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EQUALITY FOR MEN AND WOMEN, THREE APPROACHES: FRONTIERO, THE EQUAL RIGHTS AMENDMENT, AND THE MONTANA EQUAL DIGNITIES PROVISION

Joan Uda

INTRODUCTION

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage.¹

The past ten years have seen an unprecedented momentum toward full equality under the law for women. Probably no area of the law is changing more rapidly or more substantively than women's rights. In the words above, from *Frontiero v. Richardson*,² Mr. Justice Brennan rejected the traditional legal attitudes toward women,³ expressed one hundred years earlier in *Bradwell v. Illinois*:

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.⁴

This note will attempt to analyze the significance of *Frontiero*,⁵ and the pending Equal Rights Amendment to the United States Constitution,⁶ particularly as they relate to the potential impact of the Equal Dignities Provision in the 1972 Montana Constitution.⁷

FRONTIERO: SEX CLASSIFICATIONS

Sharron Frontiero, a married air force lieutenant, applied for dependent's benefits, including housing and medical benefits, for her husband, a full-time college student. Her application was refused because she was unable, as required by federal statute,⁸ to demonstrate that she provided more than one-half of her husband's support.⁹ Such benefits

¹*Frontiero v. Richardson*, 93 S. Ct. 1764, 1769 (1973).

²*Id.*

³" . . . [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Id.*

⁴83 U.S. (16 Wall.) 130, 141 (1873).

⁵*Frontiero v. Richardson*, *supra* note 1.

⁶The text of the Equal Rights Amendment [hereinafter cited E.R.A.] appears *infra* note 49.

⁷MONT. CONST. art. II, § 4. The text of the Equal Dignities provision appears *infra* note 77.

⁸37 UNITED STATES CODE § 401 *et seq.* (1970) [hereinafter cited U.S.C.] and 10 U.S.C. § 1071 *et seq.* (1970).

⁹*Frontiero v. Richardson*, *supra* note 1 at 1767.

are automatically granted to the wives of male members of the service. Lieutenant Frontiero and her husband filed suit in federal district court, alleging that this statutory distinction between male and female members unreasonably discriminated on the basis of sex, in violation of the Due Process Clause of the Fifth Amendment.¹⁰

The Frontieros claimed that the statutes discriminated in two ways: first, in procedure, because women members were required to prove their husbands' dependency, but the same burden was not placed upon men members; and second, in substance, because men members who did not provide over one-half of their wives' support received benefits, but similarly situated women members did not.¹¹ The Frontieros sought a permanent injunction to prevent enforcement of these statutes against them and members of their class, and an award of back pay for dependency allowances denied to Lieutenant Frontiero.¹²

The three-judge federal district court denied relief,¹³ concluding that "the statutory scheme on a whole is not one which classifies on the basis of sex,"¹⁴ and that "there is a rational basis for the different treatment accorded male and female members in [this] narrow context."¹⁵ The rational basis asserted by the government was "administrative convenience": Congress could reasonably have decided that it was cheaper to require women members to prove a spouse's dependency than to grant such benefits automatically as they did for men members.¹⁶

To reach its result, the three-judge court appears to have relied entirely upon traditional equal protection principles. Under these principles, for a statutory classification to withstand an equal protection attack, it is only necessary that: (1) the classification be reasonable, in the sense that it is based upon real differences¹⁷ and is not arbitrary,¹⁸ (2) that the object of the classification is to further a purpose or policy

¹⁰This is, of course, an equal protection and not a due process claim, but the United States Supreme Court has held that: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

¹¹*Frontiero v. Richardson*, *supra* note 1 at 1767.

¹²*Id.*

¹³*Frontiero v. Laird*, 341 F. Supp. 201 (M.D. Ala. 1972). One of the three judges dissented.

¹⁴*Id.* at 207. "It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. The question presented here then is whether the price for enjoying this administrative benefit fails to justify the different treatment of married service women."

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 376, 406 (1928) (Brandeis, J., dissenting).

¹⁸*Reed v. Reed*, 404 U.S. 71, 76 (1972)

which is within the permissible functions of government;¹⁹ and (3) that the difference upon which the classification is based bears some relation²⁰ to the accomplishment of the governmental purpose or policy.²¹

Thus, these equal protection principles do not forbid classification.²² They merely require that, on the surface, the classification is such that it may be assumed the legislature acted in the exercise of "legislative judgment and discretion."²³ This is what has been termed "old" equal protection, under which the standard of judicial review is "minimal scrutiny in theory and virtually none in fact."²⁴

Specifically, the three-judge court drew its standard for review from a welfare benefits case²⁵ in which the United States Supreme Court reenunciated and applied the "old" equal protection test:

"A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."²⁶

Further:

If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."²⁷

The Frontieros appealed. On appeal, the United States Supreme Court applied significantly different equal protection principles, "in effect, [serving] notice that sex discrimination by law would no longer escape rigorous constitutional review."²⁸ The Court's first step was to find that the statutory classifications were solely sex-based.²⁹

Then Mr. Justice Brennan, joined by Justices Douglas, White, and Marshall, went one giant step further, concluding that:

[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.³⁰

¹⁹Quaker City Cab Co. v. Pennsylvania, *supra* note 17 at 406; Reed v. Reed, *supra* note 18 at 76.

²⁰Mr. Justice Brandeis uses the term "substantial relation" in *Quaker City Cab Co. v. Pennsylvania*, *supra* note 17 at 406, but this seems misleading since later cases require only "some" relation—often quite tenuous. *E.g.*, *Frontiero v. Richardson*, *supra* note 1 at 1768.

²¹Quaker City Cab Co. v. Pennsylvania, *supra* note 17 at 406; Reed v. Reed, *supra* note 18 at 76.

²²Quaker City Cab Co. v. Pennsylvania, *supra* note 17 at 405.

²³*Id.* Also see the quotation from *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), cited *infra* note 26.

²⁴Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²⁵*Dandridge v. Williams*, *supra* note 23.

²⁶*Id.* at 485.

²⁷*Id.*

²⁸Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A. J. 1013, 1015 (1973).

²⁹*Frontiero v. Richardson*, *supra* note 1 at 1771. This is not explicit in the concurring opinions, but is surely implicit.

Classifications which are deemed "suspect" are treated as inherently unreasonable,³¹ because they are "constitutionally an irrelevance, like race, creed, or color."³² Further, the "suspect" status automatically carries with it the "strict" standard of judicial review, which effectively shifts the burden of proof from the challenger to the state or federal government. Under the "minimal scrutiny" of the "old" equal protection, the challenger must show that the classification is arbitrary³³ or has no rational relation to the legislative purpose.³⁴ "Strict scrutiny," however, places the burden on the defender of the classification, to show not only that it is reasonable, but that it is necessary to some "overriding" state purpose.³⁵

"Strict scrutiny" is the essence of "new" equal protection.³⁶ The principles of "new" equal protection do not dictate that a legislature can *never* discriminate on a "suspect" basis. They do make clear, however, that permissible instances of such discrimination are not common; the state or federal government can rarely, if ever, carry its "new" equal protection burden.³⁷

In *Frontiero*,³⁸ the government conceded that the statutory discrimination between men and women served no purpose other than "administrative convenience."³⁹ This, though entitled to some weight, fell far short of meeting the government's burden.

³¹SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 504-07 (1968).

³²*Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring).

³³*Morey v. Doud*, 354 U.S. 457, 464 (1957). "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

³⁴*Frontiero v. Richardson*, *supra* note 1 at 1768, and *supra* note 20.

³⁵In *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), the Court said, ". . . [A]ny classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." It should be noted that the term "compelling state interest" usually appears in equal protection cases dealing with "fundamental rights" rather than "suspect classifications." Both invoke "strict judicial scrutiny," however, indicating that whether the state's interest must be "compelling," "overriding," or something generally equivalent is a matter of language rather than substance. See, Houle, *Compelling State Interest Vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma*, 3 URBAN L. 375 (1971), which treats "fundamental rights" and "suspect classification" as two branches of the "compelling state interest" doctrine.

In *Frontiero*, *supra* note 1 at 1772, the Court indicates what is required: "In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits."

³⁶For discussion of "old," "new," and "newer" equal protection, see Gunther, *supra* note 24 at 8.

³⁷Gunther, *supra* note 24 at 8, notes that "new equal protection applies scrutiny that is 'strict' in theory and fatal in fact."

³⁸*Frontiero v. Richardson*, *supra* note 1 at 1771.

³⁹Recently the Court has not been friendly to government arguments based on admin-

On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for . . . achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ."⁴⁰

Eight to one, the Court held these statutes in violation of the Due Process Clause of the Fifth Amendment, "insofar as they require a female member to prove the dependency of her husband."⁴¹

Sex is not yet a "suspect" classification under the federal Constitution, however, because only four Justices were willing to take that step. Mr. Justice Stewart concurred in the judgment, saying only that "the statutes before us work an invidious discrimination in violation of the Constitution."⁴² Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun, also concurred in the judgment, based on *Reed v. Reed*,⁴³ which invalidated an Idaho probate statute preferring men over women for appointment as estate administrators. In *Reed*, the Court purported to apply the "old" equal protection principles,⁴⁴ but its result, like that of the concurring Justices in *Frontiero*,⁴⁵ indicates that in fact its review standard was significantly more rigorous than "old" equal protection's "minimal scrutiny."⁴⁶

Mr. Justice Powell specifically refused to hold sex a "suspect" classification. This was, he said, not only because *Reed* "abundantly supports our decision today," but also because such "premature" and "unnecessary" action would preempt a major political decision pending before the state legislatures: consideration of the Equal Rights Amendment.⁴⁷

Frontiero plainly indicates, however, that until final ratification of the E.R.A., sex discrimination plaintiffs will find some sort of "careful" scrutiny by the Court, even though a full majority is not yet ready to apply "strict" scrutiny.⁴⁸

istrative convenience. ". . . And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." *Frontiero v. Richardson*, *supra* note 1 at 1772. The Court cites *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Carrington v. Eash*, 380 U.S. 89 (1965). The same sort of result has also been reached in cases apparently not applying "strict scrutiny," however; e.g., *Reed v. Reed*, *supra* note 18; *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁴⁰*Frontiero v. Richardson*, *supra* note 1 at 1772.

⁴¹*Id.* Ginsburg, *supra* note 28 at 1015, n. 26, points out: "Automatic qualification of wives as dependent, whether or not they are in fact, but requirement of proof of actual dependency of husbands is the prevailing pattern in federal and state employment benefits and social insurance legislation."

⁴²*Id.* at 1772-73.

⁴³*Reed v. Reed*, *supra* note 18.

⁴⁴See discussion in text, *supra* notes 17-27.

⁴⁵*Frontiero v. Richardson*, *supra* note 1.

⁴⁶*Reed v. Reed*, *supra* note 18 at 75-76.

⁴⁷*Frontiero v. Richardson*, *supra* note 1 at 1773.

⁴⁸Gunther, *supra* note 24 at 20-24, lays out a "model" for what he calls "newer" equal protection, based on a line of decisions from the Burger Court. In these cases,

THE EQUAL RIGHTS AMENDMENT

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.⁴⁹

The full legal impact of the Equal Rights Amendment cannot be assessed until it becomes law and its basic principles are enunciated by the United States Supreme Court. At least two of those principles are immediately apparent, however.

First, the E.R.A. is addressed only to action by the state or federal government; it will not, and is not intended to, touch sheerly private action. In this it parallels the Fourteenth Amendment:

. . . § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections.⁵⁰

The contours of "state action" under the Fourteenth Amendment have been developed by extensive constitutional litigation, and though these contours are neither static nor wholly clear in detail, they are reasonably discernable in broad outline.⁵¹ "Legislation," whether a statute, ordinance, or administrative regulation, involves "state action,"⁵² as does discriminatory application of legislation, even if on its face the

the Court says that it is applying "old" equal protection, but seems actually to apply a standard of review that is much more rigorous than under "old" equal protection, though less rigorous than under "new" equal protection. Mr. Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1273, 1332 (1973), suggests that the Court openly acknowledge what he considers a "sliding scale" approach: "The test in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."

⁴⁹The E.R.A., which will become the 27th Amendment when adopted, was submitted to the states on March 22, 1972. Adoption requires ratification by three-fourths of the state legislatures. To date, thirty-three of the necessary thirty-eight have ratified it, including Montana, on January 21, 1974. Nebraska has attempted to withdraw its ratification, but Congress apparently has decided in the past that such states will be counted toward ratification. See Ginsburg, *supra* note 23 at 1019.

The E.R.A. contains two additional sections:

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.

⁵⁰*Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169 (1970).

Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁵¹The summary which follows is, of course, offered only as an indication of the present contours of "state action."

See *Turley v. Memphis*, 369 U.S. 329 (1962).

legislation appears to be fair.⁵³ If the action is taken by any officer or agency of a state, "state action" is present,⁵⁴ even if the action is not within the officer's or agency's scope of authority,⁵⁵ or if it is a blatant violation of state law.⁵⁶

Private conduct can in some circumstances be reached, but only where it is sufficiently intertwined with some sort of state action,⁵⁷ where it occurs under a custom having the force of law,⁵⁸ or where it involves a private party who has assumed functions which are essentially governmental in nature.⁵⁹ In short, although the precise boundaries of "state action" are not finely drawn, it is clear that § 1 of the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."⁶⁰

The great numbers of Fourteenth Amendment sex discrimination cases already decided or presently working up through the federal and state court systems are required to meet the same tests for "state action" as any other Fourteenth Amendment claims. For example, in *Millenson v. New Hotel Monteleone*,⁶¹ a woman claimed that denial of service in a "men only" hotel grill, solely on the grounds that she was a woman, violated her Fourteenth Amendment rights. The Fifth Circuit Court of Appeals, applying the standard "state action" tests, found that liquor licensing by the state, and collection of state sales taxes, did not "so intertwine the policies of the hotel with state authority that impermissible state action is present."⁶² Given the express language of the E.R.A., which speaks only to the state and federal governments, there is no reason to suppose that these tests will differ in any way under it.

Second, under the E.R.A., sex will immediately become a "suspect" classification. According to Mr. Justice Brennan in *Frontiero*:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by . . . birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." [Citation omitted] [W]hat differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of

⁵³*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁵⁴*United States v. Raines*, 362 U.S. 17 (1960).

⁵⁵*Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931).

⁵⁶*United States v. Raines*, *supra* note 54.

⁵⁷*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁵⁸*Adickes v. S. H. Kress & Co.*, *supra* note 50.

⁵⁹*Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, conformed to 463 F.2d 1095 (1972).

⁶⁰*Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁶¹475 F.2d 736 (5th Cir. 1973).

invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.⁶³

It should be noted again that Mr. Justice Brennan was joined by three other Justices who were willing to hold sex a "suspect" classification under the Fourteenth Amendment.⁶⁴ Once the state legislatures have spoken to ratify the E.R.A., there is no doubt that the initial four Justices will be joined by at least the three who worried in *Frontiero* about preempting the states' decision.⁶⁵

As everyone knows, there has been a great deal of heated public and legislative debate on the potential effects of the E.R.A. In the main, opponents of the Amendment express concern about maintaining the so-called protective legislation for women: for example, laws which prohibit or limit the situations in which women can tend bar,⁶⁶ which limit the hours a woman can work,⁶⁷ or which limit the amount of weight a woman can lift on the job.⁶⁸ It is true that under the E.R.A. much of this legislation will fall or be repealed,⁶⁹ but it is also true that much of it has already fallen or been legislatively removed from the statute books.⁷⁰ And, as the National Women's Party pointed out in 1926, shortly after the E.R.A. was first submitted to Congress:

Legislation that includes women but exempts men . . . limits the woman worker's scope of activity . . . by barring her from economic opportunity. Moreover, restrictive conditions [for women but not for men] fortifies the harmful assumption that labor for pay is primarily the prerogative of the male.⁷¹

If we are to end the truly invidious sex discrimination routinely prac-

⁶³*Frontiero v. Richardson*, *supra* note 1 at 1770.

⁶⁴Justices Douglas, White, and Marshall.

⁶⁵In *Frontiero v. Richardson*, *supra* note 1 at 1773, Mr. Justice Powell, the Chief Justice, and Mr. Justice Blackmun concurred in the judgment, as did Mr. Justice Stewart. Of Mr. Justice Stewart, who reached his concurrence in *Frontiero* merely by labeling the discrimination "invidious," one commentator writes: "Further enlightenment on the review standard by which he measures sex differentials in the law has been left for another day. In the meantime, lower courts may well assume that Justice Stewart knows sex discrimination when he sees it, just as he 'knows [hard-core pornography] when he sees it,' and accordingly conclude that at least five Justices can be relied upon to closely scrutinize sex classifications." Ginsburg, *Comment: Frontiero v. Richardson*, 1 *WOMEN'S RIGHTS LAW REPORTER* 2, 4 (1973).

⁶⁶*Goesaert v. Cleary*, 335 U.S. 464 (1948). *But see Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

⁶⁷*Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Vogel v. Trans World Airlines*, 346 F. Supp. 805 (W.D. Mo. 1971).

⁶⁸*Weeks v. Southern Bell Telephone & Telegraph*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

⁶⁹Ginsburg, *supra* note 28 at 1014. Ginsburg notes that according to the solicitor general, a recent computer search of the United States Code turned up 876 sections with sex-based references. Montana laws which would be affected include support obligations, Title 36 REVISED CODES OF MONTANA (1947) [hereinafter cited R.C.M. 1947]; domicile, R.C.M. 1947, § 83-303; and a number of others.

⁷⁰*E.g.*, *Weeks v. Southern Bell Telephone & Telegraph*, *supra* note 68; *Garneau v. Raytheon Co.*, *supra* note 67.

⁷¹Ginsburg, *supra* note 28 at 1018.

ticed in America, most of the remaining sex-based protective legislation should be eliminated.⁷²

As to legislation which accords real benefits to one sex or the other, however, the remedy granted in *Frontiero*⁷³ is instructive. Notably, the Court did not eliminate the automatic benefits for male members of the uniformed services, but rather extended those benefits to women on the same terms.⁷⁴ This supports what E.R.A. proponents have contended: that statutes affording benefits on the basis of sex would be held to apply equally to men and women,⁷⁵ and only those which merely prohibited or limited conduct would be invalidated.⁷⁶

MONTANA: EQUAL DIGNITIES UNDER THE LAW

Section 4. Individual Dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.⁷⁷

The new Montana Equal Dignities provision appears potentially more far-reaching than the E.R.A., although its contours must, of course, be defined by the Montana supreme court. There appear to be substantial reasons for urging its full enforcement, however, and for arguing before the Montana courts that its scope is as broad as its language suggests.

The Constitutional Convention documents make clear the intent underlying the Montana Declaration of Rights⁷⁸ in general, and Section

⁷²"It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena." *Frontiero v. Richardson*, *supra* note 1 at 1770.

According to the Fact Sheet on the Earnings Gap put out in 1971 by the Women's Bureau of the Employment Standards Administration, U.S. Department of Labor: "Women who work at full-time jobs the year round earn, on the average, only \$3 for every \$5 earned by similarly employed men [T]he gap is greater than it was fifteen years ago. From 64 percent in 1955, women's median wage or salary income as a proportion of men's fell to 61 percent by 1959 and 1960 and since then has fluctuated between 58 and 60 percent. Women's median earnings of \$5,323 in 1970 were 59 percent of the \$8,966 received by men."

Other Bureau statistics make the discrepancy even more clear. In 1970, women with five years or more of college education earned a median income of \$9,581 per year, which is only a few dollars higher than the median of \$9,567 per year for men with a high school education.

In general, see Kanawitz, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION*, 114-24 (1969).

⁷³*Frontiero v. Richardson*, *supra* note 1.

⁷⁴*Id.* at 1772, n. 25.

⁷⁵*Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3d Cir. 1973). Ginsburg, *supra* note 28 at 1017.

⁷⁶*Reed v. Reed*, *supra* note 18.

⁷⁷Mont. Const. art. II, § 4.

4 in specific. First, the Declaration of Rights as a whole was intended to be "the finest, most expansive declaration of rights enacted by any state of the United States."⁷⁹

As to Section 4:

The committee unanimously adopted this section with the intent of providing a constitutional impetus for the eradication of public and private discriminations based on race, color, sex, culture, social origin or political or religious ideas.⁸⁰

Sex was included among the forbidden categories because:

The committee felt that such inclusion was proper and saw no reason for the state to wait for the adoption of the federal equal rights amendment or any amendment which would not explicitly provide as much protection as this provision.⁸¹

The Bill of Rights Committee expressed great concern with wording Section 4 to make its scope as expansive as possible. The committee's report was quite critical of results achieved under federal anti-discrimination efforts, and reveals that they deliberately modelled Section 4 on provisions from other state constitutions which they felt came closest to their goal of eradicating objectionable discrimination.⁸²

Section 4 is, of course, clearly directed not only to state action, but also to the wholly private conduct not reached by the Fourteenth Amendment or the proposed E.R.A. The everyday meaning of the words tells us this,⁸³ as do the Bill of Rights Committee Report,⁸⁴ and the Constitutional Convention's floor debate on Section 4.

The intent of section four is simply to provide that every individual in the state of Montana . . . may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination, and we submit that the concern of this . . . Convention with respect to discrimination should not be reflected simply by having limitations upon the state and its agencies, but also by having those same limitations upon the private agencies . . . within . . . the state.⁸⁵

The floor debate suggests that these "private agencies" specifically include private employers and landlords,⁸⁶ but that there was no intent to interfere with the legitimate membership qualifications of private social organizations.⁸⁷

⁷⁹Montana Constitutional Convention, VII Transcript of Proceedings 5037 (1972) [hereinafter cited Transcript of Proceedings].

⁸⁰*Id.* at 5059.

⁸¹*Id.* at 5060.

⁸²Montana Constitutional Convention Studies, Report Number 10, Bill of Rights 309-12 (1972) [hereinafter cited Report Number 10].

⁸³"Neither the state nor any person, firm, corporation, or institution" [Emphasis added].

⁸⁴Report Number 10, *supra* note 82 at 130-11.

⁸⁵Transcript of Proceedings, *supra* note 79 at 5063.

⁸⁶*Id.*

Thus, questions may rise on particular fact situations as to precisely which private actions are covered by Section 4. These questions really seem to go, however, to the issue of what constitutes a "civil or political right," and not to the issue of whether a particular private party is covered by Section 4. Given the wording and expressed intent of Section 4, it should not matter who infringes a protected right, if the right itself is protected.

The really difficult question is, of course: What is the meaning of the phrase, "civil or political rights"?

A generally acceptable definition of "political" rights is not hard to find:

"Political" rights consist in the power to participate, directly or indirectly, in the establishment or administration of government, such as the right of citizenship, that of suffrage, the right to hold public office, and the right of petition.⁸⁸

A definition of "civil" rights is more elusive. During floor debate on Section 4, the question came up: "Aren't civil rights things that the legislature has to deal with?" The answer was masterful understatement:

Basically . . . that is correct and I do not think that at this time in America we have an all-inclusive definition of civil rights.⁸⁹

Generally, definitions break into the following, and overlapping, categories:

- (1) rights [which] belong to every citizen of the state or country, or, in a wider sense, to all its inhabitants, and are not connected with the organization or administration of government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury, etc.⁹⁰
- (2) rights capable of being enforced or redressed in a civil action.⁹¹
- (3) rights secured to citizens of the United States by the Thirteenth and Fourteenth Amendments to the Constitution, and by various acts of Congress made in pursuance thereof.⁹²

The floor debate on Section 4 provides some illumination as to what rights Section 4 was intended to cover:

There is no intent within this particular section to do anything other than remove the apparent type of discrimination that all of us object to with respect to employment, to rental practices, to actual association in matters that are public or matters that tend to be somewhat quasi-public.⁹³

⁸⁸BLACK'S LAW DICTIONARY 1487-88 (4th ed. 1968) [hereinafter cited BLACK'S].
Winnett v. Adams, 71 Neb. 817, 99 N.W. 681, 684 (1904).

⁸⁹Transcript of Proceedings, *supra* note 79 at 5066.

⁹⁰BLACK'S, *supra* note 88 at 1487. Roe v. Wade, 93 S. Ct. 705, 726-27 (1973); Jones v. Alfred H. Mayer, 392 U.S. 409, 441 (1968); Winnett v. Adams, *supra* note 88 at 684.

⁹¹BLACK'S, *supra* note 88 at 1487. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 753, 771 (1971); Sowers v. Ohio Civil Rights Comm., 20 Ohio Misc. 115, 252 N.E.2d 463, 475 (1969); State of Iowa v. Railroad Co., 37 F. 498, 3 L.R.A. 554 (C.C.S.D. Iowa 1889).

⁹²BLACK'S, *supra* note 88 at 1487. United States v. Reese, 92 U.S. 214 (1875); State of Iowa v. Railroad Co., *supra* note 91.

⁹³Transcript of Proceedings, *supra* note 79 at 5063.

The debate further indicates that the scope of protected rights under Section 4 was intended to be at least as broad as those encompassed by the federal Equal Protection Clause,⁹⁴ and that "anything that falls within the realm of common sense" should be covered.⁹⁵

In light of the above, it should be possible to argue that the scope of rights protected under Section 4 is at minimum as broad as those protected by the federal Constitution and Acts of Congress. Although the United States Supreme Court has apparently never attempted an "all-inclusive" definition of what rights are federally protected, it is clear that the phrase "rights, privileges or immunities secured . . . by the Constitution or laws of the United States"⁹⁶ sweeps up "all of the Constitution and laws of the United States."⁹⁷

This would include "property" rights: "That rights in property are basic civil rights has long been recognized."⁹⁸ It would also include those rights specifically enumerated by the Constitution and applied to the states by the Fourteenth Amendment,⁹⁹ such as freedom of speech and press,¹⁰⁰ and "peripheral" rights which make the enumerated rights more secure,¹⁰¹ such as "the right of association,"¹⁰² freedom of "inquiry,"¹⁰³ the "right of privacy,"¹⁰⁴ and the right to travel.¹⁰⁵

In addition, it would seem to include those rights specifically protected by Congress in civil rights legislation; for example, equality of opportunity in employment,¹⁰⁶ right of equal pay for equal work,¹⁰⁷ freedom from discrimination in public accommodations,¹⁰⁸ and all the "peripheral" aspects of those rights, such as the right to participate in an employer's pension plan free from discrimination on the basis of sex.¹⁰⁹ In brief, any right which the courts are presently protecting under

⁹⁴*Id.* at 5064.

⁹⁵*Id.* at 5065.

⁹⁶*United States v. Price*, 383 U.S. 787, 797 (1966).

⁹⁷*Id.*

⁹⁸*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

⁹⁹It has never been held that the Fourteenth Amendment "incorporates" the federal Bill of Rights, Amendments One through Eight, as a whole, but most have been held, entirely or in part, to apply to the state through the Fourteenth Amendment.

¹⁰⁰*Gitlow v. New York*, 268 U.S. 652 (1925). A partial list of other such rights is: *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the fourth amendment exclusionary rule); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Roe v. Wade*, *supra* note 90 (fourteenth amendment right to privacy in procreation).

¹⁰¹*Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

¹⁰²*Board of Education v. Barnette*, 319 U.S. 624 (1943).

¹⁰³*Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

¹⁰⁴*Roe v. Wade*, *supra* note 90.

¹⁰⁵*Shapiro v. Thompson*, *supra* note 35.

¹⁰⁶42 U.S.C. §2000e (1964).

¹⁰⁷29 U.S.C. § 206 (1963).

¹⁰⁸42 U.S.C. § 2000a (1964).

¹⁰⁹*Rosen v. Public Service Electric and Gas Co.*, *supra* note 75.

the Thirteenth and Fourteenth Amendments and under federal civil rights legislation would seem fairly classified as a "civil" right.

It may be, of course, that the Montana supreme court would decline this interpretation of the scope of Section 4. The argument for a broad reading of Section 4 is enhanced, however, by the many rights specifically enumerated in the 1972 Montana Constitution, including "inalienable rights" such as "the right of pursuing life's basic necessities,"¹¹⁰ freedom of religion,¹¹¹ the right of privacy,¹¹² and freedom of speech, expression, and press.¹¹³

This argument is further supported by the Montana Freedom from Discrimination statutes,¹¹⁴ in which the Montana legislature has declared:

The right to be free from discrimination because of race, creed, color, sex, or national origin is . . . a civil right. This right shall include, but not be limited to:

- (1) The right to obtain and hold employment without discrimination.
- (2) The right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage or amusement.¹¹⁵

By its terms, this act applies to almost any conceivable public place, from public elevators and washrooms to places where medical or dental care is offered and publicly supported nursery schools.¹¹⁶ The act defines "every person" in language no less broad than that of Section 4,¹¹⁷ and details what is meant by "deny"¹¹⁸ and "full enjoyment."¹¹⁹

A number of states, although apparently not Montana, have interpreted the equal protection provisions of their constitutions to be co-extensive with the Fourteenth Amendment.¹²⁰ Among these is Michigan, whose provision contains language strikingly similar to Montana's:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.¹²¹

It is both possible and desirable, however, to argue that not only is the scope of rights as broad under Section 4 as under the federal

¹¹⁰MONT. CONST. art. II, § 3.

¹¹¹MONT. CONST. art II, § 5.

¹¹²MONT. CONST. art. II, § 10.

¹¹³MONT. CONST. art II, § 7.

¹¹⁴R.C.M. 1947, §§ 64-301 - 64-303.

¹¹⁵R.C.M. 1947, § 64-301.

¹¹⁶R.C.M. 1947, § 64-302(5).

¹¹⁷R.C.M. 1947, § 64-302(1).

¹¹⁸R.C.M. 1947, § 64-302(2).

¹¹⁹R.C.M. 1947, § 64-302(3).

¹²⁰*Los Angeles County v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 196 P.2d 773 (1948). *appeal dismissed* 336 U.S. 929; *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Town of Greenburgh v. Board of Sup'rs or Westchester County*, 277 N.Y.S.2d 885, 53 Misc.2d 88, 277 N.Y.S.2d 885 (1967).

¹²¹MICHIGAN CONSTITUTION, Art. I, § 2.

Constitution, but that the federal Constitution provides only the "minimum" guarantees.¹²²

There are numerous reasons for so arguing. For one, the United States Supreme Court sometimes feels bound to consider the differing conditions that may prevail in various states, and thus will limit the application of its holding, to give the states time to implement some emerging constitutional principle.¹²³ The Court may also avoid a broad constitutional decision in order that states may operate as a "laboratory" for experimentation.¹²⁴ Further, as some commentators point out,¹²⁵ to find the state bill of rights merely coextensive with the federal bill of rights robs the state bill of rights of substance, making it sheer duplication.¹²⁶ Finally, it is possible that the United States Supreme Court will, in the near or distant future, significantly lessen its regard for the expansion and protection of individual rights.¹²⁷

Thus, it seems wise to urge the Montana courts toward "judicial activism," particularly in light of the "expansive" intent underlying Section 4 and the Declaration of Rights as a whole.

CONCLUSION

Legal protection for women's rights is increasing rapidly,¹²⁸ and the impetus for passage of the E.R.A. suggests that this trend will continue until women achieve total equality under the law. Meanwhile, *Frontiero*¹²⁹ will, no doubt, spur more women's rights litigation.¹³⁰ *Frontiero* also puts the country dramatically on notice that the old "minimal" scrutiny of sex classifications is dead,¹³¹ and suggests that until the E.R.A. is

¹²²Fine, Matsakis and Spector, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RTS.-CIV. LIB. L. REV. 271 (1973); Countryman, *The Role of a Bill of Rights in a Modern State Constitution*, 45 WASH. L. REV. 454 (1970).

¹²³*New State Ice Co. v. Liebman*, 285 U.S. 262 (1932) (Brandeis, J., dissenting); *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹²⁴*New State Ice Co. v. Liebman*, *supra* note 123 at 311.

¹²⁵See the sources cited *supra* note 122.

¹²⁶Fine, Matsakis and Spector, *supra* note 122 at 284. Of course in Montana, Section 4 of the 1972 Constitution's Declaration of Rights should in any event extend these protections to private action.

¹²⁷*United States v. Robinson*, 94 S. Ct. 467 (1973); *Gustafson v. Florida*, 94 S. Ct. 488 (1973). These are criminal procedure cases which seem significantly to expand an officer's authority to conduct a full scale body search after arresting a person for driving without a valid driver's license. *Miller v. California*, 93 S. Ct. 2607 (1973), *Paris Adult Theater I v. Slaton*, 93 S. Ct. 2628 (1973), and companion cases allow local authorities to set standards for what is "obscene" within the community. This constriction of individual rights is not discernible in many other areas, however. See Gunther, *supra* note 24.

¹²⁸See Ginsburg, *supra* note 28.

¹²⁹*Frontiero v. Richardson*, *supra* note 1.

¹³⁰Ginsburg, *supra* note 28 at 1015.

¹³¹*Id.*

fully implemented, the Court will continue its new regard for women's rights.¹³²

In the meantime, Montana need not take a back seat to any state in the nation. Montana was, after all, among the first states to grant women the ballot—in 1914, five years before the Nineteenth Amendment granted this right to all American women. Montana also sent the first woman to Congress: Jeanette Rankin, in 1916. This is a fine tradition, and passage of the 1972 Montana Constitution makes clear that it should—and hopefully will—continue.