For example, why should a woman have to go to the Supreme Court to get justice with respect to her pension and fight very hard for a constitutional amendment to assure justice in the job market, in terms of the social security system, and on and on? So, I get concerned when people try to equate the abortion issue with the equal rights amendment, because I think that they are separate issues, but, frankly, the equal rights amendment for me is a very, very prolife issue, to be concerned about the quality of life of all Americans.

Mr. Edwards. Thank you very much.
Mr. Rees. Can I respond very briefly to that?
If we agreed about what the amendment would do, I would very much agree with you, and I certainly don’t think there is any logically necessary connection between equal rights for women and the abortion issue.

Under certain precedents—and I suggest that Congressman Hyde’s speech to the Senate Judiciary Committee details this, and perhaps you might want to look at that—under some precedents that there are, I believe that the courts would use the equal rights amendment to create rights to abortion funding and so forth. Therefore, although the quality of life is very important to me and equality of rights is very important, I don’t want to give proabortion litigation new tools; I would like to see a different language in the equal rights amendment to make it clear that abortion is not one of the things that is being secured under the equal rights amendment.

Mr. Edwards. Thank you.
I just have a couple of questions. You have a deep pessimism about the Federal courts; is that correct?
Mr. Rees. I am afraid so.
Mr. Edwards. How about Brown v. Board of Education?
Mr. Rees. I think Brown v. Board of Education is correctly decided.
Mr. Edwards. Baker v. Carr?
Mr. Rees. I personally believe that should not have been decided under the equal protection clause, but under the republican form of government clause. I think there are some legislative districting schemes that are unconstitutional because they deny a republican form of government, but I don’t think that the Constitution mandates one person one vote in legislative districting.

Mr. Edwards. You have problems with one-man/one-vote?
Mr. Rees. Well, they call it one person/one vote these days.
Mr. Edwards. How about the 14th amendment?
Mr. Rees. I don’t think I would want to see the 14th amendment changed in the sense of, what the framers of the 14th amendment intended it to do.
I sure would like to have seen it with a more explicit legislative history or language to prevent the courts from doing things like Roe v. Wade.

The framers of the amendment did not want to create a right to abortion, but the courts managed to find one there.

It is to prevent that kind of thing from happening under the equal rights amendment—

Mr. Edwards. Gideon v. Wainwright, right to counsel? Does that bother you?
Mr. Rees. Does it “bother” me? Of course not. I think that there is a constitutional right to counsel, and I think that is almost certainly one of the rights as a historical matter that was intended to be incorporated by the 14th amendment. But if I have to answer one of these questions in the negative, all that means is that we don’t have a perfect Constitution. The Constitution does not deal with every single problem that can come up, and if I thought Gideon v. Wainwright was not correctly decided, I would want you to enact a constitutional amendment to guarantee a right to counsel.

Mr. Edwards. You mentioned that Congress is a place where a certain amount of discrimination takes place, and I certainly don’t disagree with that, but what about Davis v. Passman? That was a fifth amendment case, and it covered congressional employees, and the Supreme Court held Congressman Passman could not discriminate because of sex.

Mr. Rees. He wrote her a letter and said he was not going to hire her because she was a woman. It is likely to be limited to its facts. It has been asserted by proponents of the equal rights amendment that one of the changes that will be effected by the equal rights amendment, perhaps the only one in Government employment, will be that there will be an explicit antidiscrimination provision for, for instance, Members of Congress.

Mr. Edwards. Well, thank you very much. If there are no further questions, we thank you very much for your testimony.
Our last witness is Commissioner Mary Frances Berry. Without objection, your long statement will be made a part of the record.

TESTIMONY OF MARY FRANCES BERRY, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Ms. Berry. I am still a member of the U.S. Commission, so you are correct.

When I listened to Mr. Rees’ testimony, I decided that I could have been too properly deferential to committees of Congress over time.

As he proceeded to instruct you on various matters of how you should go about your business and proceeded to tell you with great certainty that he knew all things about what the courts would decide about this, that and the other, and I wondered how in over 20 years of studying about the Constitution and writing about it and thinking about it, I had not been able to reach that degree of certainty. But I guess some people experience different circumstances and have an easier time reaching that state in life.

So from now on, I will follow his example and begin instructing the Congress about what it should and should not do on various matters, including the ERA, and will try to be as certain as I can be.

The Civil Rights Commission has, in fact, supported ERA. We supported the amendment as necessary for women under our jurisdiction that we got over sex discrimination first in 1972, the year
ERA was passed, and we have repeatedly affirmed our support for the amendment.

We are not dissuaded because it is taking a lot of time to get ERA passed. If you look at the history, constitutional amendments, most of them, if they are substantive, take years to get passed. It does not bother me.

I would have preferred it if it had been ratified a long time ago, but that does not mean that we don’t need it because it is taking a long time. We see that the basic principle that ERA embodies is that the law must not treat men and women differently on the basis of gender alone.

The ERA, as we understand it, would not apply to private conduct that Government does not normally regulate. In other words, private personal relationships, for example, between men and women or decisions on the part of individuals that they would like to be homemakers or workers or whatever they would like to be, ERA has nothing to do with that. ERA applies only to action by Government and would bar sex discrimination in any law, policy, or practice involving governmental entities and institutions.

ERA, as we understand it, would apply to both men and women, and the law could not ignore individual characteristics and they would have to treat men and women as citizens and individuals having equal rights.

ERA would not require men and women to share restrooms or dormitories, according to our understanding. Only actions that violate the principle of equal rights would be prohibited.

Now, when one asks why you still need ERA—and I noted carefully that Mr. Gekas, for example, said that one of the things he wanted out of this hearing was whether, in fact, we still need it. What is the situation now? It seems clear to us in the employment area that he has mentioned and other witnesses have mentioned that women do continue to suffer economic inequality that could be addressed by ERA. We know that in 1981, women who worked full-time earned 59 cents for every dollar male full-time workers earned, and that this was a decrease, a decrease from the 64 cents women earned per dollar in 1955.

We did a study that we issued recently at the Commission on disadvantaged women and their households, and in that study, there is a lot of information about the significant employment barriers, including occupational segregation, wage inequities and discriminatory exclusion from high-wage jobs, that women, in fact, suffer.

Sex role stereotyping that shunts women disproportionately into lower paying jobs still exists, and there are many State and Federal laws that deprive women of employment opportunities under the "guise," we know of protecting the weaker sex.

These laws probably could not withstand court challenges. If everybody went to court all over the country and challenged all the laws, and had the resources and time to do that, some of them would go down, but they remain on the books and may be tacitly enforced.

The other relationship between employment and the thing that discourages women sometimes is that when women do get educated or trained, they still find they are disadvantaged in terms of income that they get from employment. We found that an addition-
14th amendment standards to sex discrimination that they do to race discrimination. And part of the reason why, Justice Powell says, is that there is no ERA, and that is why we don’t have to make sex a suspect class.

What he said is ratification would “resolve the substance of this precise question.” Of course, without it the result is a “catch-22.”

Women are told they don’t need ERA because they have the 14th amendment, but they can’t have the 14th amendment’s full protection because they don’t have ERA. So you are caught however you go.

As we have said before in the Commission on Civil Rights, the chief advantage of an ERA as opposed to other kinds of reforms is that it would provide stronger protection. And in the absence of a formal constitutional foundation for gender equality, a hostile legislature, we know, could wipe off all the antidiscrimination laws that are now on the books. So what we would do is just put women’s equality into the Constitution.

Of course, we could do it on a piecemeal basis. One argues every time a constitutional amendment is proposed in the country, you look at the history of it. Why don’t you do it State by State, one by one, and if you got all the States, then we would have it.

Well, the framers of the Constitution would not have put the means for getting a constitutional amendment in article 5, which provides for the Congress to adopt an amendment and send it out to the States, if they had not thought, based on the legislative history at the convention, that such a procedure on matters of national importance was absolutely necessary. We may not like it, but it has been proven to be absolutely necessary over time.

Furthermore, ERA would give all the States that have not yet done so an affirmative duty to purge sex bias from their laws and policies.

What will happen to the States if there is an ERA? Will it take away the States’ rights to do all the things they are doing now and will they all be under control of some Federal court somewhere that tells them that they can’t do certain things?

Under ERA, States would have the powers that they have now. The difference is the States would not decide whether to grant equality of rights to women. They would not decide whether they want to grant equality of rights to women, but they would have wider latitude in deciding how to grant equality.

They would have 2 years to rid their laws of gender bias. The experiences of other State legislatures prove that they can do that, and some States have already done it.

With a Federal ERA, individuals’ rights to equal treatment under the laws would no longer depend on where they live in this country—in one State you have equal rights and in the other State you don’t.

The Commission has found that ERA opponents’ predictions of social upheaval have not come true in the States that have enacted ERA’s. As and Governor Lamm said, men and women are not being forced to share restrooms and living quarters and all the rest of that stuff that people talk about.

The orderly way in which progress has occurred under State ERA’s proves that the equal rights principle can and does work in
Another factor that may discourage women from seeking jobs offering greater upward mobility and training, which can be expensive and time consuming, is the perception of lower earnings. A recent report, entitled “Unemployment and Underemployment Among Blacks, Hispanics, and Women,” cited a study in which researchers found that controlling for family background factors, occupation, and experience, that an additional year of education, gave women an average increase in earnings that was only 40 percent of the increase it gave men.

In part, wage disparities reflect the concentration of women in low-paying jobs, but that does not account for the entire discrepancy. Despite the existence of Federal laws such as the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, and State laws prohibiting sex discrimination in employment, the Commission has found that many women still receive less pay than men do for the same or similar work.

Before the advent of the Equal Employment Opportunity Commission, the National Academy of Sciences conducted a study and determined that there was substantial evidence to indicate that “...in many instances, jobs held mainly by women and minorities pay less than the same job held by a man...because they are held mainly by women and minorities.”

The Commission on Civil Rights study of unemployment and underemployment found that non-Hispanic women experienced higher levels of unemployment, especially involuntary, pay, Black and Hispanic women, like their male counterparts, generally experienced higher levels of unemployment and underemployment than did white non-Hispanic men.

Existing antidiscrimination laws have limitations that allow sex discrimination to continue unchecked in some employment contexts. Electors officials, for example, are exempt from prohibitions against discrimination.

The Commission is concerned that the increasing income disparities for women, especially minority women, who head households. Many women who head households remain poor though they are employed in full-time jobs. In 1980, such women had a poverty rate of 4.4 percent, which was almost three times the rate for two-parent households an twice that for male single-parent households.

The Advisory Council on Economic Opportunity has predicted that “...the other things being equal, if the proportion of the poor who are in female-headed families were to increase at the same rate as it did from 1967 to 1977, the poverty population would be composed solely of women and their children by about the year 2000.”


Over the years, the Commission has called attention to the importance of consistent and coordinated enforcement of Federal laws and Executive orders prohibiting discrimination against women and minorities in employment and pay. Continuing disparities show that the agencies with enforcement responsibilities have not made adequate efforts to discharge their duties.

THE EFFECT OF THE ERA ON EMPLOYMENT

The Equal Rights Amendment would provide an important legal and symbolic weapon in counteremployment discrimination. This would be particularly helpful to minority women, since they participate in the labor force at a higher rate than do white women. The ERA would close loopholes in existing coverage—excluding protections to employees of elected officials, for example, and providing a stricter standard for reviewing sex-discrimination claims of government workers. The ERA would also provide an impetus for more vigorous enforcement of antidiscrimination laws and practices.

In examining the experiences of States that have adopted equal rights amendments to their own constitutions, the Commission has found that States generally have eliminated statutory provisions that restrict members of one sex. At the same time, states that confer benefits have been enlarged to protect eligible members of both sexes. In Colorado, for example, minimum wage laws have been extended to cover minorities of both sexes and all types of workers. State ERAs have also required elimination of sex-based barriers to employment as barbers, newspaper carriers, and police officers.

The Commission found that State ERAs have provided flexibility for addressing discrimination. ERA States have taken different approaches, for example, to sex-neutralize workers’ compensation plans. The State of Washington has created an
automatic presumption of dependency for families of both male and female workers. Maryland and Virginia, by contrast, require proof of actual dependency by any spouse or children of a worker seeking benefits.

**OTHER ECONOMIC INEQUITIES**

In addition to documenting employment discrimination, Commission reports have identified gender-based economic inequities in, among other things, marital property and support laws, social security provisions, disability insurance, and pension coverage. Congress is currently contemplating addressing some of these issues in the proposed Economic Equity Act of 1983. At present, however, many laws and practices continue to deprive homemakers of economic security during marriage, upon divorce, or at widowhood, by failing to recognize their valuable contributions to their families and society.

**MARITAL PROPERTY AND SUPPORT**

At common law, married women suffered a total loss of property rights. In the 19th century, laws governing property rights during marriage were reformed on a piecemeal basis, which varied from State to State. When the Commission examined State statutes, however, it found that many still retain outdated and archaic common law concepts about ownership, possession, and control of marital property that discriminate against women.

The economic inequities found in marital property and support laws are particularly burdensome to women in the case of divorce. Sex-based presumptions about family roles have traditionally contributed to inequities when divorcing spouses divide their accumulated property, such as their home, household goods, and bank accounts. The Commission has found that the homemaker spouse generally suffers the greatest disadvantage in a divorce.

In its recent study of female-headed households, the Commission found divorce to be a primary cause of poverty among women and children. Studies have documented the differential effect of divorce on the economic status of men and women. Even if fathers who pay child support are better off financially after divorce than they were before, in sharp contrast, many women and children face severe economic reverses at the time of divorce. In 1978, for example, approximately 60 percent of the 7.1 million women with children from an absent father were awarded or had and agreed to receive child support payments. But only about half of these women received the agreed-upon amount. Roughly one-quarter received less than the full amount, and one-quarter received no payments at all.

Although the common law imposed a duty on husbands to support their wives, courts have refused to enforce the support obligation during marriage. In its study of female-headed households, the Commission found that even after divorce or legal separation, women who are eligible for alimony or spousal support receive it infrequently. In 1979, only 14 percent of the women who had ever been divorced or separated were awarded or had an agreement to receive maintenance payments or alimony.

The Supreme Court of the United States has established that statutes imposing different responsibilities for alimony and spousal support on the basis of sex are invalid, and existing constitutional law has already reversed the laws in many States, so that actual financial need, rather than sex, is the basis for alimony or maintenance awards. (Because very few husbands are economically dependent on their wives, courts in these States have rarely found it appropriate to grant alimony or spousal support to men.)

Some States have followed similar reasoning in changing laws that previously assigned child support duties to fathers only, solely on the basis of sex. These States have determined that both parents have the duty to support their children. By analyzing the facts on a case-by-case basis, the courts in these jurisdictions are in a position to assess the financial position of each parent and to award child support based upon ability to pay.

In the absence of court challenges or legislative reform, however, discriminatory alimony or support statutes remain on the books in many jurisdictions.

**THE ERA'S EFFECT ON MARITAL PROPERTY AND SUPPORT**

The ERA would invalidate discriminatory provisions and strengthen the equal right of a married woman to own, possess, and manage marital property. The Commission's examination of States that adopted their own ERAs found that the Pennsylvania and Virginia ERAs invalidated presumptions favoring one spouse over the other in determining ownership of tangible personal property. In New Mexico, the State ERA gave wives equal control of community property, which meant many could establish credit in their own names for the first time.

The ERA would also compel changes in laws that treat males and females differently with respect to their property rights. Laws that grant different rights, privileges, or protections to wives and husbands would be invalid unless extended to both spouses. This means that laws giving husbands the right to recover damages from a third party who negligently injures his spouse or child would extend the same right to wives. The Commission has found that courts applying State ERAs in Pennsylvania, Alaska, Texas, and Washington State have already extended the common law right to sue for "loss of consortium." So that even under current law, the wife of the party who cause a spouse to become disabled.

By requiring courts to recognize the value of nonmonetary contributions by family members, the Equal Rights Amendment would build on the significant changes that have occurred in recent years in alimony and support laws. The ERA would enhance the court decisions and legislation by requiring that marriage laws be based on the roles actually played by spouses within the family, rather than on gender. Husband and wife would be responsible to each other to an extent consistent with their individual resources, abilities, and the type of contribution each made to the family unit.

The ERA would not require that a husband and wife contribute identical amounts of money to a marriage or that the wife obtain an income-producing job outside the home. Both spouses would be free to choose to work inside or outside the home in an arrangement suiting them best. The debates and reports that form the legislative history of the Equal Rights Amendment expressly recognize the crucial importance of contributions to marriage, as have courts and legislatures in States that have adopted their own ERAs.

By invalidating sex-based stereotypes and presumptions in family law and encouraging legal recognition that marriage is an economic as well as social and emotional partnership, the ERA would help the legal system operate more equitably for women facing divorce. The Commission has found that to be the case in States with ERAs. As a basis for dividing household goods, for example, Pennsylvania's Supreme Court has established the presumption of equal distribution of property, as have courts and legislatures in States that have a paying job have been equal.

States that have enacted equal rights amendments, the Commission has found, have not interpreted mutual responsibility for child support as requiring mathematical equality in the monetary contribution of mother and father. In fact, one Pennsylvania court specifically held that permitting a nonworking parent to remain at home while the child matures did not violate the State's ERA. A Federal ERA would promote the uniform adoption of these principles in all jurisdictions, to the benefit of all families.

**CUSTODY**

Although it is not technically an economic issue, a related subject when a marriage dissolves is who receives custody of the children. In most States today, contested custody determinations are made on the basis of the "best interest of the child" and the fitness of the parent. The analysis of the child's best interest has traditionally been clouded by sex-based stereotypes that presumed that the mother was more fit to be the custodial parent than the father, especially when a child of "tender years" was involved. These sex-based presumptions are increasingly being rejected, although they still operate as factors in custody decisions in some States.

**THE EFFECT OF THE ERA ON CUSTODY**

The ERA's clear rejection of sex-based stereotypes, and the importance of such a constitutional mandate to the courts would provide a basis for arguing that such presumptions are invalid. Without broad generalizations about a mother's and father's "proper role" to fall back upon, courts would have to make meaningful assessments of the respective households and, therefore, act more effectively in the best interests of the child.

The experience of States with equal rights provisions has demonstrated that such nonbiased custody determination mandated by the ERA neither requires nor has resulted in widespread denial of custody to mothers. In fact, as the Commission reported in its 1981 statement on the ERA, the Colorado Supreme Court rejected the contention that Colorado's State ERA was violated because a majority of women in divorce cases were granted custody.
PENSIONS, DISABILITY INSURANCE, AND SOCIAL SECURITY

Significant economic inequities await older women. Single women (those who never married or are now widowed or divorced) comprise almost three-fourths of our nation's elderly who are living in poverty. One out of every three single women over the age of 65 has income below the poverty rate. In the course of its studies, the Commission has discovered that the income protections for old age that individuals can secure from pensions, insurance plans, or social security are not always available to women. What they are, the costs are often higher or the benefits are lower for women than for men.

Social security provisions continue to disadvantage women economically because they are premised on sex-based assumptions: that the family consists of one "individual breadwinner" and his "dependents"; and that the dependents need or deserve less income security than the breadwinner. These assumptions fail to reflect the value of work in the home, the discriminatory wage structure in the labor force, and the diversity of roles women play today.

Because they are concentrated in homemaking, service, and clerical jobs, women are often unable to purchase disability insurance and pension plan coverage. As a result, men are twice as likely as women to be covered by pensions. Even those women who have had access to pension plans often have received lower benefits than their male coworkers based on actuarial tables showing women as a group generally live longer than men. The recent decision by the Supreme Court of the United States in Arizona Governing Committee v. Norris held that such practices in employer-sponsored pension plans violate Title VII prohibitions against sex discrimination in employment. But the ruling does not apply to all pension plans and does not affect other discriminatory practices based on insurance companies' actuarial tables. In addition, the remedy in Norris is not retroactive, so it will not help women who have already retired.

Divorced homemakers frequently find that they are not entitled to any portion of pension benefits in the wage-earner's name, even though the pensions were purchased with marital income. Legislative reforms have given the former spouses of qualified military and civilian Federal workers the right to share in such benefits, but most women remain unprotected.

THE EFFECT OF THE ERA ON INCOME SECURITY PROGRAMS

The ERA would strengthen women's economic status by prohibiting sex-based discrimination in insurance, pensions, and retirement security programs that involve governmental action. The ERA would also encourage legislative reforms recognizing pensions and other such benefits as marital property to which homemakers may have made nonfinancial, but nonetheless valuable, contributions.

EDUCATION

Another significant area of continuing inequality is education. Despite Title IX prohibitions against sex discrimination in educational programs receiving government support, the nation's schools continue to pigeonhole children and youth into sex-segregated roles and to provide unequal educational opportunities. College faculties remain predominantly male, while elementary school faculties are still overwhelmingly male—except for the principals, most of whom are male. And, although the number of girls and women participating in school sports has increased dramatically, facilities and equipment for male students continue to surpass those of female students in most systems.

In part, this continuing discrimination is due to limitations in existing law. But lack of enforcement is a significant factor, as well. Title IX has never been vigorously enforced, and efforts are currently being made to narrow its applicability to only those programs directly receiving Federal funds specifically earmarked for them. In failing to appeal restrictive rulings that conflict with prevailing case law, and by announcing the intention to rewrite Title IX regulations to conform with such rulings, the United States Departments of Justice and Education have broken with established policy and administrative procedure. The Commission on Civil Rights recently issued a statement calling upon the President to take the steps necessary to ensure that his administration will stand, with its predecessors, for broad and effective civil rights protections.

THE EFFECT OF THE ERA ON EDUCATION

The ERA would give courts a firm handle for deciding constitutional challenges to sex bias in the public schools. Although the ERA would apply only to educational institutions where governmental action was involved, it would provide a broader guarantee than Title IX because it would not require Federal funding to trigger its application. The ERA would also close the loopholes of the various State and Federal statutory schemes.

CRIMINAL LAW

Women continue to encounter inequities in the administration of justice, both as victims and as offenders. Sentencing and parole statutes and practices, for example, differ for men and women in some States, and women tend to receive inferior job training while incarcerated.

In its study of battered women and the administration of justice, the Commission found that the legal system's response to victims of domestic violence, most of whom are women, differs markedly from its typical response to other assault victims. Law enforcement officials also tend to treat the perpetrators of spouse abuse more leniently than they treat other assailants.

THE EFFECT OF THE ERA ON CRIMINAL LAW

The Equal Rights Amendment would require criminal laws to treat individuals according to their acts, rather than their gender. Most States that have enacted ERA's have neutralized sexual assault statutes to protect both men and women, and many States have revised their rules of evidence and standards of proof to eliminate sex bias. In appeals based on State ERA's, courts have upheld valid convictions, while neutralizing sentencing or age differences based on sex. Several States have begun giving women access to the greater range of programs available at male correctional facilities. A Federal Equal Rights Amendment would extend these kinds of reforms to all States.

THE MILITARY

Women also face inequality in the military. Recruitment goals operate as quotas to limit women's enlistment, and those women who do enlist encounter restrictions that shunt them away from officer training programs and into lower paying jobs.

The military is the largest single vocational training institution in the nation. It offers on-the-job training at full pay and lifelong post service benefits, as well. As a result, it continues to be an important route for upward mobility. But, as the Commission reported in its 1981 statement on the ERA, women were excluded from much of the training for more highly paid skills. In 1977, 78 percent of all authorized military slots were closed to women. The armed services claimed the restrictions were necessary because women are prohibited from combat, but nearly one third of the restrictions were not combat-related.

THE EFFECT OF THE ERA ON THE MILITARY

The issue of whether the Equal Rights Amendment would require women to be drafted or to serve in combat is controversial. The Commission addressed this issue in its 1981 report and determined that Congress has the power to draft women and would retain that power under the ERA. The ERA would require that women not be excluded on the basis of gender from the pool of individuals eligible for a military draft. But the ERA would not require all women to become soldiers, as many of its opponents have claimed. The Commission has always maintained that Congress would retain the authority to create exemptions from compulsory service.

With or without the ERA, women will continue to face responsibility for military service. Congress and the courts will determine who will be called upon during wartime to bear the responsibility for military conscription and combat duty—whether or not the ERA becomes a part of the Constitution. The Commission's assessment has been that the ERA is needed to guarantee that women and men are accorded equal treatment and opportunity in the armed forces on the basis of their individual skills and abilities.

The inadequacy of existing law and alternative reforms

One reason sex discrimination persists is that we lack a firm constitutional basis for equal rights on the basis of gender. Although opponents of the ERA maintain that the 14th amendment provides adequate protection against sex discrimination, the Supreme Court of the United States has stopped short of applying the same 14th amendment standards to sex discrimination that it does to race discrimination—in part, apparently, because the ERA has not been ratified. The Court has split on
many of his sex discrimination decisions and has not fully developed a doctrine for
resolving such cases. One member of the Court, Justice Powell, in a separate
opinion, specifically mentioned the absence of an equal protection class. In the
same way as ERA, I

I have two questions. First, do the women under the

Do you agree that the ratification of the ERA would do that in

Do not hallucinate.
what the law is today. What about if the law was passed and we apply that to sex?

Ms. BERRY. It would depend on the reason the specific school, if you are talking about sex-segregated schools, why it was established and what the purpose is. If the only purpose for it being established is to segregate people on the basis of sex because they are women and because they are men and if someone wants to go to that school and it is a public school and there is State action involved then in fact on the facts it would be illegal. But you cannot say that in a blanket way because I do not know what the facts are in the case of each school.

Mr. DEWINE. But can you not say that in a blanket way in regard to race?

Ms. BERRY. With regard to race all you can say is the same thing, that a law that says people must be segregated on the basis of race is subjected to strict judicial scrutiny and the State must show a compelling State interest for it to exist. If they cannot show a compelling State interest, then it is declared illegal. That is the present standard.

Mr. DEWINE. But as a fact of the matter with regard to race we are not going to find a compelling State interest.

Ms. BERRY. I do not know that. Maybe you know it.

Mr. DEWINE. Well, I certainly cannot think of any.

Ms. BERRY. On the basis of sex if a State segregates women and men and if it is challenged, judges would look at it and give it strict scrutiny and ask what is the compelling State interest here. If there is no compelling State interest, then you cannot do it.

Mr. DEWINE. Let me move to the abortion question, the Hyde amendment. What is your feeling if ERA is passed with regard to that?

Ms. BERRY. Well, most respectfully, Mr. DeWine, the Civil Rights Commission is prohibited by law—by Congress—to comment on any matter having to do with abortion. Do not ask me why. It is in the statute, so I am not supposed to comment on any matter having to do with abortion as a Commissioner.

Mr. DEWINE. Well, why do you not take your hat off as a Commissioner and testify as an attorney who is familiar with this area of law?

Ms. BERRY. Can I not be a Commissioner, Mr. Chairman? Is that possible? I have to get a ruling from the Chair. I have had enough problems with these people. But generally speaking on the matter not as Commissioner but as Lawyer Counsel Berry, constitutional lawyer, generally speaking I would suppose that if a government decides to provide funds for medical services of any kind that medical service, if it decides to fund medical services of a general category, without saying which services, for people who cannot afford it or are poor or whatever, it would generally have to provide those medical services to women and men on an equal basis. But the Government would not have to provide medical services because there is no law that says you have to fund medical services. But that is the best I can do right now, and I do not want to get more deeply into that.

Mr. DEWINE. Let me follow it up. I think the argument that has been made in many States that have ERA in their State constitu-