and regulation and an infinitely greater promise of permanence. Ratification of this Amendment, which requires a 3/5 vote here in Congress and widespread popular support, will leave no doubt as to the commitment of our people and our government to equality of the sexes before the law.

Mr. Edwards. We are very grateful to our three witnesses for coming on such short notice, and I understand that you have agreed to appear as a panel.

If you all want to come up and sit as a panel?

We will yield to the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. Sensenbrenner. Thank you very much, Mr. Chairman, I have no opening statement, but I would like to ask unanimous consent that the legal analysis of Karen J. Lewis of the American Law Division be included in the record of the Equal Rights Amendment. This legal analysis related to the potential impact of the proposed Equal Right Amendments and the right to an abortion or the funding of an abortion, and just to say that the conclusion indicated that sex is a suspect classification and the Hyde amendment would be overturned under strict scrutiny by the United States Supreme Court.

Mr. Edwards. Without objection, it will be included in the record.

Professor Emerson, I believe you are first. It is nice to have you all here. You may move ahead.

STATEMENT OF THOMAS I. EMERSON, LINES PROFESSOR OF LAW EMERITUS, YALE LAW SCHOOL; NEW HAVEN, CT; JULES GERARD, PROFESSOR OF LAW, WASHINGTON UNIVERSITY LAW SCHOOL, ST. LOUIS, MO; AND ANN FREEDMAN, ASSOCIATE PROFESSOR OF LAW, RUTGERS UNIVERSITY, CAMDEN, NJ

Professor Emerson. I appreciate the opportunity to appear before this committee. I am the coauthor, along with Professor Freedman here, of an article in the Yale Law Journal which came out in 1971 and which dealt with an analysis of the ERA as it was proposed at that time. In general, I still adhere to the position that we took in that article. In fact, I think that the recent developments have tended to firm up that position.

In my written statement, I undertake a very brief analysis of the Supreme Court decisions that deal with the Equal Protection Doctrine in sex discrimination cases, and I have come to the conclusion, as we did before in the article, that the current state of the law as far as the Supreme Court is concerned is not adequate to assure equality of women and that the ERA is necessary for that purpose.

Just very briefly, the reasons for that are, first, that the Supreme Court has never applied the strict scrutiny standard to sex discrimination cases that it has used in race discrimination cases.

Second, it seems to have adopted, more or less the rule in Craig v. Boren. The law will be valid even though it differentiates between men and women if it serves an important governmental objective, one, and, two, the regulation is substantially related to the achievement objective.

This formulation seems to me quite inadequate. It is very easy to find an important government objective, and it is not difficult at all to find that the regulation is substantially related to the achievement of that objective. So it doesn't give much protection.

As a matter of fact, that formulation does not even address the question of whether or not there is inequality; it simply addresses the question of whether there is important government regulation.

Third, even the Craig formulation has tended to break down. Some of the Justices of the Supreme Court, including a majority, have adopted the formulation that where the sexes are not similarly situated or where there is a real difference between the sexes, the regulation will be allowed. A real difference means not only the physical difference, but also the difference in economic status and legal rights and so on.

Of course, this formulation merely accepts the underlying existing discrimination and stereotypes which caused the problem in the first place.

Fourth, in the disparate impact cases the Court has required a showing of discriminatory purpose; that is to say, an intent to harm an identifiable group. Obviously, I think everyone recognizes that a showing of discriminatory purpose would be very difficult to make.

So even more than in 1971 and 1972, the present doctrine of the Supreme Court is not suitable. The ERA offers an alternative system of principles, and I would mention those again in summary form because they are spelled out somewhat more in my written statement.

First, as a starting point, classification by sex, that is to say, by gender, is not permissible. Classification by individual characteristics of men and women is permissible, but grouping of all men or women together is not permissible classification as a starting point.

Second, the ERA does recognize that there are physical differences between the sexes, and it therefore would allow for the concept of the unique physical characteristic. That is to say, in regulations dealing with a unique physical characteristic, even though it is applicable to only one sex, it would be permissible provided it did not produce inequality, and it would also be subject to strict scrutiny.

The reason for that is that if it is a unique physical characteristic and the regulation is narrowly related to that, the regulation does not affect factors that are comparable between the sexes. Therefore, there is no issue of discrimination. But as I said, where it went beyond that it would not be permissible and, in any event, it would be subject to strict scrutiny.

Third, the ERA fits within the constitutional framework as a whole. More particularly, it fits into the constitutional right of privacy and the constitutional right under the First Amendment to freedom of religion. So that cases involving those issues must consider not only the Equal Rights Amendment, but also the rest of the Constitution.

Now, fourth, affirmative action to remedy specific acts of past discrimination would be permissible.

And, finally, the impact of the ERA in the disparate cases; that is to say, cases where the regulation or the statute seems to be neu-
tral on its face, but in actual effect is adverse to, has adverse consequences to, one of the sexes. This problem is not unique to the ERA. You find it whenever, by Constitution or by statute, one attempts to eliminate discrimination in our society.

There are many laws that do not overtly discriminate but which are based upon presumptions or premises that assume the subordination of one group, and would tend to perpetuate those. It becomes important to be able to make a decision as to whether those regulations conform to the basic principles of equality. In fact, you get somewhat similar disparate impact cases even in the First Amendment area.

The method by which the ERA deals with this, in our position, is that the courts must give careful scrutiny where disparate impact is shown. The principal question is whether or not the regulation denies equality of rights under the law. In answering that question, one takes into account a number of factors.

I have covered this in my statement, and I will only mention them briefly: first, the relationship between the challenged statute and patterns of discrimination in the past. Next is the severity of the impact—the number of people involved and how they are affected. Third, the importance of the government interest involved. Fourth, the extent to which the statute or regulation solves the problem. Fifth, alternative solutions to the problem with which the government is concerned that is accomplishing the result by measures not having an adverse impact on one group or another.

These are difficult problems and ones that have arisen in the past 10 years, more than was visualized before. It is not always easy to draw the line, but it is a line that can be drawn and the problem is soluble.

Finally, my statement undertakes to answer some objections that have been advanced based on constitutional interpretation, and I will just go into that very briefly.

As far as federalism is concerned, the argument that the ERA would transfer a substantial area of power from the states to the Federal Government is I think without substance. All the areas in which the ERA operates that the state now has control of would remain under the control of the states, including marriage law, criminal law, labor law, all of those. The only impact on the states would be that they would have to conform with one principle, the principle of nondiscrimination. Otherwise, there is no effect on them.

Another objection is related to the disruption of family life. I point out here that the Equal Rights Amendment deals with legal rights. It gives options to women, but it doesn't command any particular relationship within the family.

And finally, there is a question, and perhaps the overriding question, of uncertainty. It is said that the Equal Rights Amendment is stated in very general terms: that one can't be totally sure in advance how it will be applied; and that, therefore, it presents risks to us in terms of how it will be implemented.

I think that position cannot be sustained. As I have just indicated, there is a rational structure, a set of principles, under which interpretation of the Equal Rights Amendment can proceed. But beyond that, I think the contention of uncertainty does not really
do justice to our constitutional structure. The ERA would operate totally within traditional constitutional terms.

Our rather unique system of individual rights rests upon general principles that are binding on all persons, and binding on the Legislature and the Executive, but which are particularly the province of the courts to implement. That is what the ERA does. It establishes a basic principle with a set of subprinciples, and in that respect it is like many other provisions that sustain our system of individual rights under the Constitution.

I would say that at the time of the formulation of the Bill of Rights in 1789-1791, it could have been argued that the First Amendment, freedom of speech, would allow a person to shout "Fire!" in a crowded theater. Or it could be argued that freedom of religion embraces human sacrifice. If we had listened to that sort of counsel at that time we would never have had the First Amendment. The same is true of the Equal Protection Clause, the Due Process Clause, and many of the provisions of the Bill of Rights.

The principles set forth in the Equal Rights Amendment, equality under the law without regard to gender, is in my judgment essential to the conduct of a civilized society. It deserves to be embodied in our fundamental law.

Thank you.

Mr. Edwards. Thank you, Professor Emerson.
[The prepared statement of Professor Emerson follows:]

I am one of the authors of the article in the Yale Law Journal, published in 1971, which discussed the need for the Equal Rights Amendment and undertook to analyze its meaning and impact. I firmly believe that adoption of the Equal Rights Amendment is essential to assure equality under the law for women. I will not, however, address myself to that issue at this time. Rather I will confine myself to discussion of the constitutional problems raised by the Equal Rights Amendment, particularly as the issues have developed since Congress originally considered that amendment and sent it to the states for ratification.

I still adhere to the basic analysis set forth in the Yale Law Journal article. Indeed I believe that intervening events have fully justified the position there taken. In evaluating this analysis it is necessary, first, to consider the Supreme Court's current interpretation of the Equal Protection Clause as applied in sex discrimination cases; second, to restate the legal principles embodied in the Equal Rights Amendment that are necessary to achieve legal equality for both sexes; and third, to discuss some of the main objections that have been advanced by opponents of the ERA.


First of all it should be stated that the Supreme Court has failed to develop any clear or consistent constitutional doctrine in sex discrimination cases. Various justices offer differing views, majorities shift from case to case, doctrinal lines are blurred, and results are uncertain. As near as one can summarize the situation it is as follows:

(1) The Supreme Court has made an appropriate distinction between cases where the statute or regulation contains an express classification by sex and cases where the statute or regulation is neutral on its face but has a disparate effect upon one of the sexes.

(2) In cases involving express classification by sex the Court has consistently refused to apply the standard of "strict scrutiny" or "suspect classification" utilized in race discrimination cases. Frontiero v. Richardson, 411 U.S. 677 (1973); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

Under the "strict scrutiny" standard the burden of proof is on the government to demonstrate a "compelling" reason for the classification by race and to show that no other alternative is available to achieve the desired objective. In practice, with the exception of the Japanese detention cases, the Court has never found an explicit race classification to be justified under the "strict scrutiny" test. Such an approach has never been accepted by a majority of the Court in sex discrimination cases.
III. OBJECTIONS BASED UPON PROBLEMS OF CONSTITUTIONAL INTERPRETATION

Opponents of the ERA, in the years that have passed since the proposed amendment was adopted by Congress, have advanced a number of objections related to issues of interpretation. Many of these, such as the argument that the ERA would require unisex rest rooms or sanction homosexual marriages, are in my judgment frivolous. The amendment cannot fairly be read to compel any such outcome; the legislative history plainly repudiates any such interpretation and there is no likelihood that the courts would reach any such conclusion. Other objections, however, deserve fuller consideration.

It has been argued that the ERA would result in a vast accretion of federal power at the expense of the states and localities. This is a legitimate concern, but it is misdirected in the case of the ERA. Jurisdiction over all the traditional areas of state and local authority -- the criminal law, family law, education, labor law, and the like -- would remain with the state and local governments as it does now. The only change resulting from the ERA would be that the states and localities would have to exercise their powers in conformity with the principle of non-discrimination on account of sex. Enforcement of that requirement would rest with the state and local, as well as federal courts, and implementation would be the primary responsibility of the state and local legislatures.

Moreover, the state and local legislatures would have a two year period of grace in which to adjust their statutes and regulations to the non-discrimination requirement. Only in the event that the state and local authorities refused or failed to adhere to the non-discrimination principle -- that is, violate the constitutional mandate -- would federal intervention occur in areas of state and local concern.

Another contention is that the ERA would result in the disruption of traditional family life. Here, again, the precise impact of the ERA should be kept in mind. The ERA deals only with equality of rights "under the law," that is, with legal rights. My colleague, Ann Freedman, will detail the impact of the ERA on legal rights in the family law area. The ERA, however, does not require changes in social, cultural, or other non-legal family arrangements.

This is not to say that the ERA would have no impact on family life. Primarily the result would be that women who wish to engage in activities outside the immediate family circle would be assured equal rights in such endeavors. But this result is not coerced by the ERA. Such options are available but not mandated.
Many factors in modern society are changing the ways of family life. The ERA recognizes these changes and strives to provide an equitable basis upon which women may take part in a broader range of activities outside the home. It thus meets the new and growing needs of the society. It does not, however, compel the abandonment of traditional forms of family relationships.

Finally, the most insistent argument against the ERA has been the charge of uncertainty. It is said that the provisions of the ERA are too general and hence subject to varied and unpredictable interpretation. In large part this fear is self-generated. In interpreting the ERA, opponents are too often, in the words of Justice Oliver Wendell Holmes, "fired with a zeal to pervert." It is not hard, given the nature of law, language and lawyers, to think up half a dozen meanings which could be squeezed out of the formulation of a general principle. Those who engage in this practice ignore the fact that, at this stage of the constitutional amending process, the determination of what basic meaning is embodied in the provisions of the ERA is largely up to the framers of the amendment. It is within the power of Congress to make the legislative history that will provide a rational structure within which the necessary interpretation of the ERA will proceed.

The elements of that structure are available, and indeed were explicitly set forth when Congress first proposed the ERA in 1971 and 1972. They include the fundamental propositions that classification by sex is impermissible; that this does not prohibit a statute or regulation dealing with a physical characteristic unique to one of the sexes; that the ERA must be fitted into the existing constitutional framework, including the constitutional rights to privacy, freedom of religion, and freedom of association; that remedies by way of affirmative action are not precluded; and that a statute or regulation that is neutral on its face but has a substantial disparate impact upon one sex must be carefully scrutinized, taking into account all relevant factors, to determine whether it does in actuality deny "equality of rights under the law."

Of course some areas of uncertainty will exist. That is hardly surprising. But the fear that the ERA is couched in language that is too general is not borne out by the experience with the equal rights amendments that have been incorporated in a number of state constitutions. Nor would adoption of the ERA mark a departure from our constitutional tradition. Most of the cherished provisions of the bill of rights are expressed in the form of a general principle embodying a fundamental value of our society. Had the approach of the ERA opponents prevailed we would not now have in our Constitution provisions securing such basic rights as freedom of speech and of the press, freedom of religion, equal protection of the laws, and the right to due process of law.