BOOK REVIEW

A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT, by Rex E. Lee. Provo, Utah: Brigham Young University Press, 1980, pp. xiii+ 141. $18.50.

The proposed Twenty-seventh Amendment to the Constitution, popularly known as the Equal Rights Amendment ("ERA"),[1] has joined its predecessor ERA's in defeat. The failure to ratify by the necessary thirty-eight states marks the end of the most sustained of the numerous campaigns waged this century for a constitutional guarantee of equality for women.[2]

In the wake of the ERA's demise, Rex Lee's book, *A Lawyer Looks at the Equal Rights Amendment*,[3] is instructive, not as an academic postmortem on the Amendment itself, but as a bellwether of the future prospects for constitutional equality of women in America. Rex Lee is currently the Solicitor General of the United States. As the chief appellate lawyer for the federal government, Lee occupies a position of paramount importance in the formulation and enforcement of the Reagan administration's legal policies and positions in the area of civil rights.[4] A distinguished law graduate of the University of Chicago, Lee was the founding Dean of Brigham Young University's fledgling law school and served briefly as Chief of the Civil Division of the Justice Department under President Gerald Ford. He brings to his current job a reputation as an outspoken opponent of judicial activism, a devout Mormon, and an articulate adversary of ERA proponents.[5] Lee's efforts in this last regard have included service on the litigation board of the business-oriented "public interest" law firm that, during his board tenure, elected to represent Idaho and Arizona state legislators in their

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1. "SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SECTION 3. This amendment shall take effect two years after the date of ratification." *See* S.J. Res. 8, 92d Cong., 2d Sess. (1972), H.R.J. Res. 208, 92d Cong., 1st Sess. (1971), 86 Stat. 1523 (1972), 118 CONG. REC. 9598 (1972).

2. For an in-depth historical discussion, see S. BECKER, THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS (1981). *See also* L. KANOWITZ, EQUAL RIGHTS: THE MALE STAKE 61-74, 85-144 (1981).

3. R. LEE, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT (1980).

4. Pressman, *Rex Lee: Legal Soldier in the Reagan Crusade*, III W. L.J. No. 4, at 2, 2-3 (1982).

5. *Id.*

judicial challenge to Congress' three-year extension of the time period within which states could have ratified the ERA.[6]

The early chapters of Lee's book present a relatively dispassionate historical analysis of the legal status of women in the United States. Lee first engages in a short discussion of the nation's historically pervasive pattern of discrimination against women. Sketching out instances of early statutory and constitutional "relegation of women to a legal status similar to that of slaves,"[7] Lee notes that the very amendment intended to guarantee equality for blacks was the first to interject the word "male" into the Constitution.[8] He briefly touches on the initial stages of nineteenth century legislative reform of the Draconian restraints on the ability of married women to own, control, and transfer their property, to control their wages, to engage in employment outside the home, and to own and control businesses.[9] In a later chapter, Lee alludes to the continuing burdens imposed on women by these and numerous other statutory disabilities.[10]

Lee's argument against the ERA begins to take shape as he shifts his focus to constitutional history. He outlines the century of Supreme Court repudiation of challenges to sex-based legislation, brought first under the Fourteenth Amendment's privileges and immunities clause, subsequently under its due process provision, and ultimately, under its guarantee of equal protection.[11] Lee takes the position that the Court's continuing refusal, until 1971, to afford constitutional recourse for denial of women's rights understandably sparked the current drive for a constitutional amendment guaranteeing gender equality. One basic premise of Lee's argument against the ERA in 1980, however, is that a decade of decisions under the Court's newly adopted "intermediate scrutiny" test for gender-based Fourteenth Amendment equal protection claims has obviated the need for a constitutional amendment:

> Over the intervening decade [since 1971] the Supreme Court has developed a rather comprehensive body of case law dealing with sex discrimination. The standard is neither rational basis nor strict judicial scrutiny. It lies somewhere between the two. . . .
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> [I]t is beyond dispute that the big leap has already been made. One of the proper roles for a constitutional amendment in achieving reform is to make large changes, to reach new ground previously unexplored. With respect to sex discrimination, a change of that magnitude was needed in 1971. It had been needed for decades and even centuries prior to 1971, but nothing

6. *Id.* at 3.
7. R. LEE, *supra* note 3, at 4.
8. *Id.* at 6.
9. *Id.* at 5.
10. *Id.* at 69-73.
11. U.S. CONST. amend. XIV, § 1.

> had happened. Today, the situation is very different. There is no longer any question whether equality is constitutionally guaranteed to women. It is.[12]

In support of this position, Lee carefully traces for his lay audience the development and nature of an "intermediate scrutiny" test under the Fourteenth Amendment for sex-based classifications. Prior to 1971, he explains, challenges to gender-based classifications were doomed to failure because of the Court's use of the traditional "rational basis" standard of review in equal protection cases.[13] Lee explains how the strong presumption of legitimacy accorded to legislative enactments has been held to require persons challenging a legislative classification to prove that the distinction is not rationally related to any conceivable legitimate governmental objective, regardless of the state's actual basis in fact for creating the classification. By contrast, in cases where the nature of the classification is found to be "suspect," giving rise to the presumption that its purpose is invidious, a "strict scrutiny" test is applied. This requires the government to bear the burden of proving that the classification is necessary to the achievement of a compelling state interest. As Lee correctly concludes, few classifications can be found invalid under the former test, while virtually none will survive the latter.[14]

By 1971, the only "suspect" classifications subject to strict scrutiny were those based on race,[15] national origin,[16] and alienage.[17] Lee observes with approval that only a plurality of the Supreme Court held in 1973 that gender-based classifications were suspect classifications subject to strict scrutiny.[18] A majority of the Court has been marshalled only in support of the curious hybrid standard appropriately dubbed "intermediate scrutiny."[19]

Although the Court's decisions under this standard have been inconsistent and increasingly problematical, the test has generally been held to place the burden on the government[20] to prove that the sex-based classification is substantially related to achievement of an important governmental objective,[21] which must transcend mere administra-

12. R. LEE, *supra* note 3, at 83.

13. *Id.* at 23-25.

14. *Id.* at 11-12.

15. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879).

16. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954).

17. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

18. Frontiero v. Richardson, 411 U.S. 677 (1973).

19. R. LEE, *supra* note 3, at 23-31.

20. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 460 n.7 (1981); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979).

21. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

tive ease and convenience.[22] Further, the government must make a persuasive factual showing both that the classification closely serves the goal that was, in fact, the basis for the distinction,[23] and that a gender-neutral scheme would not serve the objective equally as well.[24] Finally, in scrutinizing classifications purportedly established to benefit women, the Court has attempted to draw a distinction between those whose purpose is "benign and compensatory," and therefore permissible, and those founded on "archaic and overbroad" generalizations as to the proper roles of women and men, and therefore constitutionally impermissible.[25] As discussed later in this review,[26] the continuing vitality of intermediate scrutiny, always a matter of doubt, has been seriously threatened by two recent decisions upholding, respectively, the exclusion of women from draft registration[27] and the exclusion of women from criminal liability for statutory rape.[28]

Lee's argument against the ERA evolves from his comparison of the theory that he believes to underlie intermediate scrutiny with the results he foresees to be the outcome of judicial scrutiny under the ERA. Purporting to rely on the Amendment's legislative history and on general principles of constitutional law, Lee first explores the probable standard of review that would be adopted by the courts in applying the ERA. He thereafter predicts the ERA's effect on existing law in the areas of compulsory military service, family law, education, and employment. The primary focus of his concern, however, centers on his conviction that the ERA will interfere with or invalidate governmental efforts to regulate sexual activity *per se* in three areas: criminal sanctions for rape, laws limiting the rights of homosexuals, and laws or customs barring maintenance of coeducational dormitories in state institutions of higher learning.[29] He is also deeply troubled by the ERA's implications for the future role of women in the draft and combat.[30]

Lee's argument against the ERA is based essentially on two seemingly contradictory propositions. On the one hand, he believes that the ERA lacks either practical or symbolic value because women have already achieved their constitutional guarantee of equality through the

22. *See, e.g.*, Frontiero v. Richardson, 411 U.S. at 690; Reed v. Reed, 404 U.S. 71, 76 (1971).

23. *See, e.g.*, Craig v. Boren, 429 U.S. at 200; Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975).

24. *See, e.g.*, Orr v. Orr, 440 U.S. at 280.

25. *See, e.g., id.* at 279; Stanton v. Stanton, 421 U.S. 7, 14 (1975); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

26. *See* text accompanying notes 76-91 *infra*.

27. Rostker v. Goldberg, 453 U.S. 57 (1981).

28. Michael M. v. Superior Court, 450 U.S. 464 (1981).

29. R. LEE, *supra* note 3, at 61-68.

30. *Id.* at 55-59.

intermediate scrutiny test.[31] On the other hand, Lee also opposes the Amendment on the ground that it will compel judges to enforce its mandate of equality by invalidating existing classifications based on sex, some of which he believes to be in the public interest and to enjoy wide public support. He states, for example, "Several American experiences of recent years—most notably the exclusion of women from draft registration in 1980—suggest that the national mood does not favor radical changes in limiting government's flexibility to treat women and men differently."[32] Later, he adds:

> [O]ur national legislators—who usually are a fair bellwether of national public opinion— . . . determined that even if compulsory military service were to be reestablished, it would not apply to women. Under the ERA Congress would not have had that choice. Even as to one of the few ERA consequences on which everyone agrees, therefore, the 1980 draft experience shows that our nation is not at a point of consensus.[33]

Regarding existing gender-based statutes regulating sexual conduct, Lee similarly notes:

> For some in our society, preservation of premarital virginity and avoidance of extramarital sex relations are moral values of the highest order. . . . Outmoded or not, they are important values to the people that hold them. The inability of state legislatures to use their best judgment in protecting against intrusion on such values would diminish individual dignity and liberty.[34]

He concludes that, "[T]he greater need is for flexibility in determining what kinds of distinctions between men and women are really in our national interests, and what kinds are not."[35]

These excerpts aptly indicate Lee's position on the constitutional rights of women. First, he believes that state-sanctioned distinctions between men and women are and should be constitutionally permissible in an ill-defined group of cases in which a court finds the classification to be in the national interest. This finding turns in substantial part on the court's perception of strong public support for the classification. Second, the proper standard of review for gender-based classifications must afford judges the flexibility to make these political judgments on a case-by-case basis. Third, women are nonetheless guaranteed equality under this standard because most of the sex-based laws that hurt them will be invalidated. Fourth, the standard of review required by the ERA wrongfully would compel judges to invalidate substantially all gender-based legislation, the "good" as well as the "bad."

31. *Id.* at 83-85.
32. *Id.* at 31.
33. *Id.* at 86.
34. *Id.* at 63.
35. *Id.* at 84.

The most disturbing implication of Lee's argument is its ultimate relegation of the constitutional rights of women to what Professor Lawrence Tribe calls "Gallup poll justice."[36] Where women are concerned, the result is judicial reinforcement of the supposedly antiquated notion that a woman's place is in the home and a man's is in the world of affairs.

Judicial deference to public opinion, in matters of sex discrimination, as in any other domain, is repugnant to the fundamental principles of separation of powers and independence of the judiciary. In condemning any "prescription for judicial submission to majoritarian prejudice,"[37] Professor Tribe maintains that, "Liberals and conservatives ought to agree that the one thing we do *not* need from our judges is a good nose for what the public wants and a readiness to bend the law—or break it—to keep judicial rulings in line with the majority mood."[38] Professor Tribe views with alarm the attack by Lee's colleague, Attorney General William French Smith, on the federal courts' stubborn refusal to yield to "the groundswell of conservatism evidenced by the 1980 election."[39]

Judicial abdication to public sentiment is particularly insidious when applied in sex discrimination cases where, as in race cases, the same societal prejudices responsible for creation of the classification may then be used to sustain its validity. Courts have summarily rejected the conceptually similar "customer preference" argument urged by defendants in support of gender-based discrimination in employment cases brought under Title VII of the Civil Rights Act of 1964.[40] As stated by one court, "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices [Title III] was meant to overcome."[41]

Lee correctly concludes that the mandate of the ERA admits of no such justification for gender-based distinctions. To the contrary, the Amendment's premise was that laws that distinguish between people on the basis of sex are illegal because they irrationally predicate governmental allocation of legal rights and obligations on the irrelevant factor of gender, rather than on individual ability, need, or potential.[42]

36. Tribe, *Courts should not be criticized for ignoring public opinion*, 2 CAL. LAW. 11 (1982).

37. *Id.* at 12.

38. *Id.* at 11.

39. *Id.* at 12.

40. 42 U.S.C. § 2000(e)-1 to -6, -8, -9, -13 to -17 (1964).

41. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

42. S. REP. No. 92-689, 92d Cong., 2d Sess. 4-6, 11 (1972). For a detailed discussion of the Amendment's theory, see Brown, Emerson, Falk, & Freedman, *The Equal Rights Amend-*

Lee is also correct in assuming that courts, at a minimum, would have applied strict scrutiny to sex-based classifications challenged under the ERA.[43] It has been argued that the Amendment's legislative history additionally would have compelled strict scrutiny of facially neutral laws that are shown to have a disparate impact on one sex—for example, laws stating that "persons with primary responsibility for children under six need not apply."

> Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classifications of the Equal Rights Amendment. Past discrimination in education, training, economic status and other areas has created differences which could readily be seized upon to perpetuate discrimination under the guise of functional classifications. The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured.[44]

As Lee notes, courts might well have determined that the ERA's clear language and legislative history warranted use of an "absolute standard with qualifications."[45] The authors of a law review article that was read into the *Congressional Record* as part of the Amendment's legislative history assert: "The issue under the equal rights amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interests, or the demands of administrative expediency. Equality of rights means that sex is not a factor."[46] This absolute bar on all gender-based classifications would have been subject to two narrow qualifications. First, traditional principles governing judicial balancing of constitutional rights would have been invoked in cases involving the countervailing right of privacy. Thus, a state could have continued to protect the rights of the individual to perform intimate personal functions free of intrusion by members of the opposite sex.[47] Similar balancing has been accomplished by courts in cases posing conflicts between First Amendment press rights and rights of criminal defendants under the Sixth

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ment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871 (1971) [hereinafter cited as Emerson]. *See also* B. BROWN, A. FREEDMAN, H. KATZ, & A. PRICE, WOMEN'S RIGHTS AND THE LAW (1977) [hereinafter cited as B. BROWN].

43. R. LEE, *supra* note 3, at 41-42.

44. B. BROWN, *supra* note 42, at 17, *citing* Emerson, *supra* note 42, at 900. The authors argue that although the Court has largely rejected this argument in race cases brought under the Fourteenth Amendment, *see* Washington v. Davis, 426 U.S. 229 (1976), most such laws in sex cases arise from systematic exclusion of women from all but traditional domestic roles, which would place them within the group of cases excluded from the Washington rule. B. BROWN *supra* note 42, at 18.

45. R. LEE, *supra* note 3, at 47.

46. Emerson, *supra* note 42, at 892.

47. B. BROWN, *supra* note 42, at 15.

Amendment.[48]

A second qualification would have held permissible gender-based distinctions based on physical, presumably sexual, characteristics necessarily and uniquely found in one sex. These classifications would have been subject to strict scrutiny and limited to designations such as sperm donor or wet-nurse. Lastly, contrary to Lee's implication, it is exceedingly unlikely that the ERA would have been held to bar gender-based affirmative action plans. Rather, courts would have looked to the ERA's overriding purpose and upheld as consistent with that purpose a true affirmative action program that met qualifications similar to those established for racial programs in *United Steelworkers v. Weber*.[49]

By its terms, the ERA would not have been self-enforcing, but rather would have required citizens' groups, legislators, litigants, and judges to implement its mandate. At the very least, the Amendment would have served as a basis for judicial development of a coherent approach to sex discrimination cases. It would also have stimulated states to reexamine the hundreds, perhaps thousands, of gender-based statutes that remain on their books and to reevaluate these laws' continued viability under the ERA. Most important, the ERA would serve in the long run as a basis for affirmative legislation implementing its promise of equal opportunity.

Curiously, Lee's most passionate arguments against the Amendment are not based on its potential for redistributing burdens and benefits, but rather on the threat he perceives it to pose to his own standards of morality. Accordingly, he directs his arguments to the ERA's real or imagined prospective impact on laws controlling sexual activity. With respect to these prohibitions, Lee expresses the fear that courts will somehow run amuck under the ERA, invalidating statutes willy-nilly, with no regard for ordinary jurisprudential principles or public opinion.[50] His case for this scenario is weak. The judiciary is a notoriously conservative institution, which historically has manifested few revolutionary tendencies in the area of sex discrimination. Indeed, the most radical example that Lee can cite from all court decisions implementing state ERA's, is a decision requiring a school district to allow two girls, weighing, respectively, 170 and 212 pounds, to play on their high school football team with the coach's enthusiastic support.[51] In fact, as Lee concedes, judicial experience with state ERA's demonstrates that courts have sought to enforce these amendments in as uncontroversial a

48. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); R. LEE, *supra* note 3, at 85.

49. 443 U.S. 193 (1979).

50. R. LEE, *supra* note 3, at 85-90.

51. *Id.* at 52, *citing* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

manner as possible.[52] It is true, however, that the ERA and its state counterparts closely limit judicial discretion in an area where discretion historically has been abused to deny vindication of individual rights.

In analyzing specific areas of the ERA's impact, Lee's tunnel vision on the issue of sexual morality leads to deceptively skewed and often incorrect results. In the area of criminal justice, for example, he ignores the Amendment's major potential impact on gender-based laws that differentially define crimes, impose penalties, and determine conditions of imprisonment for males and females.[53] Lee instead concentrates on two areas in which the ERA would have had little or no meaningful impact. He first raises the specter of judicial abolition of gender-specific rape laws, only to then acknowledge that the ERA, at most, would have resulted in continuing punishment of vaginal rape under a new, gender-neutral label.[54] Lee makes a second emotionally charged argument that the ERA would be held to abolish laws criminalizing or otherwise burdening homosexual conduct.[55] This argument is untenable in light of the Amendment's legislative history to the contrary[56] and the judiciary's unequivocal rejection of this theory in analogous contexts.[57] Title VII's proscription of employment discrimination based on "sex," for example, uniformly has been held inapplicable to claims of discrimination based on sexual preference.[58]

Lee's analysis of the ERA's impact on public education betrays a similarly misplaced focus. His discussion omits any mention of the changes that would be effected in education *per se* by the ERA, including those in curriculum, class instruction, and counseling. The need for the Amendment in this area has become all the more evident with the advent of Republican leadership in Congress and an Executive Branch committed to stripping the federal statutes in this area of much of their force and effect.[59] Of more significance to Lee are those areas, incidental to education, in which the ERA might increase the propinquity of

52. R. LEE, *supra* note 3, at 51.

53. *See generally* B. BROWN, *supra* note 42, at 66-96.

54. R. LEE, *supra* note 3, at 62-64.

55. *Id.* at 64-65.

56. *See Hearings on H.R.J. Res. 35-208 and Related Bills, and H.R. 916 and Related Bills*, 92d Cong., 1st Sess. 402 (1971).

57. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (Title IV); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (Washington ERA does not invalidate a statute allowing only heterosexual marriages).

58. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979), *quoting* Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) ("Giving the statute [Title VII] its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind"); *see also* EEOC Empl. Prac. Dec. 76-75 (CCH) ¶ 6495 (1976).

59. *See, e.g.*, ASSOCIATION OF AMERICAN COLLEGES PROJECT ON THE STATUS AND EDUCATION OF WOMEN, SUMMARY OF PROPOSED AMENDMENT TO TITLE IX: IMPACT ON POST-SECONDARY INSTITUTIONS (1981); ASSOCIATION OF AMERICAN COLLEGES PROJECT

male and female students. Chief among his areas of concern is the Amendment's effect on coeducational student housing for those who desire it, in those state universities that do not already provide it.[60] Although this narrow issue presents for Lee a conflict with his own strongly held, private standards of morality, it is not clear why his personal morals should serve as a basis for denying college students the right to live in cheap, coeducational state housing. Nor can this issue possibly assume the importance that Lee clearly accords it.

Lee's lopsided approach is equally apparent in his brief discussion of employment. His focus is on the ERA's admittedly nominal effect on sex-based state "protective" laws, which, he concedes, already have been legally invalidated by federal statute.[61] Moreover, most courts that have applied state ERA's to these largely harmful statutes have utilized traditional rules of legislative interpretation and construction, striking down those that unreasonably burden one sex and, when consistent with legislative history, rendering "gender-neutral" a statute that confers substantial benefits to one sex.[62]

Ironically, Lee neglects to address the one issue of sexual segregation that *is* of paramount importance: the continuing segregation of women into "women's jobs" of low remuneration and limited opportunities for advancement. In 1973, for example, over sixty percent of all working women were employed as clerical workers, service workers, or teachers.[63] In 1977, women, who then comprised almost forty percent of the nation's full-time work force, earned only fifty-nine cents for every dollar earned by men, with female college graduates earning less than men who had failed to complete the ninth grade.[64]

Both as a symbol of national commitment to equality for women and as a practical tool for enforcement of equal opportunity in public employment, the ERA would have played a major role in changing these statistics. Federal, state, and local governments together constitute by far the largest employer in the nation, and one of the most discriminatory. Seventy-eight percent of all federally employed women, for example, are concentrated in jobs rated GS-8 or below, on a scale from GS-1 to GS-16, while seventy-three percent of all men are employed at GS-8 or higher.[65] Continued wide use of sex-differentiated

ON THE STATUS AND EDUCATION OF WOMEN, ON CAMPUS WITH WOMEN 2-3 (No. 30 Spring 1981).

60. R. LEE, *supra* note 3, at 65-68.

61. *Id.* at 75-78.

62. B. BROWN, *supra* note 42, at 29.

63. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU 1975 HANDBOOK ON WOMEN WORKERS 88 (1975).

64. U.S. DEP'T OF LABOR, OFFICE OF THE SECRETARY, WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN WOMEN AND MEN 2, 4 (1979).

65. NATIONAL ORGANIZATION FOR WOMEN, ERA AND EMPLOYED WOMEN, (1981).

job titles, neutral job requirements that have a disparate impact on women, and sex-based benefit plans, would all be vulnerable to attack under the Amendment.[66]

It is true that the ERA would have merely supplemented existing state and federal fair employment and equal pay statutes. As a prominent figure in the Reagan administration, however, Lee would hardly have the temerity to argue that women should rest secure in the continuing vitality of laws currently on the President's chopping block.[67] In fact, it is the very "correctability" of such legislation that commends to Lee the legislative rather than the constitutional approach to these problems.[68]

Consonant with this view is Lee's preference for the "flexibility" of the intermediate constitutional scrutiny test in sex cases. Lee finds comfort in what he perceives to be its neutral approach to governmental enactments and its wide leeway for exercise of judicial discretion.[69] But, when the test has been applied in accordance with its own basic requirements, his perceptions are inaccurate. The test actually imposes an exceptionally heavy burden on the government to establish the classification's actual basis to be an important, nonstereotypical objective for which the gender-based distinction is carefully tailored.[70] The Court's adherence to these well established principles has resulted in its invalidation of numerous federal and state gender-based statutes, many of which were enacted in the exercise of governmental powers traditionally accorded judicial deference. These include military[71] and social security statutes,[72] regulation of alcoholic beverages,[73] and family law enactments.[74]

The Court has misapplied intermediate scrutiny, however, in cases where the state's ostensible objective was the "benign" purpose of "compensating" women for past and ongoing discrimination that itself is unaffected by the decision.[75] The Court thus has failed to distinguish between true affirmative action, the goal of which is to change and

66. *See* C. SAMUELS, THE FORGOTTEN FIVE MILLION: WOMEN IN PUBLIC EMPLOYMENT (1975).

67. *See, e.g.*, Lublin, *Reagan's Advisors Accuse the EEOC of "Racism," Suggest Big Cutback*, Wall St. J., Jan. 26, 1981, at 21, col. 4.

68. R. LEE, *supra* note 3, at 86.

69. *Id.* at 31.

70. *See* notes 20-25 and accompanying text *supra*.

71. Frontiero v. Richardson, 411 U.S. 677 (1973).

72. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

73. Craig v. Boren, 429 U.S. 190 (1976).

74. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981); Orr v. Orr, 440 U.S. 268 (1979).

75. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

broaden the roles of women, and "compensation," which serves as a stopgap palliative, merely reinforcing existing discriminatory role patterns. Such measures are never "benign." Moreover, these decisions reflect the Court's dangerous tendency in difficult cases to revert to the kind of judicial paternalism that has ill-served women for over a century.

Never has this been as painfully clear as in two of the Court's opinions of the 1980-81 term, which together distort the intermediate scrutiny test beyond recognition. In upholding gender-based draft registration in *Rostker v. Goldberg*[76] and statutory rape laws in *Michael M. v. Superior Court*,[77] Justice Rehnquist and the Court's majority may well be signaling a dramatic retreat from the gains of the past decade. The implicit rationale of these decisions is, in essence, no different from that employed in 1873 by Justice Bradley in his now infamous concurring opinion in *Bradwell v. Illinois*,[78] which denied women the right to practice law because:

> Man is, or should be, woman's protector and defender. 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 paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[79]

A similar rationale underlies the Court's 1908 decision in *Muller v. Oregon*,[80] in which women were found to be in need of "protection" in the workplace because:

> Even though all restrictions on political, personal and contractual rights were taken away . . . it would still be true that she is so constituted that she will look to [man] for protection, that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the wellbeing of the race—justify legislation to protect her from the greed as well as the passion of men.[81]

The Court's 1980-81 opinions, of course, superficially take a different tack. In aid of upholding Congress' decision to exclude women from draft registration, despite unanimous support by top military leadership for their inclusion, Justice Rehnquist in *Rostker*[82] finds

76. 453 U.S. 57 (1981).
77. 450 U.S. 464 (1981).
78. 83 U.S. (16 Wall.) 130 (1873).
79. *Id.* at 141.
80. 208 U.S. 412 (1908).
81. *Id.* at 422.
82. Rostker v. Goldberg, 453 U.S. at 81.

vague assertions of the hitherto impermissable goal of administrative convenience to justify the exclusion. He acknowledges with approval the Senate Report's finding that "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."[83]

Most disturbing in the Court's quest for a legal rationalization is its bootstrap argument that the exclusion of women from registration is justified by the constitutionally suspect, yet unexamined, exclusion of women from combat by federal statute and custom.[84] The Court has twice before engaged in this specious reasoning. In *Schlesinger v. Ballard*,[85] it upheld a statute allowing female Navy officers a longer period than males in which to achieve promotion, on the ground that this compensated women in part for the pervasive pattern of sex-based military regulations that otherwise burdened their advancement. Similarly, in *Parham v. Hughes*,[86] the Court upheld a law denying the father, but not the mother, of an illegitimate child the right to sue for the child's wrongful death unless he had legitimated the child. Again the Court reasoned that this gender-based statute was valid in light of another, constitutionally unexamined, state law allowing fathers alone to legitimate children.[87] As the third and most damaging instance in which the Court has engaged in this reasoning, *Rostker* bodes ill for future efforts to dismantle pervasive systems of discrimination.

While *Rostker* might optimistically be dismissed as a matter of pure politics, the Court's decision in *Michael M. v. Superior Court*,[88] upholding California's statutory rape law, must be seen as a clear instance of retreat to rational basis scrutiny, or worse. In *Michael M.*, the Court upheld a statute imposing criminal penalties on men, but not women, who engage in intercourse with a member of the opposite sex who is under eighteen years of age and not their spouse. The Court's plurality opinion first accepts and relies on the state's patently *post hoc* justification for the statute as a means of deterring teenage pregnancy, even though the state had twice before defended the statute on the grounds that it protected female virtue and chastity.[89] In addition, despite the fact that the state was unable to make any factual showing that the male-only criminal penalty closely served, or indeed, served at all, the goal of pregnancy prevention, the Court nevertheless upheld the statute on the bare assertion that it "protects women from sexual inter-

83. *Id.* at 77.
84. *Id.* at 77-79.
85. 419 U.S. 498 (1975).
86. 441 U.S. 347 (1979).
87. *Id.* at 355.
88. 450 U.S. 464 (1981).
89. *Id.* at 471-72.

course at an age when those consequences are particularly severe."[90] Thus, as in *Muller*, decided 75 years earlier, woman's "physical structure" presumptively justifies "legislation to protect her from the . . . passion of men."[91]

The darker side of this "protection" emerges in some of the Court's employment decisions. In *Dothard v. Rawlinson*,[92] for example, women were "protected" from the possibility of being raped while employed as guards in a maximum security prison by the simple expedient of excluding them from that employment altogether. Pregnant working women likewise found little protection in the Court's reasoning in *Geduldig v. Aiello*,[93] which upheld their exclusion from an otherwise comprehensive program of disability insurance coverage. Holding that pregnancy discrimination is not "sex" discrimination, the Court stated: "The lack of identity between [pregnancy] and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons."[94]

Michael M. and *Rostker*, particularly when read together with the Court's third sex case of the term, *Kirchberg v. Feenstra*,[95] demonstrate the ultimate plasticity of intermediate scrutiny. In *Kirchberg*, Justice Marshall, writing for the majority, strictly applied the test to strike down an already superseded state law giving husbands the unilateral right to dispose of jointly owned community property without the wife's consent. This trilogy represents a result Rex Lee professes to respect and expect under the intermediate scrutiny test. It serves to grant women "equality" when politically feasible to do so, and to withhold equality in controversial areas of fundamental importance. In protecting young women from the most onerous of civic obligations, for example, the Court in *Rostker* confirms the second class citizenship of all women. Another majority of the Court noted 130 years earlier in *Dred Scott v. Sandford* that a black in 1857 could not serve in the Army because "[h]e forms no part of the sovereignty of the State, and is not, therefore, called on to uphold and defend it."[96]

The Court's recent decisions highlight the tragedy of the ERA's defeat. Never was a symbol of the nation's commitment to women's equality more sorely needed than it is now, when the Congress is considering constitutional amendments to ban abortion,[97] federal legisla-

90. *Id.* at 472.
91. Muller v. Oregon, 208 U.S. at 422.
92. 433 U.S. 321 (1977).
93. 417 U.S. 484 (1974).
94. *Id.* at 496 n.20.
95. 450 U.S. 455 (1981).
96. 60 U.S. (19 How.) 393, 415 (1856).
97. *See, e.g.*, S.J. Res. 110, 97th Cong., 2d Sess. (1982).

tion to cut aid to school districts whose textbooks depict women in nontraditional roles,[98] and other federal action intended to destroy the effectiveness of statutes protecting women's rights to equal educational opportunity.[99]

As a practical matter, the Amendment would have had no effect on sexual morality, but it would have had an enormous impact on public morality. As noted in the ERA's legislative history:

> [T]he basic principle of the ERA derives from two fundamental judgments inherent in the decision to eliminate discrimination against women from our legal system. First, the Amendment embodies the moral judgment that women as a group may no longer be relegated to an inferior position in our society . . . . Second . . . (c)lassification by sex . . . negates all our values of individual self-fulfillment.[100]

In the absence of a federal amendment, efforts will be focused on passage of state ERA's, continuing legislative reform, and persistent pressure on the courts to construe strictly the requirements of intermediate scrutiny.[101] Rex Lee's book should be of guidance to those seeking to understand the deeply held beliefs and fears of many of those who most strenuously opposed the ERA. With knowledge may come the power to convince.

*Drucilla Stender Ramey**

98. *See, e.g.*, S. 1378-H.R. 395, 97th Cong., 1st Sess. (1981) (known as the "Family Protection Act").

99. *See* note 59 *supra*.

100. Emerson, *supra* note 42, at 890.

101. After this book review had gone to press, the Court held, by a bare 5-4 majority, that a state's maintenance of an all-female nursing school constituted a violation of Fourteenth Amendment equal protection guarantees. Justice Sandra Day O'Connor's ringing endorsement and rigorous application of the intermediate scrutiny test may signal a promising move back to the test's fundamental tenets and vitality. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

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