MOTION FILED

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IN THE

Supreme Court of the United States

Nos. 70-4 and 70-5026

SALLY M. REED, *Appellant,*

v.

CECIL R. REED, Administrator, in the Matter of the Estate of Richard Lynn Reed, Deceased, *Appellee.*

CLAUDE ALEXANDER, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Federation of Business and Professional Women's Clubs, Incorporated, hereby respectfully moves for leave to file the attached brief *amicus curiae* in these cases. The consent of both attorneys of record has been received in *Alexander v. Louisiana.* In *Reed v. Reed* the consent of the attorney for the Petitioner has been received, and the consent of the attorney for the Respondent was requested but refused. Neither case has yet been set for oral argument, and Respondent's brief in *Reed v. Reed* is not due to be filed until September 7, 1971. Therefore, *amicus* respectfully submits that granting of this motion will not cause

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hardship to any of the parties or delay the resolution of the causes.

The interest of the National Federation of Business and Professional Women's Clubs in these cases arises from the fact that they squarely present the issue of the degree to which the Equal Protection Clause of the Fourteenth Amendment guarantees equality of treatment for women under the law. One of the primary policy objectives of the Federation, which has approximately 180,000 members and is open to all working women, has been to eradicate laws and practices that perpetuate invidious sex discrimination. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on the constitutional issue and a fuller description of the factual background surrounding these cases than any of the other briefs. If this argument is accepted, it would be dispositive of these cases.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.

INTEREST OF *AMICUS*

The National Federation of Business and Professional Women's Clubs, Inc. (hereinafter referred to as BPW), is a nationwide non-partisan organization dedicated to promoting the interests of business and professional women. It is a federation composed of 53 state federations, which in turn are composed of 3,800 local clubs. These clubs are in operation in every state of the United States as well as in the District of Columbia, Puerto Rico, and the Virgin Islands. The BPW has approximately 180,000 members.

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Membership is open to any working woman, and the Federation's membership includes secretaries, lawyers, assembly line workers, clerks, and in short, women engaged in virtually every occupation.

In its 52 year existence, the BPW has been particularly concerned with securing equality of treatment for women under the law. One of its primary policy objectives is to eradicate laws and practices that perpetuate invidious sex discrimination in violation of the guarantee of Equal Protection of the Laws. The BPW has long been a supporter of the proposed Equal Rights Amendment to the United States Constitution, and has testified on behalf of its adoption before both the House and Senate Committees on the Judiciary. As an advocate of the strict enforcement of the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964, BPW filed an *amicus* brief in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

The cases at bar involve the direct application of the Equal Protection Clause of the Fourteenth Amendment to State laws which patently discriminate against women on the basis of sex. The proper application of the Equal Protection Clause is of immediate and substantial importance to the BPW, to the purposes which it endeavors to serve, and to women throughout the United States.

STATEMENT OF FACTS

Both cases at bar involve constitutional challenges under the Fourteenth Amendment to State laws that systematically exclude women from the full and equal exercise of certain rights because of sex.

In *Reed v. Reed,* No. 70-4 appellant, as the mother of an intestate decedent, filed her petition for probate of the estate. Decedent's father, appellee herein, also petitioned for letters of administration. Both parties were equally entitled to letters of administration under § 15-312, Idaho Code. The probate judge ruled in favor of the father on the

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grounds that § 15-314, Idaho Code, required that males must be preferred to females as between persons equally entitled to administer an estate. The probate court order was reversed by the Fourth Judicial District Court of Idaho which held that I.C. § 15-314 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Idaho Supreme Court, reversing the district court, upheld the constitutionality of I.C. § 15-314.

In *Alexander v. Louisiana,* No. 70-5026, petitioner's conviction by the District Court for the 15th Judicial District in Lafayette Parish, Louisiana, was affirmed on appeal by the Supreme Court of Louisiana. Petitioner challenged the validity of the original indictment on the ground, among others, that women were systematically excluded from the grand jury list and venire and from the grand jury empaneled. The evidence below established that women were totally excluded from juries in Lafayette Parish because of the operation of Article 402, Louisiana Code of Criminal Procedure, which prohibits the selection of a woman unless she has filed a written declaration of her desire to serve. The Supreme Court of Louisiana rejected petitioner's challenge to the grand jury venire, relying on *Hoyt v. Florida,* 368 U.S. 57 (1961), to uphold the exclusion of women. Petitioner contends that the indictment against him was invalid and illegal because it was returned by a grand jury empaneled from a venire made up in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

Sex discrimination is a massive affront to our fundamental concepts of equality. It imposes a massive psychological and economic burden on American society. In those areas in which the costs can be documented—for example, average annual income—and in its immeasurable impact on personal dignity, sex discrimination may well take an even greater toll than racial discrimination.

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Much of the discrimination stems directly from State action. Federal, State, and local governments employ more than 20% of the labor force, and their practices are followed by many other employers. Despite the fact that these institutions ought to serve as a model of nondiscriminatory employment, available studies indicate that women are relegated almost exclusively to the lowest grades of government service. State action in the area of education shows a clear and persistent pattern of discrimination against women, both in admissions and in access to teaching and supervisory positions. Some States continue to discriminate against women in their criminal laws. The vast majority of States continue to enforce archaic laws—"protective" labor legislation, limitations on the right to contract and the right to enter business, and so forth—which severely restrict women who wish to advance and earn promotions in their work.

This Court has never struck down any law on the ground that it denied the Equal Protection of the Laws to either sex. Instead, in a line of cases beginning in 1872, the Court has determined that State action fostering or permitting sex discrimination is constitutionally permissible if it appeared "reasonable"—and the Court has found every instance of sex discrimination with which it has been presented to be "reasonable." As a result of these cases, the Equal Protection Clause has been effectively rendered a nullity as far as sex discrimination is concerned.

Today there is increasing recognition in all parts of our society that it is neither constitutionally permissible nor morally justifiable to subject the majority of our population to second class status. Employment opportunities have been expanded under decisions construing the sex discrimination provisions of Title VII of the 1964 Civil Rights Act. In addition to action in the courts, there has been substantial action in State legislatures and by State Attorneys General, important changes in private institutions and customs, and even increased pressure for fundamental constitutional change—all directed at the problem of sex discrimination in

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our society. Moreover, a number of courts have challenged the wisdom of—and in some cases effectively overruled—this Court's earlier decisions in cases directly attacking the constitutionality of State laws discriminating on the basis of sex. These cases implicitly—and on occasion explicitly—reject the premises on which this Court's earlier decisions rested.

At the same time, a series of Supreme Court cases has struck down other forms of personal discrimination by requiring that all such discrimination be "subject to the most rigid scrutiny" under the Equal Protection Clause. The Court has recognized that when "fundamental" and "individual and personal" rights are involved, "strict scrutiny" must be exercised by the courts lest such important rights be abridged or infringed. This standard of review has been used by the Court to overturn discrimination in voting power, discrimination against aliens, discrimination against the poor, and most importantly, instances of racial discrimination.

Women, too, are entitled to Equal Protection of the Laws under the Fourteenth Amendment. Sex discrimination has as substantial an adverse impact on our society as the other forms of discrimination which this Court has struck down. Women have as great a claim to the benefits of the Equal Protection Clause as do aliens, indigents, and members of racial minorities. The same premises of human dignity and fundamental equality that give rise to the Fourteenth Amendment demand that its full protection be extended to strike down discrimination on account of sex.

In the cases at bar, both the Idaho law which automatically prefers males over females in the administration of estates, and the Louisiana law under which women are effectively precluded from jury service discriminate entirely on the basis of sex, without regard to the personal capabilities or circumstances of the individuals involved. Accordingly, neither can survive the "most rigid scrutiny" mandated by the Equal Protection Clause of the Fourteenth Amendment, and both decisions below should be reversed.

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ARGUMENT

I

SEX DISCRIMINATION IS A MASSIVE AFFRONT TO FUNDAMENTAL HUMAN LIBERTY AND DIGNITY, WITH PERVASIVE AND DEMONSTRABLE ADVERSE IMPACT ON OUR SOCIETY.

The evidence is overwhelming that persistent patterns of sex discrimination permeate our social, cultural, and economic life. Much of this discrimination is directly attributable to State action, both in maintaining archaic discriminatory laws and in tolerating and perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That the majority of our population should be subjected to the indignities and limitations of second-class citizenship is a fundamental affront to personal human liberty. We submit that State action which in any way perpetuates this invidious sex discrimination should be subject to the strictest application of the Equal Protection Clause.

Startling as the revelation might be to many Americans, it is a fact that sex discrimination takes an even greater economic toll than racial discrimination. In 1968 the median earnings of white men employed year-round full-time were $7,396, of Negro men $4,777; of white women $4,279, of Negro women $3,194. Women with some college education, both white and Negro, earn less than Negro men with eight years of education.[1] That sex discrimination can be even more invidious than racial discrimination was eloquently demonstrated by Congresswoman Shirley Chisholm in her testimony on the Equal Rights Amendment: "I have been far oftener discriminated against because I am a woman than because I am black." Hearings on the Equal Rights Amend-

[1] "A Matter of Simple Justice," Report of the President's Task Force on Women's Rights and Responsibilities, 18-19 (1970).

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ment Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess., at 35 (May 1970).

Federal, State, and local governments bear a substantial responsibility for perpetuating these pervasive patterns of sex discrimination. Through discriminatory employment practices, through financial support of public institutions such as universities, and by permitting archaic discriminatory laws to remain in effect, government at all levels is implicated in subjecting women to second-class treatment. The effect of governmental involvement in sex discrimination is magnified far beyond its actual scope since governmental policies have traditionally set a standard for practices in the private sector.

Sex Discrimination in Employment

Although the vast majority of the labor force is employed in the private sector, State, local and federal governments, including the military, employ more than 15,000,000 people—more than 20 percent of the labor force.[2] More important than the actual numbers suggest, governments are often looked to by private employers as models in relation to employment practices. Therefore, it is especially disturbing that studies of government employment practices reveal patterns of sex discrimination as pervasive as those in the private sector.[3] For example, although women constituted 34 percent of all full-time white collar federal Civil Service employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four

[2] U.S. Bureau of the Census, Statistical Abstract of the U.S.: 1970, Table 325, p. 218.

[3] The discrimination has persisted in spite of Executive Order 11357, 3 C.F.R. § 320 (1967), and Executive Order 11478, 3 C.F.R. § 133 (1970) which prohibit sex discrimination in the executive agencies of the Federal government, in competitive positions in the legislative and judicial branches, and in the government of the District of Columbia.

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highest grades.[4] In October, 1969, of the 665,000 women in full-time white collar Civil Service positions (33.4 percent of the total), 77.8 percent were in the six lowest grade levels. In the three-year period 1966-1969, women's share of jobs in grade levels GS-13 and above rose only slightly, from 3.5 percent to 3.8 percent.[5]

Equally pervasive patterns of sex discrimination persist in the private sector.[6] Whatever the occupation, there is a dramatic differential in earnings between men and women at every level. The median salary income for women is only 60.5 percent of that earned by men. The gap in earnings is largest for sales workers; women in this category earn less than half—41 percent— of what men doing similar work earn. While the wage gap is smallest in clerical, professional, and technical fields, women still earn only 65 percent of what men earn in those same fields. In 1969, less than 5 percent of all full-time women workers earned over $10,000 a year,

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[4]U.S. Civil Service Commission, Bureau of Management Services, "Study of Employment of Women in the Federal Government, 1967," at 17 (1968).

[5]Statement of Irving Kator, Asst. Executive Director, U.S. Civil Service Commission, Hearings on Sex Discrimination Before the Special Subcommittee on Education of the House Committee on Education & Labor, 91st Cong., 2nd Sess., Part 2, at 728-729 (1970) (hereinafter cited as *Education Hearings*).

[6]Congress has made several major efforts to alleviate some aspects of this discrimination. The Equal Pay Act of 1963, 29 U.S.C. 206 (d) (1964), requires that employees engaged in interstate commerce receive equal pay for equal work. The Act does not cover administrative, executive, and professional women, nor government employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1964), prohibits discrimination based on race, color, religion, national origin, or sex by employers with 25 or more employees, employment agencies which procure employees for an employer, and labor unions which maintain a hiring hall or have 25 or more members. Title VII excludes from coverage instrumentalities of the Federal, state, or municipal governments except for the U.S. Employment Service, and the system of state & local employment services receiving Federal assistance.

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compared with 35 percent of all male workers. At the lowest end of the salary scale, 14.4 percent of women, but only 5.7 percent of men, earned less than $3,000.[7]

Women have traditionally been employed in jobs which have less prestige or policy-making power than those to which men have access.[8] In 1969, women constituted 59 percent of all service workers, exclusive of private household employees.[9] A survey of industry conducted the same year revealed that while women account for more than 40 percent of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs.[10]

The startling disparities in income and employment opportunity between male and female workers cannot be explained by differences in education. In 1968, the median number of years of school completed by women in the total work force was 12.4 compared with 12.3 for working men.[11] Yet, women with four years of college education made only slightly more than men with an eighth grade education.[12] Nor can the disparities be explained by the assumption that women work only for their personal interests, rather than for their livelihood. In 1969, at least 12 million women,

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[7]U.S. Department of Labor, Women's Bureau: "Fact Sheet on the Earnings Gap" (Feb. 1971).

[8]Recruiting policies are in part responsible for the concentration of women in less prestigious jobs. For example, a 1969 survey showed that of 208 companies recruiting at Northwestern University, only 63% were considering female graduates. "Special Report: Why Doesn't Business Hire More College Trained Women?" in *Personnel Management–Policies & Practices* (April 1969), reprinted in *Education Hearings,* Part 1, at 174.

[9]U.S. Dept. of Labor, *supra* note 7.

[10]Equal Employment Opportunity Report No. 1, "Job Patterns for Minorities and Women 1966" (1969).

[11]U.S. Dept. of Labor, Women's Bureau, "Background Facts on Women Workers in the United States" 11-12, 1970.

[12]President's Task Force, *supra* note 1.

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or 40 percent of working women, were self-supporting; further, 5.4 million families were totally dependent on the earnings of women.[13] The conclusion is inescapable that the inferior economic position of working women is the direct result of pervasive sex discrimination in both the private and the public sector. This discrimination has massive adverse impact on the economy of the entire nation, as well as on the lives of working women and on the people who look to them for economic support.

Sex Discrimination in Education

Another area in which state action contributes directly to sex discrimination is in the educational field. Colleges and universities have a critical role in determining employment opportunity for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country.

Such discriminatory practices are inextricably tied to government both at the State and federal level, in that even privately endowed institutions receive substantial federal assistance directly through specific grants or indirectly through service contracts, research grants, and student loan programs. Further, the vast majority of college graduates come from state supported institutions, some of which expressly discriminate against women. The University of North Carolina at Chapel Hill, for example, published in the fall of 1969 a "Profile of the Freshman Class" which stated that "admission of women on the freshman level will be restricted to those who are especially well qualified." At Texas A & M, a land-grant, state-supported university, women students are admitted only for summer school sessions, and never to the regular academic curriculum, unless they are

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[13] U.S. Dept. of Labor, *supra* note 11; U.S. Dept. of Labor, Bureau of Labor Statistics: Monthly Labor Review (May 1970).

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related to employees or students, and they wish to pursue a course of study otherwise unavailable.

Discrimination against women does not end with admission to college or graduate school; it pervades every level of the teaching profession. Although more than two-thirds of the teachers in public elementary and secondary schools are women, they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. A recent survey by the National Education Association reported that of 13,000 school superintendents, only 2 were women.[14]

At the college faculty level, sex discrimination becomes even more pronounced. A report on the distribution of women faculty at ten high endowment institutions of higher education in 1960 showed that the proportion of women faculty ranged downward from 9.8 percent of instructors to 2.6 percent of full professors.[15] A survey of 188 major departments of sociology revealed that women accounted for 30 percent of the doctoral candidates, but comprised only 4 percent of full professors and 1 percent of departmental chairmen.[16] Similar studies conducted in public and private colleges and universities throughout the country con-

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[14]Testimony of Dr. Peter Muirhead, Associate Commissioner of Education, Dept. of Health, Education & Welfare, *Education Hearings*, Part 2, at 644.

[15]See *Education Hearings* for statistical reports & statements on the status of women at the following colleges & universities: Brandeis at 336; Univ. of Buffalo, SUNY, at 212; Cal. State College at Fullerton, at 202; Univ. of Cal. at Berkeley at 1143; Univ. of Chicago at 753, 994; Columbia Univ. at 242, 260; Cornell Univ. at 1077-78; Eastern Ill. Univ. at 1222, 1223; Harvard Univ. at 183; Univ. of Illinois at 1225; Kansas State Teachers College at 1226; Univ. of Maryland at 1024; N.Y.U. Law School at 584; Univ. of Wisconsin at 190.

[16]Rossi, "Status of Women in Graduate Departments of Sociology 1968-69," 5 *American Sociologist* 1, Feb. 1970.

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firm this dismal picture of pervasive sex discrimination in the academic world.[17]

Sex Discrimination in State Regulatory and Criminal Laws

Although shockingly archaic in the second half of the twentieth century, State laws which severely restrict the activities of married women in the business and professional world continue to exist. Four States require a married woman to obtain a court order before establishing an independent business. Eleven States place special restrictions on the right of a married woman to contract. In three States, a married woman cannot become a guarantor or surety. In only five States does she have the right to establish her own domicile. In seven of the eight community property States, the husband has control over the community property.[18]

State laws also discriminate against women in other ways. In many States, only a woman can be prosecuted for prostitution, and only her conduct, not her male partner's, is criminal. Female juvenile offenders are also subjected to a double standard; in New York State, for example, they can be declared to be "persons in need of supervision" for non-criminal acts until age 18, while boys are covered by the statute only until age 16.[19] Yet most States permit girls to marry without parental consent at an earlier age than boys, presumably because of some State determination that early marriage is more appropriate and proper for women than for men.

Similar assumptions are reflected in State criminal laws which discriminate against women. In Arkansas, for example, a woman can be sentenced to 3 years in jail for habitual

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[17]Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 Valparaiso U. L. Rev. 237, 247-268 (1971).

[18]These statistics are drawn from Freeman, The Legal Basis of the Sexual Caste System, 5 Valparaiso U.L.Rev. 203, 210-216 (1971).

[19]New York Family Court Act, § 712(b).

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drunkenness, while a man can receive only 30 days for the same offense.[20] In Texas and Utah, the defense of "passion killing" is allowed to the wronged husband, and not to the deceived wife.[21]

The provisions of Idaho and Louisiana laws challenged in the cases at bar are further examples of invidious sex discrimination perpetuated by State action. In light of the pervasive nature and adverse effect of sex discrimination throughout American society, such laws should be subjected to the most rigorous judicial scrutiny under the Fourteenth Amendment.

II

IN THE PAST, THIS COURT HAS SANCTIONED SEX DISCRIMINATION WHENEVER IT WAS THOUGHT TO BE BASED UPON SOME "REASONABLE" GROUND.

Since the ratification of the Fourteenth Amendment in 1868, numerous cases challenging State practices and laws perpetuating sex discrimination have been brought before this Court. Yet despite evidence that sex discrimination is at least as invidious, pervasive, and damaging as racial discrimination, this Court has never struck down any law because it denied the Equal Protection of the Laws to either sex. Because this Court has found every instance of sex discrimination to be "reasonable" and therefore—according to its standard—constitutional, the Equal Protection Clause has been effectively rendered a nullity as far as sex discrimination is concerned.

The first significant case involving sex discrimination was *Bradwell v. Illinois,* 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to

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[20] Ark. Stats. Ann., §§ 46-804, 48-943.

[21] Texas Penal Code 1220; Utah Code § 76-30-10(4).

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allow women to practice law.[22] Although the Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, the presumptions and attitudes which were to govern later decisions sanctioning sex discrimination were already apparent:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. (Bradley, J., concurring, 83 U.S. at 141)

Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in *Minor v. Happersett,* 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

The test of "reasonableness" for determining the validity of sex discrimination under the Fourteenth Amendment was first expressly stated in the landmark case of *Mueller v. Oregon,* 208 U.S. 412 (1908), which upheld an Oregon maximum hour law for women. It is ironic that *Mueller,* which represented the most progressive thinking of its time, should have become the cornerstone of a judicial philosophy which upheld almost all forms of discrimination against women as "reasonable," and therefore not in violation of the Equal Protection Clause.

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[22] See also *In re Lockwood,* 144 U.S. 116 (1893), in which the Court held that the Fourteenth Amendment did not prohibit Virginia from denying women admission to practice before the highest state court.

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In *Mueller* the Court was responding to the demonstrated need for legislative protection of working conditions, a protection which it subsequently upheld for both men and women. *Bunting v. Oregon,* 243 U.S. 426 (1917). Yet the assumptions about women on which the Court based its decision in *Mueller* have become firmly entrenched in judicial doctrine. Finding that the apparent difference in physical endurance and strength between men and women justified the State's restriction on women's right to work, the Court stated:

> That woman's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . 208 U.S. at 421.

Under similar reasoning, the Court sustained other restrictive labor laws for women in subsequent years as "reasonable" under the Fourteenth Amendment. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (minimum wage law for women upheld as reasonable exercise of State's police power); *Radice v. New York,* 264 U.S. 292 (1924) (law prohibiting night-time employment of women in restaurants not unreasonable or arbitrary classification); *Miller v. Wilson,* 236 U.S. 375 (1915) (women's eight-hour labor law not an arbitrary invasion of liberty of contract nor unreasonably discriminatory).

Applying the standard of "reasonableness," the Court failed to find constitutional fault with later labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart v. Cleary,* 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court reasoned that,

> Bartending by women, may, in the allowable legislative judgment, give rise to moral and social prob-

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> lems against which it may devise preventive measures. Since the line drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to monopolize the calling. 335 U.S. at 466-467.

The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied. It specifically refused to consider whether the statute might reflect an "unchivalrous desire" of males to monopolize the bargending trade—as the Court itself noted. Moreover, the Court's concern for protecting women from the noxious "moral and social" influences of the barroom was misplaced, since Michigan permitted women to work in bars, prohibiting them only from employment as bartenders. Furthermore, the statute itself exempted the wives and daughters of bartenders from its supposed protection.

More recently, in *Hoyt v. Florida,* 368 U.S. 57 (1961), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment, since it was reasonable

> . . . for a state, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. 383 U.S. at 62.

It is this predetermined, generalized conception of the nature and role of women that underlies the Court's past decisions finding sex discrimination a "reasonable" exercise of the State's police power. Women as a group have been judically viewed primarily as being limited to the home and family. Further, they have been regarded as weaker in strength and endurance than men and as less able to protect

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themselves against moral corruption and economic exploitation. While this view may be accurate for some women, it might also be accurate for some men. As a generalization, it is clearly inapplicable to the vast majority of women in our society today. Because of the continued application of this outdated conception of the role and nature of women, the majority of our population has been subjected to massive discrimination in the labor market, in education, and in virtually every significant aspect of American life.

In the 63 years since *Mueller* was decided, there has been great progress in securing adequate protection for all people in the labor force. The need for government to establish protective discriminatory legislation has been overcome by progress in the private sector, primarily through the recognition and use of collective bargaining to protect the interests of workers. The benevolent intent of *Mueller* is no longer needed today; in fact, the sex discrimination which the Court upheld in *Mueller* has become a pernicious force in excluding women from the full range of opportunity available to men. The Equal Protection Clause is flexible enough to incorporate this change. State action which perpetrates sex discrimination should no longer be subjected to the test of "reasonableness;" rather, it should be subjected to the most rigorous judicial scrutiny under the Fourteenth Amendment.

III. THERE IS INCREASING RECOGNITION IN THE COURTS AND THROUGHOUT AMERICAN SOCIETY THAT SEX DISCRIMINATION CAN NO LONGER BE JUSTIFIED.

In the past few years, there has been significant and substantial recognition throughout our society that sex discrimination can no longer be tolerated. Increasingly, the American people have come to recognize that it is neither constitutionally permissible nor morally justifiable to subject the majority of our population to second-class status. This growing trend to reject sex discriminatory practices is apparent in the following areas:

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Title VII enforcement actions.

In August 1969, the Equal Employment Opportunity Commission, which administers Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1964), ruled that State laws which restrict the employment of women are invalidated by Title VII. 29 C.F.R. 1604.1 (1970).

Following the lead of the Commission, the Federal courts have struck down a number of State restrictive laws and private discriminatory practices. Although Title VII does not apply "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation" of a particular business or enterprise, 42 U.S.C. 2000e-2(e) (1964), the Court of Appeals for the Fifth Circuit, in the landmark case of *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), construed this exemption very narrowly. The Court held that the company could not rely on an arbitrary weight limit to justify its refusal to promote women unless it could show "that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

The Court stated that hiring and promotion rules differentiating on the basis of sex were generally unacceptable under Title VII: "Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks." 408 F.2d at 236.

The Seventh Circuit Court of Appeals followed the *Weeks* lead in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). The Court held that Title VII proscribed a company-imposed weight restriction applied to women only, and specifically stated that the company could retain the weight lifting limit only if it were applied as a general guideline to all employees, male and female alike.

Perhaps the most significant decision in this area is *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971). The Court of Appeals for the Fifth Circuit had held below that

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Title VII allowed an employer to refuse to hire mothers of pre-school age children, since sex was not the only factor involved in the decision. 411 F.2d 1 (5th Cir. 1969). This Court granted *certiorari*, making *Phillips* the first case of sex discrimination under Title VII to be heard by the Supreme Court. In a unanimous decision, this Court ruled that the Fifth Circuit had erred in interpreting Title VII as permitting one hiring policy for women and another for men—each having pre-school age children. In remanding for a fuller development of the record, the Court held that Title VII requires persons of like qualifications be given employment opportunities irrespective of their sex. Like *Phillips*, the cases at bar present another fundamental question of degree in dealing with substantial allegations of sex discrimination.

Within the past few months, the Court of Appeals for the Ninth Circuit in *Rosenfeld v. Southern Pacific Company*, 3 FEP Cases 604 (June 1971), has struck down a California weight and hours law which applied only to women, finding that Title VII was intended to invalidate just such discriminatory laws. The Court stated, "The premise of Title VII . . . is that women are now to be on an equal footing with men . . . Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity." 3 FEP Cases at 608.

Another important recent decision from the Ninth Circuit in the area of employment discrimination is *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971).[23] While remanding a challenge to a California maximum hours law for women brought under both the Fourteenth Amendment and Title VII, the Court struck a blow at the continuing viability of *Mueller v. Oregon, supra*. It pointed out that the employment conditions which led to the *Mueller* decision are no longer wholly relevant today.

[23] *Mengelkoch v. Industrial Welfare Commission*, 284 F. Supp. 950 (C.D. Calif.), *vacated*, 393 U.S. 83, *rehearing denied*, 393 U.S. 993 (1968), *rev'd and remanded*, 437 F.2d 563 (9th Cir. 1971), *rehearing denied*, 3 FEP Cases (May 3, 1971).

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As the Court stated, "Women still differ physically from men and still perform maternal functions. It may be seriously questioned, however, whether some or all of the other conditions referred to in the *Mueller* opinion exist today or, if they do exist, whether they have the same importance as was attributed to them sixty-two years ago." 437 F.2d at 567.

The Federal District Courts have also struck down a number of State restrictive labor laws applicable only to women on the ground that such laws conflict with Title VII and are therefore invalid under the Supremacy Clause of the United States Constitution.[24]

As the Courts have recognized in striking down sex discrimination in employment, working conditions have improved dramatically in the past 63 years. Since 1908 when *Mueller* first established the validity of restrictive labor laws for women, the overriding and understandable concern for protecting women and children from harmful working conditions has been the motive force in leading the Courts to avoid a strict application of the Fourteenth Amendment to sex discrimination. It is undeniable, however, that collective bargaining has become an effective means of protecting workers from exploitive employer practices. Thus, the cases which have arisen under Title VII in the past few years should be viewed not only as interpretations of Title VII;

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[24] *Kober v. Westinghouse Electric Corp.*, 3 FEP Cases 326 (W.D. Pa. 1971) (Penn. statute limiting hours of work of female employees invalid); *Ridinger v. General Motors Corp.*, 3 FEP Cases 280 (S.D. Ohio 1971) (Ohio weight and hours law applicable only to women invalid); *Garneau v. Raytheon Co.*, 3 FEP Cases 215 (D. Mass. 1971); (Mass. law limiting maximum hours of employment for women invalid); *Local 246, Utility Workers v. Southern Calif. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970) (California law prohibiting female employees to lift over 50 pounds invalid); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970) (Ill. Female Employment Act hours limitation void); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) (Order of state wage and hour commission setting 30 pound lifting limit for women employees invalid).

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they should also be viewed as implicitly giving judicial recognition to the fact that "protective" legislation for women is no longer necessary or appropriate. The United Auto Workers, one of the largest and most progressive labor unions in the country, has long recognized that State protective laws have been used by employers to deny women as a class opportunities to work overtime, to bid on certain jobs, work in certain departments and on certain shifts, regardless of the fact that an individual woman might have had the seniority, skill and ability which should have been recognized in any of these situations. See UAW Administrative letter, Vol. 21, No. 10, Nov. 6, 1969, reprinted in Hearings on the Equal Rights Amendment Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2nd Sess., at 595 (May 1970). The UAW has urged strict enforcement of Title VII and has strongly supported all efforts to eradicate sex discrimination, especially through the adoption of the Equal Rights Amendment. Mrs. Olga Madar, Vice-President of the UAW, testifying for the adoption of the Equal Rights Amendment, stated that ". . . a very strong tide is running in behalf of the proposition that American women, while they may like candy and roses, really need basic rights still denied them. Rights not roses is the watchword for an increasing number of American women . . ." *Id.*, at 611.

Sex discrimination held unconstitutional.

In the past few years, courts across the country have increasingly recognized the unconstitutionality of State action which perpetuates sex discrimination. Many of these decisions are based squarely on the ground that sex discrimination must be reviewed under the strictest Fourteenth Amendment standard and that seldom if ever can such discrimination withstand careful judicial scrutiny.

Perhaps the most striking progress in eradicating sex discrimination is in the area of occupational restrictions. In effect, this Court's decision in *Goesart v. Cleary*, 335 U.S. 464 (1948), has been rejected by the Supreme Courts of

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New Jersey and California, and by the Federal District Court for the Northern District of Illinois. Each of these cases involved challenges to laws prohibiting women from employment as bartenders, laws which were similar to the Michigan statute sustained by this Court in the *Goesart* decision, held that the sex discrimination embodied in such occupational restrictions could not be sustained under the Fourteenth Amendment. *McCrimmon v. Daley,* 2 FEP Cas. 971 (N.D. Ill. 1970); *Sail'er Gun, Inc. v. E.J. Kirby,* 3 CCH Employment Practices Decisions, para. 8222 (Cal. Supreme Court, 1971); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970).

Some of the principal cases striking down sex discrimination in other areas can be grouped in the following categories:

(1) *Criminal law:* Longer prison terms for women than for men convicted of the same crime have been declared unconstitutional under the Fourteenth Amendment. *United States ex rel. Robinson v. York,* 281 F. Supp. (D. Conn. 1968) (differential sentencing laws for men and women constitute "invidious discrimination" against women in violation of the Equal Protection of the laws guaranteed by the Fourteenth Amendment), *Commonwealth v. Daniel,* 430 Pa. 642, 243 A.2d 400 (1968) (statutory scheme fixing the maximum term of imprisonment for women but not for men convicted of the same crime creates an arbitrary and invidious discrimination in violation of the Fourteenth Amendment).

(2) *Public accommodation:* Exclusion of women from liquor licensed public taverns has been held to violate the Fourteenth Amendment. *Seidenberg v. McSorleys' Old Ale House, Inc.,* 308 F. Supp. 1253 (S.D.N.Y. 1969). See also, *Mollere v. Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969), in which a federal court held unconstitutional a requirement that unmarried women under 21 live in the State college dormitory when no such requirement was imposed on men.

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(3) *University exclusion:* Exclusion of women students from state-supported "prestige" institutions has been held to violate the Fourteenth Amendment Equal Protection guarantee. *Kirstein v. Rector and Visitors of University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970).

(4) *Mandatory maternity leave:* A regulation requiring a female teacher to leave her job in the fifth month of pregnancy has been held to violate her right to Equal Protection. *Cohen v. Chesterfield County School Board,* Civ. Action No. 678-79-R (E.D. Va. May 17, 1971).

(5) *Exclusion from promotion examination:* The exclusion of policewomen from the examination required for promotion to sergeant solely because of sex has been struck down as an impermissible denial of constitutional rights. *Matter of Shpritzer v. Lang,* 234 N.Y. Supp. 2d 285 (1st Dept. 1962), *aff'd* 13 N.Y.2d 744, 241 N.Y. Supp. 2d 869, 191 N.E.2d 919 (1963).

(6) *Inheritance tax:* Inheritance tax imposed on certain property when devised by husband to wife, but not when devised by wife to husband, has been held to violate the Equal Protection guarantee. *In re Estate of Legatos,* 1 Cal. App.3d 657, 81 Cal. Rptr. 910 (1969).

(7) *Jury service:* The statutory exclusion of women from jury service has been held to violate the Fourteenth Amendment's Equal Protection Clause. *White v. Crook,* 251 F. Supp. 401 (N.D. Ala. 1966).

The judicial trend apparent from even this small sample of cases is clear. Courts across the country are beginning to recognize that laws or practices which subject women to differential or inferior treatment because of their sex are no more constitutionally permissible than other forms of invidious discrimination, particularly racial discrimination. In striking down sex discrimination, some courts have adopted the "rigid scrutiny" test of the strictest Fourteenth Amendment Equal Protection standard.

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Increased pressure for adoption of an Equal Rights Amendment to the United States Constitution.

The growing recognition that fundamental changes must be made in the legal status of women in this country is reflected in the widespread support for an Equal Rights Amendment. Although such an amendment has been introduced in Congress for the past 48 years, the mounting pressure in recent years to eradicate sex discrimination resulted in its adoption last year by the House of Representatives. The Amendment failed in the Senate by only a narrow margin.

Much of the motive force behind the proposed Amendment is due at least in part to the past unwillingness of this Court to apply the Fourteenth Amendment Equal Protection guarantee to cases of sex discrimination, as demonstrated by *Goesart v. Cleary,* 335 U.S. 464 (1948), and *Hoyt v. Florida,* 368 U.S. 57 (1961). As a result, many women feel that the right for full legal equality cannot be won in the courts. As Congresswoman Martha Griffiths stated in her recent testimony in support of the Equal Rights Amendment:

> You may ask why a constitutional amendment is needed to correct the problem of unfair sex discrimination. Why won't the Fourteenth Amendment do the job? Because the Fourteenth Amendment has been with us since 1868, and in all those years the Supreme Court has never once held unconstitutional a law which discriminated on the basis of sex. No woman has ever won a case before the Supreme Court on the Fourteenth Amendment. Hearings on the Equal Rights Amendment Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92nd Congress, 1st Session, ser. 2, at 41 (March 1971).

Many other women who testified in support of the Equal Rights Amendment expressed similar views on the Court's unwillingness to strike down sex discrimination under the Fourteenth Amendment. They also recognized, and we agree

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that when this Court does act to end sex discrimination, an Equal Rights Amendment would still be desirable, if only because of its immense symbolic value. As Caroline Byrd, author of "Born Female," has stated:

> Even if the equal rights amendment did nothing but state the principle, it would be worth it . . . the time has come when this . . . amendment is both needed and politically feasible. Women are beginning to see their situation. They can never go back so we must all go forward. Hearings on the Equal Rights Amendment Before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess., at 347 (May 1970).

State legislative action to end sex discrimination.

An equally significant indication of the growing recognition that sex discrimination can no longer be tolerated in our society is the increasing number of States that have voluntarily rescinded or invalidated restrictive labor legislation which applies only to women. In 12 States attorneys general have ruled that Title VII and state fair employment practices legislation supercedes state legislation restricting the employment of women. Since the effective date of Title VII, July 2, 1965, eight States and the District of Columbia have amended or repealed discriminatory legislation, thereby substantially expanding employment opportunities for women.[25] It seems clear that State governments as well as federal and State courts are coming to recognize that sex discrimination is anachronistic and unjustifiable both because of the broad application of Title VII and because of the unconstitutional nature of such discrimination.

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[25] These statistics are drawn from Task Force on Labor Standards, *Report to the Citizens' Advisory Council on the Status of Women* 56-58 (1968), and Ross, "Sex Discrimination and Protective Labor Legislation," in Hearings on the Equal Rights Amendment Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92nd Cong., 1st Sess., at 186 (1971).

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Elimination of sex discrimination at all levels of American society.

Women now participate in occupations and activities which were unthinkable in even the recent past. They serve as pages in the U.S. Senate, work as professional clowns and jockeys, and even play professional football. The U.S. Army and Air Force have recently sworn in the first women Generals. The Executive Protection Service, an arm of the United States Secret Service, has hired a women agent. Many religious orders are opening their highest ranks to women.

The trend towards eliminating sex-role stereotypes has increased the number of opportunities available for men as well as for women. Men now work as nurses, airline attendants, and nursery school teachers, professions previously considered to be particularly limited to women.

Organizations and institutions which have traditionally been almost exclusively male have begun to recognize the need to afford women greater representation. Only this year, the National Press Club admitted women members for the first time in its 50 year history. The New York Stock Exchange, exclusively male for 176 years, now permits a woman to hold a seat on the Exchange. The Democratic National Committee recently adopted a resolution that women be represented in State delegations in reasonable relationship to their presence in the populations of each State. The Republican National Committee last month recommended that each State delegation have equal representation of men and women. The American Bar Association has established a new committee on rights for women.

In short, there has been significant, substantial recognition throughout our society that sex discrimination can no longer be tolerated. Increasingly, the American people have come to recognize that women, like all citizens, must be accorded equal treatment under law and equal access to opportunities in every field of endeavor. In harmony with these developments, this Court should explicitly hold

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that State laws discriminating on the basis of sex will be subjected to the "most rigid scrutiny," as required by the Fourteenth Amendment.

IV. THIS COURT SHOULD REVIEW CASES INVOLVING SEX DISCRIMINATION WITH THE "MOST RIGID SCRUTINY," IN ORDER TO STRIKE DOWN STATE ACTION WHICH DISCRIMINATES ON THE BASIS OF SEX, JUST AS THIS COURT HAS STRUCK DOWN OTHER FORMS OF PERSONAL DISCRIMINATION AFFECTING FUNDAMENTAL HUMAN FREEDOMS, PARTICULARLY RACIAL DISCRIMINATION.

The Fourteenth Amendment forbids any State to "deny to any person within its jurisdiction the Equal Protection of the laws." State power to prescribe regulatory laws, including laws which determine the right to administer an estate and the right to serve on juries, is limited by the Equal Protection Clause. This Court has traditionally recognized that when fundamental individual rights are infringed by State action, such action must be "carefully and meticulously scrutinized" under the Fourteenth Amendment.

Thus, in *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court held unconstitutional a State apportionment scheme not based substantially on population, stating that

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature . . . (A)ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. 377 U.S. at 561-62.
>
> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown v. Board of Education,* 347 U.S. 483, or

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> economic status, *Griffin v. Illinois,* 351 U.S. 12, *Douglas v. California,* 372 U.S. 353. *Id.* at 566.

One year after *Reynolds,* this Court struck down a State limitation on voting qualification in *Carrington v. Rash,* 380 U.S. 89 (1965), reasserting the principle that State action which infringes "matters close to the core of our constitutional system" cannot be sustained under the Equal Protection Clause. The Court stated ". . . By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." 380 U.S. at 96.

The standards of Equal Protection are not static, but move with the times. Thus, in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966), in which the Court held unconstitutional the Virginia poll tax, the Court stated

> the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, . . . Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change. 383 U.S. at 669 (emphasis in original).

Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause have changed dramatically in the past 50 years. Within the expanding concept of Equal Protection, this Court has subjected an increasing number of State laws which impair the exercise of fundamental rights to the strictest Fourteenth Amendment review. Further, this Court has recognized that State infringement of fundamental rights cannot be justified when such limitation of personal freedom is applicable only to one specific group within the community.

Thus, in *Truax v. Raich,* 239 U.S. 33 (1915), this Court invalidated a State law which discriminated against aliens in private employment. In *Takahashi v. Fish & Game Com-*

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mission, 334 U.S. 410 (1948), the Court held that California could not prohibit aliens from making a living by fishing off the State shore line, stating that

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws. 334 U.S. at 420.

Just last Term this Court struck down State laws which deny welfare benefits to resident aliens or require them to meet longer residence requirements than citizens in order to qualify for welfare benefits. *Graham v. Richardson,* 39 U.S.L.W. 4732 (1971).

Nor can a State deny fundamental rights to citizens because of their poverty. Thus, in *Griffin v. Illinois,* 351 12 (1956), this Court held that Illinois could not block effective appellate review for the indigent by refusing to furnish them trial transcripts without cost. And in *Douglas v. California,* 372 U.S. 353 (1963), this Court overturned a California rule of criminal procedure limiting free counsel for indigent defendants on appeal to those cases in which the court, after a preliminary screening of the case, thought counsel would be useful. More recently, in *Shapiro v. Thompson,* 394 U.S. 618 (1969), the Court struck down a one-year State residency requirement for welfare benefits, stating that

> Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* State interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause. 394 U.S. at 638 (emphasis in original).

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court ruled that the State's interest in minimizing administrative costs did not justify the termination of welfare benefits without

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a prior hearing. And last Term in *Boddie v. Connecticut,* 401 U.S. 371 (1971), the Court held that a State could not deny access to the courts in divorce cases solely because of a party's inability to pay court costs.

The most significant use of the Equal Protection Clause within the past twenty years, of course, has been in the area of racial discrimination. In response to the clearly adverse economic, social, and cultural impact of racial discrimination on our society, this Court in 1954 announced the landmark decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), which outlawed racial segregation in the public schools. Relying on the Equal Protection Clause, the Court stated:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. 347 U.S. at 495.

Since the *Brown* decision, the Court has strictly applied the Fourteenth Amendment to all cases involving racial discrimination. Thus, in *McLaughlin v. Florida,* 379 U.S. 184 (1964), the Court struck down a State law prohibiting cohabitation of unmarried couples of different races, stating that

> (T)he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. 379 U.S. at 192.

The Court used similar language about the reach of the Equal Protection Clause to strike down a State anti-miscegenation law in *Loving v. Virginia,* 388 U.S. 1 (1967):

> Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of

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> equality.' At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . 388 U.S. at 11 (citations omitted).

More recently, in *Hunter v. Erikson,* 393 U.S. 385 (1969), the Court held unconstitutional a city charter amendment imposing special barriers to the enactment of fair housing ordinances. Reasserting the principle that State imposed deprivations of fundamental rights must be subjected to the most rigorous judicial scrutiny, the Court said

> Because the core of this Fourteenth Amendment is the prevention of meaningful and justified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications. 393 U.S. at 391-92 (citations omitted).

Sex discrimination has had at least a substantial an adverse impact on our society as the other forms of discrimination which this Court has struck down under the Fourteenth Amendment. Women have as great a claim to the protection of the Fourteenth Amendment as do aliens, indigents, and members of racial minorities. As demonstrated above, women have been subjected to pervasive, invidious discrimination in employment, in education, and in every field of endeavor. Their basic rights as citizens have been denied through the operation of archaic, discriminatory State laws and practices which have reduced them to inferior status as second-class members of this society.

Until the Court recognizes women as persons entitled to the full Equal Protection of the Laws, they will continue to be denied the equality of treatment basic to our concept of democracy. The challenged provisions of Idaho and Louisiana law perpetuate the legal inequality accorded women throughout our history: they preclude women from the exercise of basic statutory rights because of erroneous

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legislative assumptions about the nature and capabilities of women as an entire class. In harmony with this Court's previous holdings that laws which deny fundamental human rights must be subjected to the most thorough judicial scrutiny, State action which perpetuates sex discrimination should be held unconstitutional.

V. UNDER THE FACTS OF THE CASES AT BAR, AND UTILIZING THE RIGID SCRUTINY DEMANDED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE CHALLENGED STATE ACTION MUST FALL.

A. The Absolute Preference Given by Section 15-314, Idaho Code, to Males Over Females As Between Persons Equally Entitled to Administer an Estate, Is Invalid Under the Equal Protection Clause.

As indicated by the court below, Section 15-314 embodies a legislative judgment that men are in general better qualified to act as administrators than are women. No evidence was provided, however, that the male contestant, as an individual, was more capable in financial matters than the female contestant, appellant herein. Thus, on the basis of a vast and inaccurate legislative classification, appellant was deprived of the substantive right to administer the estate of her deceased son.

It is precisely this type of sweeping legislative classification based on sex that this Court should subject to the most careful judicial review. Even on its face, the legislative assumption underlying Section 15-314—that women are generally less able than men to administer an estate—is invalid. As discussed above, the participation of women in the business world has grown dramatically in the past decade. Further, women represent an increasingly significant portion of those professions particularly related to financial management. In 1968, women constituted 20 percent of the total

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number of accountants in this country, 10 percent of the total number of mathematicians, and 33 percent of the total number of statisticians.[26] In light of the demonstrated competence of some women to perform these highly technical jobs, the Idaho legislature was clearly proceeding on unwarranted, inaccurate assumptions about the abilities of women as a class.

Moreover, it is questionable whether extensive business experience is necessary for the performance of the duties of an administrator under the Idaho Code. The Code confers very limited authority upon the administrator, and empowers the court to supervise the estate closely during the entire period of administration. It is probable that most women, many of whom handle the daily financial affairs of their family units, would be as qualified to perform the duties of an administrator as most men would be.

Although the Idaho Supreme Court recognized that Section 15-314 discriminates against women on the basis of sex, it sustained the provision as a legitimate exercise of the State's interest in curtailing litigation over the appointment of administrators. The court stated,

> While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. 465 P.2d 635, 638 (1970).

However, Section 15-314 achieves the presumed legislative objective of curtailing litigation *only* when a contest arises between males and females who are otherwise equally qualified under the Idaho Code to administer an estate. In most situations in which there are more than one contestant from the same eligibility class, hearings must be held. In fact, the Idaho Code invites hearings by providing that "any person interested" may challenge the competency of an admin-

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[26]U.S. Dept. of Labor, Bureau of Labor Statistics: Occupational Handbook Bulletin No. 1650 (1970).

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istrator. Idaho Code, Sec. 15-322. It is only when one of the contestants within an eligibility class is female that the absolute statutory preference for males operates, thus eliminating the necessity for hearings.

This Court has held that certain basic statutory rights cannot be sacrificed to considerations of administrative efficiency. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court ruled that the Fourteenth Amendment requires that hearings be held before welfare benefits are terminated, even if such hearings cause the State substantial expense and administrative inconvenience. More recently, in *Boddie v. Connecticut,* 401 U.S. 371 (1971), the Court held that the Fourteenth Amendment prohibits a State from denying indigents access to the courts in divorce cases solely because of their inability to pay court fees and costs. The Court reasserted the fundamental principle that:

> The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due. 402 U.S. at 380.

Idaho, by automatically preferring male over female contestants as between persons equally qualified to administer an estate, has denied petitioner the right to a hearing on her individual capabilities as an administrator. This statutory denial of an opportunity to be heard was justified by the court below solely on the grounds of administrative convenience. Such a deprivation of fundamental rights because of sex cannot withstand the strict judicial scrutiny required by the Fourteenth Amendment.

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B. The Exclusion of Women From Juries Through the Operation of Article 402, Louisiana Code of Criminal Procedure, Is Invalid Under the Equal Protection Clause.

The Louisiana statute raises two different but related Fourteenth Amendment issues for the Court's consideration: first, whether the Equal Protection Clause permits a State to establish a different system of jury selection for women than for men; and second, whether petitioner's right to due process was violated by the operation of a State law which systematically excludes women from juries.

The challenged provision places an affirmative burden on women who wish to serve on juries by excluding them automatically from jury duty unless they file with the Court a declaration of willingness to serve. This statutory burden is made even greater by the official interpretation of Article 402. The jury commissioners obtain an initial list of potential jurors from a variety of sources and preliminary questionnaires to determine eligibility. However, questionnaires are deliberately not sent to women. As a result of this official policy, the jury list, the grand jury venire, and the grand jury that indicted petitioner contained no women at all, even though women constitute a majority of the persons eligible to serve in Lafayette Parish. Thus, the effect of the challenged provision is to exclude systematically all women from jury service.

Through the operation of Article 402, all women are placed in an inferior position to exercise their right to serve on juries. Jury service is a fundamental prerequisite of citizenship; it is generally denied only to those groups who are considered to be incapable or untrustworthy, such as felons and mental incompetents. In Louisiana, women are placed in a similarly excepted category. Thus, the effective exclusion of women from jury service clearly labels them as second-class citizens.

Presumably, the legislative assumption underlying the challenged provision is that women as a class are more likely

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than men to have family responsibilities that would make jury service a hardship. It was precisely such a purpose that this Court found constitutionally permissible in *Hoyt v. Florida,* 368 U.S. 57 (1961), holding that a State could reasonably conclude "that a woman should be relieved of jury service unless she herself determines that such service is consistent with her own special responsibilities." 383 U.S. at 62. *Amicus* submits that *Hoyt* was wrongly decided.

Although *Hoyt* also involved a statute which did not absolutely prohibit women from serving on juries, the operation of the Florida statute did not exclude women as systematically as does the challenged Louisiana provision. In *Hoyt* the Court found that there were women on the jury rolls in the county, and that efforts had been made to include all eligible women on the rolls. In the case at bar, no women whatsoever were included on the jury lists, and virtually no effort seems to have been made to solicit their participation. Thus, the Louisiana provision, as interpreted by the State, effectively prohibits women from serving on juries. This case is just as compelling as *White v. Crook,* 251 F. Supp. 401 (N.D. Ala. 1966). There, a three-judge Federal district court struck down an Alabama statute which absolutely excluded women from jury service. The Louisiana statute, like the Alabama statute in *White v. Crook,* should be viewed by this Court as "arbitrary in view of modern political, social and economic conditions . . ." 251 F. Supp. at 409.

The systematic exclusion of all women from juries in order to relieve those women whose family responsibilities might make jury service a hardship cannot be sustained under a strict application of the Fourteenth Amendment. It is precisely this type of vast legislative overclassification based on sex that the Court should not allow. First, many women do not have children to care for. Second, in some cases, as where the father is a widower, the absence of a male parent can be just as detrimental to a child's welfare as the absence of the female parent, and jury duty may place an equally great burden on him. Third, even when both parents are

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alive and well, the mother is not always the individual primarily responsible for child care. Thus, the Louisiana statute sweeps too broadly in effectively excluding all women from jury service if in fact its purpose is to relieve only those persons whose parental responsibilities would make jury service unduly onerous. A more effective and constitutionally permissible means of achieving this purpose would be to excuse from jury service those persons, male and female, whose family responsibilities preclude them from serving. By discriminating against women as an entire class, the statute effectively denies women the Equal Protection of the laws, and should be struck down.

The operation of the Louisiana statute also denies petitioner his due process right to a jury venire from which no class has been arbitrarily excluded. This Court has specifically recognized that a jury must be "a body truly representative of the community." *Carter v. Jury Commission of Green County,* 396 U.S. 320 (1970). A system of jury selection that totally excludes women cannot be said to be truly representative of the community. In *Ballard v. United States,* 329 U.S. 187 (1946), the Court applied this principle to the administration of federal jury selection statutes, finding that ". . . a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded," 329 U.S. at 194. In the case at bar, over half of the persons eligible for jury service were women. The systematic exclusion of this group from jury selection clearly denied petitioner his right to be judged by a cross-section of the community.

The denial of this fundamental constitutional right cannot be justified unless a compelling need for the classification is shown. *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). As discussed above, the State has not met the burden of demonstrating that the purpose of the statute, which presumably is to exempt women whose family responsibilities would make jury service unduly burdensome, cannot be met by more narrow means that will not result in the denial of

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basic constitutional rights. On the contrary, the Louisiana provision effectively excludes all women, regardless of their family responsibilities, from jury selection. Accordingly, this Court should strike down Article 402 under the strictest interpretation of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the "reasonableness" standard for reviewing State action which discriminates on account of sex should be abandoned. Such action should be subject to the very strictest scrutiny under the Equal Protection Clause. The challenged provisions of Louisiana and Idaho law which perpetuate invidious, unjustifiable sex discrimination should be struck down under the very strictest application of the Fourteenth Amendment. In *Reed v. Reed,* this Court should reverse the decision below so that an administrator can be chosen without regard to sex. In *Alexander v. Louisiana,* this Court should reverse the decision below so that petitioner may be indicted by a properly constituted grand jury.

Respectfully submitted,

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