coexist with each other—no single approach is mutually exclusive. Should the Supreme Court apply the fourteenth amendment favorably for women and should an equal rights amendment be adopted, the need for legislation would not be diminished. However, the judicial approach has the inherent problems of delay while each particular situation or statute is contested through the levels of the appellate courts. The equal rights amendment will face the additional delay and uncertainty of state ratification if, indeed, the resolution is adopted by Congress. It is apparent that obtaining passage

15. The Court has consistently maintained that classification by sex is reasonable and within the police power of the state. Such reasoning allows the states to enact legislation pertaining exclusively to women or to grant special exemptions and exclusions for women. See Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).
20. See notes 5-6 supra and accompanying text.
of legislation which deals with specific areas of discrimination poses fewer obstacles than gaining ratification of a constitutional amendment, especially since such legislation would be necessary in any case.

The passage of specific federal legislation has been suggested by Professor Paul Freund of Harvard Law School. In the hearings of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee in September, 1970, he renewed his long standing opposition to the amendment. While opposing the equal rights amendment and advocating legislation as the desirable alternative, Freund raised the possibility that

Congress can exercise its enforcement power under the 14th amendment to identify and displace State laws that in its judgment work an unreasonable discrimination based on sex. This would be done on the analogy of the 18-year-old voting legislation.

The basis for the approach which Freund only briefly touched upon in his statement is found in \textit{Katzenbach v. Morgan}, where the Supreme Court ruled that Congress had the legislative authority under section 5 of the fourteenth amendment to prevent racial discrimination. Section 5 of the fourteenth amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In describing the nature of Congressional power under section 5, the Court stated that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."\[23\]

\textit{Morgan} eliminates the necessity for judicial determination that sex-based discrimination is a violation of equal protection under the fourteenth amendment. In upholding the constitutionality of a section of the Voting Rights Act of 1965, the Court stated that

[a] construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by

\begin{enumerate}
\item See 96 Cong. Rec. 865 (1950).
\item Id. at 80.
\item 384 U.S. 641 (1966).
\item U.S. Const. amend. XIV, § 5.
\item 384 U.S. at 651.
\end{enumerate}
Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.  

By applying Morgan to the problem of sex discrimination, Congress could arguably forbid states to treat the sexes differently in any field of legislation traditionally regarded as the province of the state. Indeed, the potential for congressional action appears to be limitless. Such an approach avoids the problems of delay and multiplicity of suits that are inherent in fighting sex discrimination in the courts under the fourteenth amendment or a future equal rights amendment.

Federal legislation can solve many of the problems of sex-based discrimination. It can do so by amendment of present law to insure the opportunity of the female sex to contribute to and achieve in all aspects of life. Legislation can provide the tools with which women can erase prejudices against their sex held by both men and women.

**Extension of Present Legislative Reform**

While examination of the roles of men and women in our society reveals benefits and discrimination to both, the evidence presages an acceptance of the fact that the greatest and yet least defensible discrimination that women face in America today is that of economic discrimination. In order to estimate the impact of economic discrimination, one must examine the position of women in the labor market. As of 1969, 43 percent of all women of working age were employed. This 43 percent amounted to over 30.5 million women. Of these 30.5 million working women, approximately 11.6 million or over one-third had children under the age of eighteen. Most significantly, though women make up 38 percent of all workers, the median income of full-time women workers is only 58 percent of the median earnings of full-time men workers, i.e., annual earnings of $4,457 as compared to $7,664. No valid reason

28. 384 U.S. at 648. Morgan indicates that the test of constitutionality of legislation enacted pursuant to section 5 is whether the legislation is "appropriate."

[T]hat is . . . whether [a statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adopted to that end" and whether it is not prohibited but is consistent with "the letter and spirit of the constitution."

Id. at 651. The Court, applying that test, found the section prohibiting literacy tests constitutional. See also United States v. Arizona, 91 S. Ct. 260 (1970), upholding under section 5 the right of Congress to lower the voting age for federal elections.


30. Id. at 20.
exists for such discrepancies between two major segments of the working force. The question is what legislation can best put men and women in an equal position in the labor market.

The Equal Pay Act\(^{31}\) and the Civil Rights Act\(^{22}\) have been the most significant legislative attempts to erase the discrepancies between men and women workers in recent years. The Equal Pay Act of 1963\(^{33}\) amended the Fair Labor Standards Act\(^{34}\) to provide equal pay for equal work to employees engaged in interstate commerce. Title VII of the Civil Rights Act of 1964 (the only title of that act which refers to sex) prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.\(^{35}\) Title VII covers private employers, employment agencies and labor organizations engaged in industries affecting interstate commerce.\(^{36}\)

The importance of these two laws is often underestimated by those who, regarding present legislation as inadequate, cite the weaknesses of the laws and the lack of achievements of women workers since their passage. The Equal Pay Act and the Civil Rights Act, however, were major steps toward giving women equality in the labor market.

Not the least of the results of these acts has been the encouragement of similar legislation on the state level.\(^{37}\) Prior to the enactment of Title VII of the Civil Rights Act, only two states had laws prohibiting sex discrimination in employment; by 1970, twenty-two states and the District of Columbia had enacted such laws.\(^{38}\) Since 1963, ten states have enacted equal pay laws or fair employment practices laws with equal pay provisions.\(^{39}\) The total number of states with equal pay laws

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was thirty-five at the beginning of 1970\textsuperscript{40} with four other states prohibiting sex-based wage discrimination under their fair employment practices laws.\textsuperscript{41} The example set by the federal government must surely be credited as the primary impetus for this increased state activity in the field of equality legislation.

Another aspect of federal influence is seen in the reaction of the states to the sex discrimination guidelines issued by the Equal Employment Opportunity Commission. Title VII of the Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC) to administer that portion of the act.\textsuperscript{42} In August, 1969, the EEOC issued a guideline indicating that state laws prohibiting or limiting the employment of women in such matters as types of employment, hours worked and weight lifted were unsatisfactory because they did not take into account the abilities of individuals and effectively served as an excuse for discrimination against women.\textsuperscript{43} The Commission


The present regulations are as follows:

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex, based on assumption of the comparative employment characteristics of women in general. For ex-
found such laws to be in conflict with Title VII and stated that the laws
would not be regarded as a defense for discriminatory employment
practices.\footnote{44} Although a final interpretation of the validity of state protec-
tive laws has not yet been adjudicated,\footnote{45} the guideline has had an effect.
Ohio, Pennsylvania, South Dakota and North Dakota are among the
states presently enforcing state laws in accordance with Title VII and
EEOC guidelines.\footnote{46}

The Need to Amend the Equal Pay and Civil Rights Acts

Although the Equal Pay Act and Title VII of the Civil Rights Act
have obviously had a salutary effect on the movement to end sex dis-

ample, the assumption that the turnover rate among women is higher than
among men.

(ii) The refusal to hire an individual based on stereotyped characterizations
of the sexes. Such stereotypes include for example, that men are less capable of
assembling intricate equipment; that women are less capable of aggressive sales-
manship. The principle of non-discrimination requires that individuals be con-

(iii) The refusal to hire an individual because of the preferences of co-
workers, the employer, clients or customers except as covered specifically in
subparagraph (2) of this paragraph.

(iv) The fact that the employer may have to provide separate facilities
for a person of the opposite sex will not justify discrimination under the bona
fide occupational qualification exception unless the expense be clearly unreason-
able.

(2) Where it is necessary for the purpose of authenticity or genuineness
the Commission will consider sex to be a bona fide occupational qualification,

(b) (1) Many States have enacted laws or promulgated administrative
regulations with respect to the employment of females. Among these are those
which prohibit or limit the employment of females, e.g., the employment of
females in certain occupations, in jobs requiring the lifting or carrying of
weights exceeding certain prescribed limits, during certain hours of the night,
or for more than a specified number of hours per day or week.

(2) The Commission believes that such State laws and regulations,
although originally promulgated for the purpose of protecting females, have
ceased to be relevant to our technology or to the expanding role of the female
worker in our economy. The Commission has found that such laws and regula-
tions do not take into account the capacities, preferences, and abilities of in-
dividual females and tend to discriminate rather than protect. Accordingly, the
Commission has concluded that such laws and regulations conflict with Title
VII of the Civil Rights Act of 1964 and will not be considered a defense to an
otherwise established unlawful employment practice or as a basis for the applica-
tion of bona fide occupational qualification exception.

\footnote{29} C.F.R. § 1604.1 (1970).

\footnote{44} Id.

\footnote{45} At least one federal court has declared a “protective” state labor law unconsti-
Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

\footnote{46} Ferrill, State Labor Legislation Affecting the Employment of Women, in

laws. Teachers and administrative personnel of educational institutions and state and local governments are excluded from coverage of Title VII;47 administrative, executive and professional women are excluded from coverage of the Equal Pay Act.48 Congress should act to end these exclusions. Lack of enforcement powers also severely handicaps the EEOC. The Commission is limited in authority by Title VII to only conciliation efforts.49 Individuals must seek enforcement through federal courts which may or may not follow EEOC guidelines. The Equal Employment Opportunity Commission should be given authority to issue cease and desist orders to employers.

While the changes suggested for Title VII of the Civil Rights Act would aid the status of women in employment, amendment of other titles of the act would be similarly advantageous. Title IV of the Civil Rights Act of 196450 should be amended to authorize the Attorney General of the United States to intervene on behalf of individuals to contest sex discrimination by public school officials.51 This would enlarge the present authority of the Attorney General to bring suits on behalf of persons denied equal protection by public school officials. Title II, the public accommodations section of the Civil Rights Act,52 should also be extended to cover sex-based discrimination. Sex discrimination should be prohibited where it interferes with enjoyment of public accommodations just as discrimination on the ground of race, color, religion, or national origin is presently prohibited by law.53

Extension of the Authority of the Civil Rights Commission

A change in existing federal law particularly helpful to women's equality would be the extension of the authority of the Civil Rights Commission to the area of denial of civil rights because of sex.54 The Civil Rights Commission currently has the following authority: 1) to investigate deprivation of voting rights; 2) to study and collect information concerning legal developments which constitute a denial of equal protection of the laws under the Constitution because of race, color,

religion, or national origin or in the administration of justice; 3) to appra' the laws and policies of the federal government with respect to equal protection of the laws under the Constitution because of race, color, religion, or national origin or in the administration of justice; and 4) to serve as a clearing house for civil rights information.55

The President's Task Force on Women's Rights and Responsibilities has recognized the need to extend the Commission's fact-finding role into the area of sex discrimination: "Perhaps the greatest deterrent to securing improvement in the legal status of women is the lack of public knowledge of the facts and the lack of a central information bank."56 In fact, a favorite criticism of the effort to secure equal rights for women is the inability of proponents to provide concrete evidence of discrimination in any but the field of employment. The role of illuminating racial discrimination, which the Civil Rights Commission continues to perform, indicates the service it might provide in the area of sexual equality.

Reform in the Executive Branch

The executive branch of our Government has been delinquent in pressing the cause of women's rights. It was not until August 8, 1969, that Executive Order 11478 decreed:

It is the policy of the Government . . . to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.57

Yet, the Department of Defense continues a policy of discrimination: 1) married American women are not hired to teach in our Government's overseas dependents' school system;58 2) married women do not receive

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56. President's Task Force on Women's Rights and Responsibilities, supra note 5, at 2.
58. Air Force policy is expressed in the following letter:

Air Force regulations, equally applicable to males and females, stipulate that normally we do not hire in the CONUS for overseas assignment, either a single person with dependent children or the wife or husband of military or civilian personnel stationed . . . in the same country. One reason . . . is that a . . . recruit must be eligible to sign a transportion agreement with a reasonable expectation of complying with the conditions of the agreement. Our experience reflects that accompanying spouses are not overseas for the primary purpose of government employment, usually resign from employment to go with their spouses . . . and are not as stable as single employees . . . .

Letter from Colonel B. M. Ettenson to Patsy T. Mink, June 17, 1969, reproduced at

Produced by The Berkeley Electronic Press, 1971
equal treatment as "head of household" in order to qualify for family housing and transportation privileges;\textsuperscript{59} 3) certain benefits are not provided for husbands of female employees although they are available to the wives of male employees.\textsuperscript{60} For years the writer has been working to obtain actual executive branch compliance with the lofty wording of its pronouncements, but the results have been limited to the extension of post exchange privileges to the husbands of female armed service employees.\textsuperscript{61} It is clear that the executive branch will do little in the absence of statutory commands.

Current Legislative Proposals to Extend Reform

Congress offers an arena where efforts can be centered without the hazards of judicial delay or administrative buck-passing. All too often, the executive's public relations powers through unimplemented orders and statements are sufficient to divert women's attention from the specifics of legislative issues—yet, it is only in the Congress that goals can be achieved. Admittedly, the legislative path is filled with obstacles. The 91st Congress in 1969 removed a sex-discrimination provision

\textsuperscript{116} CONG. REC. H7209 (daily ed. July 27, 1970). Official Air Force policy states that "[c]ivilian positions are filled without regard to . . . sex . . . . While supervisors may specify that a particular position requires men only—or women only—the restriction must be clearly justified . . . ." 32 C.F.R. § 890.2 (1970).

59. For example, a married woman working for the federal government as an overseas instructor has been denied certain benefits because they accrue "only to those individuals whose reason for being in the area is employment with the United States Government." Therefore, a wife who accompanies her husband to his foreign duty assignment and who "incidentally" instructs in the installation's education facilities is considered to be in the area in order to be with her husband and not for the purpose of employment with the Government. This distinction of purpose seems arbitrary at best. Memorandum from John G. Kester to Deputy Assistant Secretary of Defense, June 22, 1970, reproduced at 116 CONG. REC. H7210 (daily ed. July 27, 1970). \textit{See also} USAR EUR Reg. 210-50: "For married female personnel (military or civilian) the husband's status will determine eligibility for housing." \textit{Id.} The Chairman of the United States Civil Service Commission does not find that such policy violates Executive Order No. 11478 (stating the non-discriminatory policy of the federal government):

\textit{I do not believe that we can equate discrimination against married women with discrimination because of sex within the meaning of Executive Order No. 11478.\textsuperscript{59}}

\textit{While the distinction here may seem more fictitious than real . . . there is, nevertheless, a distinction that cannot be disregarded.}


60. Such benefits are limited to dependents. Air Force Reg. 168-1 ¶ 34(a)(2) defines dependents to include: "(1) Wife who is not an employee of a federal agency. (2) Husband who is physically or mentally incapable of supporting himself." \textit{Id.} See 116 CONG. REC. H7211-12 (daily ed. July 27, 1970).


H.R. 2580, 92d Cong., 1st Sess. (1971), has been introduced to provide for equality of treatment in the application of dependency criteria.
from the Civil Service Act which had prevented equal recognition of the contributions of women workers to the survivors annuity fund but failed to adopt a similar reform for the Social Security law. Congress also failed to approve other bills in the women's rights field, notably H.R. 17555, the Equal Employment Opportunities Enforcement Act, and H.R. 18278, the Woman's Equality Act of 1970. These bills would enact some of the most important legislative provisions sought by women.

The purpose of H.R. 17555 was to grant the EEOC authority to issue judicially enforceable cease and desist orders. The bill also proposed to broaden the Commission's jurisdictional coverage by deleting existing exemptions of state and local government employees and educational institution employees connected with educational activities (the latter exemption now adversely affecting the pay of millions of women school teachers). The bill deletes the exemption of federal employees, thereby helping remove inequities in the overseas school system and elsewhere. The measure extends coverage to employers and labor unions with eight or more employees or members, a significant improvement from the present provision which prevents the Commission from entering the picture unless twenty-five persons are employed.

The second priority bill, H.R. 18278, would amend current law to extend protection to women. Its provisions would:

1) amend Title II of the Civil Rights Act of 1964 to authorize federal courts to enjoin sex discrimination in public accommodations;

2) amend Titles III and IV of the same Act to authorize the Attorney General to institute suits to eliminate sex discrimination in public facilities and public education;

3) amend the Civil Rights Act of 1957 to extend the jurisdiction

of the Civil Rights Commission to include sex discrimination;\textsuperscript{72}

4) amend Title VI of the 1964 Civil Rights Act to prevent sex discrimination in federally-assisted programs;\textsuperscript{78}

5) amend Title VII of the same Act to insure equal employment opportunity in the hiring of state and local government employees;\textsuperscript{74}

6) amend Title VII to remove the exemptions of educational institutions from equal employment opportunity laws;\textsuperscript{75}

7) amend Title VII to provide the EEOC with cease and desist powers;\textsuperscript{76}

8) amend the Federal Fair Housing Act to prohibit sex discrimination in the sale, rental or financing of housing or in the provision of brokerage services;\textsuperscript{77}

9) amend the Federal Fair Labor Standards Act to apply its equal pay provisions to women in executive, administrative and professional positions;\textsuperscript{78} and

10) authorize the Secretary of Health, Education and Welfare to make matching grants to states for the establishment of commissions on the status of women.\textsuperscript{79}

The bill calls for the Health, Education and Welfare Secretary to study and make legislative recommendations within one year to equalize the treatment of women under the Social Security Act, the Internal Revenue Code and other discriminatory acts.\textsuperscript{80} It also requires the Commissioner of Education to survey all educational institutions and report to Congress on any denial of equal educational opportunities because of sex and make recommendations to eliminate any such discrimination.\textsuperscript{81}

\section*{Enactment of New Legislative Proposals}

\subsection*{Child Care Legislation}

If the significant legislation of the sixties was the Equal Pay Act of 1963 and Civil Rights Act of 1964, legislation providing for adequate child care will be the milestone of sexual equality in the decade of the seventies. When over one third of the women in the labor force have

\begin{thebibliography}{99}
\bibitem{72} H.R. 18278, 91st Cong., 2d Sess. § 6 (1970).
\bibitem{73} H.R. 18278, 91st Cong., 2d Sess. § 7 (1970).
\bibitem{80} H.R. 18278, 91st Cong., 2d Sess. § 13(a) (1970).
\bibitem{81} H.R. 18278, 91st Cong., 2d Sess. § 13(b) (1970).
\end{thebibliography}
children under eighteen, it is easy to conclude that the single most important legislation for the cause of economic equality will be that which creates an extensive child care program. The lack of day care facilities is a major obstacle to an overwhelming number of women who are employed or who, more importantly, desire employment. It is difficult to overestimate the importance of adequate child care facilities. Not only are such services a necessity for many women, whether married or single, but the lack of reasonably priced adequate child care deters many women from either seeking a job or striving to advance to more responsible and demanding positions. While the writer defends the right of any women to stay "in the home" raising a family, the fact is that many women work, either through choice or necessity. They and their children should not be penalized simply because of the belief that "a woman's place is in the home."

Lack of child care facilities is a major tool of discrimination. Employers can avoid giving women equal consideration for advancement on the basis of problems in obtaining good or even adequate child care. This problem exists for both professional women and women performing unskilled labor. The problem rarely has been solved in individual instances without sacrifice either in money or human resource.

This decade must and will see the child care situation resolved. It is a problem that is ripe for federal-state cooperation. Federal funds undoubtedly will be necessary to alleviate some of the burden. The writer is the congressional author of major bills in this field and feels that a 10 billion dollar federal program is urgently needed. Such expenditures are indeed justifiable because solution of the child care problem will have implications exceeding the issue of the woman's place in the labor market. Readily available low-cost child care would aid the welfare situation, alleviate the problem of untrained, unskilled workers, have a noticeable effect on the public education system, and, in general, substantially affect the social and economic problems borne in this country by the unskilled laboring class of minority groups. The President's Task Force on Women's Rights and Responsibilities has recommended inclusion of provisions for child care in the Social Security Act which would provide child care facilities for low-income and welfare

82. See note 29 supra and accompanying text.
families. The Task Force also recommends federal aid to develop child care facilities for persons without regard to income.

At the present time, Title IV of the Social Security Act authorizes child care services under the Aid to Families with Dependent Children program. The federal government provides 75 percent of the funds for day care services, but the funds may not be used for construction or major renovation of facilities. Grants-in-aid are also available to state welfare agencies for day care services for parents undergoing job training. A portion of these grants is a fixed grant with the remainder allotted on a variable matching formula basis. Some measure of day care service funding is provided by the Department of Health, Education and Welfare, Office of Economic Opportunity, Department of Housing and Urban Development, Department of Labor, Small Business Administration, and the Department of Agriculture. The large number of agencies, each dispensing relatively small amounts of funds, is one of the drawbacks to federal support of child care at present. The above-mentioned problems of restrictions on construction and the curtailment of eligibility to low income families have prevented the full utilization of child care programs. The programs are characterized by restriction of eligibility to low-income and migrant families and are based on a job-training concept.

Day care for pre-school and school-age children of welfare mothers is a major provision of President Nixon's Family Assistance Plan. The plan purportedly will streamline and make more effective the nation's welfare programs. It also provides for the availability of $386 million for this program. The President's approach, however, has been criticized.

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86. President's Task Force on Women's Rights and Responsibilities, supra note 5, at 13.
87. Id.
Appropriations to the Secretary of Health, Education, and Welfare would be authorized for grants and contracts for up to 90 percent of the cost of projects for child care and related services for persons registered under the Family Assistance Plan . . . . The cost of these services could include alteration, remodeling, and renovation of facilities, but no provision is made for wholly new construction.

as inadequate both in funding and scope.\textsuperscript{44}

A number of bills dealing solely with child care have been introduced in Congress.\textsuperscript{95} The writer's bill, H.R. 19362,\textsuperscript{96} stressed child development benefits as the major justification of the program. The bill recognizes the necessity for uniting child care programs under one agency and the need for construction of new facilities. The bill was approved by the House Select Subcommittee on Education and awaits further action in the 92d Congress.

The child care program, unfortunately, must be virtually built from scratch, and it must be done in a visionary way. Even the elimination of poverty and welfare would not end the need for such a program. Any program which purports to solve the problem must provide care for parents of all income levels or provide for future growth toward that goal. Child care programs should not be limited to lower income families.

\textit{Other Legislative Reform}

Beyond the legislative programs outlined above, the possibility exists for federal laws to enter entirely new areas of law affecting women's rights. In light of the importance of economic equality to the efforts to end discrimination, it is interesting to speculate how the \textit{Morgan} decision, mentioned earlier,\textsuperscript{97} might be utilized to achieve that equality. Federal pre-emption of state labor laws is one obvious answer.

An area of the law which is not generally regarded as a federal concern is domestic relations law. The inequality noticeably present in that area is based on economic considerations since in the past the husband has been the source of economic support for the family.\textsuperscript{98} The theory of the husband as legal head of the household results in inequities for both parties. In some states, married women may not establish a separate domicile from her husband except in special circumstances.\textsuperscript{99}

\begin{thebibliography}{9}
\bibitem{95} See, \textit{e.g.}, S. 530, 92d Cong., 1st Sess. (1971). The bill was introduced by Indiana Senator Birch Bayh and Minnesota Senator Walter Mondale on February 2, 1971, and referred to the Senate Committee on Labor and Public Welfare. 117 \textit{Cong. Rec.} S670 (daily ed. Feb. 2, 1971). For a detailed discussion and reproduction of the bill see \textit{id.} at S676-84.
\bibitem{97} See notes 24-28 \textit{supra} and accompanying text.
\end{thebibliography}
Certain more obviously discriminatory laws exist in other states, such as the inability of married women to contract or sue as an individual without judicial approval.\textsuperscript{100}

Property law and specific aspects of domestic relations law are frequently mentioned as areas of the law in which the effects of an equal rights amendment are least predictable.\textsuperscript{101} Federal legislation grounded on the \textit{Morgan} rationale might be utilized to eliminate discriminatory aspects of domestic relations law and also avoid the confusion resulting from litigation of the constitutionality of various state laws.

\textbf{Conclusion}

The enactment of specific legislative proposals should play a vital role in the movement toward sexual equality. Indeed, that approach appears to be far more promising than the enactment of an equal rights amendment or judicial expansion of the equal protection clause. Present federal law has scarcely begun to effectuate economic equality between the sexes. Current law designed to promote social and religious equality should be amended to prohibit sexual discrimination as well. In addition, federal legislation should be enacted to provide for child care programs and to eliminate unequal treatment in property and domestic relations law.

The goal should be to guarantee equal treatment for men and women, thereby allowing them to compete and achieve on the basis of individual abilities and ambitions. The fact of birth should not eliminate opportunities, create obstacles, or deny success whether because of race, national origin, religion or sex.

\textsuperscript{100} \textit{NEV. REV. STAT.} § 124.010 (1969).