

# COMMENTARY

## THE PROPOSED TWENTY-SEVENTH AMENDMENT: A BRIEF, SUPPORTIVE COMMENT

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### I. INTRODUCTION

When the unratified Constitution of 1787 came before the state conventions, one controversy more than any other nearly led to its rejection. The point of controversy concerned whether an additional effort should be made prior to ratification to incorporate an enumerated list of certain especially protected subjects into our fundamental law. In at least seven of the states, a significant number of people pressed the appropriateness of such amendments. Essentially, their view was that certain matters were so frequently the object of recurring disregard that the Constitution itself should resolve the basic principles upon which they rested; although persons might subsequently disagree whether these principles would (or would not) permit a given kind of proposed law, it was important nonetheless to resolve at least the general principles against which proposed departures must carry the burden of adequate explanation.

In the first instance, the insistence upon these additions to the proposed Constitution did not succeed. Rather, the prevailing sentiment at that time denied the need for such a special listing and asserted, moreover, that efforts to add to the Constitution in this way were both unwise and impractical. In the *Federalist Papers*<sup>1</sup> Alexander Hamilton observed that insofar as such a list could not be of indefinite length, it must perforce leave some things out of account. The result, he suggested, would be confusing and misleading—an implication that any subject not specially listed would be deemed wholly unprotected de-

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1. See THE FEDERALIST No. 84 (A. Hamilton). See also the remarks of James Wilson in the Pennsylvania Convention, III M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 143-44, 161-62 (1937).

spite the settled understanding that only such subjects as had been expressly committed to the federal government were to be within the national power. Against the practicality of the project, Hamilton also noted that however such a list might be drafted, the language of the draft would necessarily introduce uncertainties of its own—unavoidable margins of substantial ambiguity that inevitably characterize any provision sufficiently succinct to include in a constitution—uncertainties leaving much to doubt and inviting future quarrels over interpretation that would be far better to avoid.<sup>2</sup>

These “eminently sensible” arguments easily prevailed at the Philadelphia Convention, and the original Constitution was submitted to the state conventions essentially without a Bill of Rights.<sup>3</sup> It came close to failure on that account, probably succeeding only because of repeated assurances that ratification would itself be quickly followed by prompt consideration of additional amendments,<sup>4</sup> as indeed it was with the rat-

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2. For example, Hamilton was unenthusiastic about any efforts to provide for the protection of a free press because:

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.

THE FEDERALIST No. 84 (A. Hamilton) (C. Rossiter ed. at 514-15 (1961)) (footnote omitted).

3. The Constitution was submitted “essentially” (rather than literally) without a Bill of Rights because, despite rejection in the Philadelphia Convention of efforts to secure a more complete enumeration of particular rights, the original Constitution nonetheless did contain scattered provisions affirmatively safeguarding certain rights. *E.g.*, U.S. CONST. art. I, §§ 9 & 10 (forbidding ex post facto laws or bills of attainder and securing the privilege of habeas corpus); U.S. CONST. art. III, §§ 2 & 3 (securing a right to jury trial in certain cases and restricting the definition of treason); U.S. CONST. art. IV, § 2 (interstate privileges and immunities clause); U.S. CONST. art. VI, cl. 3 (forbidding religious test oaths).

4. Reference to the several volumes of J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (2d ed., reprinted by Lenox Hill Pub. & Dist. Co., 1974) confirm the suggestion that in virtually every state for which there is any significant record of convention debate (*e.g.*, Virginia, North Carolina, New York, Pennsylvania, Massachusetts, and Maryland), the absence of an additional Bill of Rights was a principal source of consternation and hesitation. North Carolina declined to ratify until such time as some more satisfactory assurance was provided. Virginia narrowly divided, *id.* vol. 3, at 576, (in part bemused by an ambivalent letter from Thomas Jefferson in which he declared that ratification by nine states was essential to guarantee an effective union, and rejection by four states was essential to guarantee a Bill of Rights; the letter did not indicate in which column Virginia should place herself, *id.* at 573). Virtually all of these states asserted an expectation that additional rights would at once be guaranteed. Several states accompanied their resolutions of ratification with an express call for the proposal of such amendments.

ification of ten (of a proposed twelve) amendments completed in 1791.

To a very considerable extent, some of Alexander Hamilton's criticisms of those proposed additions to the Constitution have been entirely fulfilled. The Bill of Rights is not a detailed code; most assuredly, the applicability of many of its provisions to particular laws or government practices has generated all manner of disagreement. Consider by way of but one example the first amendment provision that restricts Congress from making any law "respecting an establishment of religion or prohibiting the free exercise thereof," an amendment subsequently deemed applicable to restrict the states by force of the due process clause in the fourteenth amendment.<sup>5</sup> We are sometimes still at odds with one another over what this provision means and, more concretely, what kinds of laws touching religious interests may be deemed compatible with the first amendment.<sup>6</sup> A law forbids homicide. It provides no exception even when the homicide is an exercise of sincere religious zeal or a ritualistic offering of sacrifice reluctantly committed as a doctrinally required demonstration of faith and supplication. Yet the "conflict" between amendment and law is scarcely worth a pause: we do not doubt that the law's determination to allow no such exception will meet whatever burden of justification someone might attempt to suggest is required by the first amendment. (We may say, even as the Supreme Court has said, that, "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute *but, in the nature of things, the second cannot be.*"<sup>7</sup>) In other instances, however, the burden of reconciling our laws with the free exercise clause is not so easily dismissed; *e.g.*, whether snake handling can be forbidden as a religious practice,<sup>8</sup> whether po-

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5. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

6. The most recent and well-publicized example is the proposal by Senator Helms of North Carolina to deny jurisdiction to the federal courts, including the Supreme Court, over any case arising under any state law relating to "voluntary" prayers in the public schools. The notion is that each of the fifty state supreme courts should make the final determination whether such activity violates the fourteenth amendment, regardless of any opinion by the United States Supreme Court whose previous decisions on this subject Senator Helms believes to be mistaken and so mischievous that the Supreme Court should be forbidden to review such matters in the future. 125 CONG. REC. S4128-31 (daily ed. Apr. 5, 1979) (remarks of Sen. Helms); 125 CONG. REC. S4138-57 (daily ed. Apr. 9, 1979) (remarks of Sen. Helms).

7. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (emphasis added).

8. Evidently, it may be forbidden. *See, e.g., Tennessee v. Pack*, 527 S.W.2d 99 (Tenn.), *cert. denied*, 424 U.S. 954 (1976).

lygamy can be prohibited and monogamy installed as the sole licit kind of marriage,<sup>9</sup> whether ceremonial uses of mild hallucinogens can be the subject of suppression,<sup>10</sup> and whether compulsory education beyond the eighth grade can be required even for the offspring of disaffected sects.<sup>11</sup>

Yet however unruly, difficult, and unwelcome these controversies often may be, very few of us would be happier without the first amendment. The Constitution surely would be a lesser document without it. Like so much else in the Constitution, the Bill of Rights compels us to measure our sense of the fairness of our laws and governmental practices by imposing a burden of explanation. Not in any sense a blueprint of fine detail, it nonetheless lays down certain standards on particular subjects deemed to be of sufficient importance to be featured in our most fundamental law. Indeed, it is probably not too much to say that the Bill of Rights—with all its controversy over its principles of freedom of speech, freedom of religion, security of one's person and home, security of private property from uncompensated appropriation, fair trial, and limitations on tolerable punishment—is central to our Constitution. Madison and Jefferson surely were right about this general matter; it would have been a mistake to leave everything out of account.

It is the remembrance of these things that prompts my introduction to this very brief Commentary on the proposed twenty-seventh amendment. For in the end, I have come to believe that approval of this amendment provides the most appropriate answer to the same questions that were deemed sufficient to justify ratification of the earlier and equally important amendments that constitute our Bill of Rights. Those questions I think to be these three. First, is the subject of the amendment of sufficient importance to warrant recognition in the Constitution of the United States? Second, is the particular subject inadequately addressed in the Constitution? And third, does the manner in which the subject is treated in this amendment fairly compare with the essential style of the Bill of Rights itself? These are the questions that,

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9. Apparently, to criminalize polygamy does not violate the free exercise clause; nor does the installation of monogamy enact a dominant religious preference in violation of the establishment clause. *See* *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

10. Possibly, they are not. *See* *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

11. Evidently, it cannot be so required. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

when answered to our satisfaction in the past, have produced the most enduring and the most admirable parts of our Constitution. There is little reason to think that they are not now as useful as they always have been merely because the proposal at hand is the twenty-seventh amendment rather than some other.

As right as this unstrained approach now seems to me, it is only fair to acknowledge that I nonetheless have taken a very long time to reach it. When the twenty-seventh amendment was proposed by Congress in 1972, I instinctively thought of the matter in quite a different way—that until one could nail down every possible interpretation upon which reasonable persons might disagree, it was both premature and unprofessional to entertain any opinion about this amendment. In brief, the chief question as it then appeared to me was not any of the three above, but rather this: *precisely* what does this amendment mean, *i.e.*, exactly what results are (or are not) to obtain in each kind of case that might plausibly relate to or arise under it?<sup>12</sup>

The quest for clarification became a mild professional interest at the

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12. This brief Commentary quite deliberately does not undertake to provide “still another” interpretation of the twenty-seventh amendment. It does not do so because an approach to the subject that takes seriously every kind of alleged result imputed to the amendment by those hostile to it is doomed from the beginning. It might also appear to “protest too much” by gradually becoming buried in an argumentative minutiae, enduring the futility of Sisyphus. Scarcely could one conclude an elaborate response to one supposed danger imputed to the amendment than another would at once be rolled down the hill to try one’s labor again. Because the conjured evils of the amendment are no more finite than the imaginations of persons opposed to the basic fairness standard of the amendment itself, an approach to the amendment that begins so defensively is bound to be unconvincing and, thereby, to fail. Again, that kind of approach to the first amendment of our Constitution, to the fourth amendment, or to the eighth amendment—each one of which the reader is urged seriously to read again—would have left us with the legacy of Alexander Hamilton’s preference, *i.e.*, no Bill of Rights at all. At the cutting edge of the current dispute is *that* very choice: whether to incorporate the enduring value of an important and articulate principle into our fundamental law, or to leave our Constitution vacant in a respect that we know leaves it poorer.

As an example of why I do not believe objections to the proposed twenty-seventh amendment generally reflect an adequate understanding of how provisions unfit for a particularized statute may nonetheless be entirely fit for a Constitution, it may be helpful to consider at least one principal objection. One objection stems from an anxiety that if the twenty-seventh amendment were ratified, then men could not be made to serve in combat roles unless women were equally subject to identical military service, *i.e.*, as combat troops. Former Solicitor General Erwin Griswold appropriately expressed this concern:

[P]robably the most serious questions in the minds of many persons is that of women in combat services in the Armed Forces. And I venture to say that this is really at the heart of much of the opposition which has finally arisen. Many persons, rightly or wrongly, see this as a serious threat to the security of the United States.

*Equal Rights Amendment Extension: Hearings Before the House Subcomm. on Civil and Const.*

beginning, a major distraction somewhat later, and by the fourth year

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*Rights of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 113 (1977-78) (statement of Erwin Griswold).

Despite the tendency of some to assume that such a result is acceptable (*i.e.*, they see no serious probable compromise of the war power even assuming this result were mandated by the twenty-seventh amendment), many, myself included, do not share that easy confidence. Rumors to the contrary notwithstanding, evidently no country deploys women in its combat infantry. Doubts regarding the wisdom of doing so are by no means confined to male chauvinist pigs or to anti-feminists. For a recent review, see Gilder, *The Case Against Women in Combat*, New York Times Magazine, Jan. 28, 1979, at 29.

But the issue, so far as the twenty-seventh amendment is involved, is not whether under certain conditions it might be desirable or even ultimately unavoidable to pursue that course, as indeed it might; the issue is whether the twenty-seventh amendment would compel that result regardless of a contrary desire by Congress. I am confident that it would not. *Equal Rights Amendment Extension: Hearings Before the House Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 150 (1977-78) (statement of William W. Van Alstyne).

It is quite true that one possible construction of the amendment would give colorable basis to a claim that even in a wartime draft male combat troops could refuse to serve unless women were subject to conscription for identical combat service. (The colorable basis for that claim evidently is that insofar as women might not be subject to that form of military service, an "equality of rights under the law" must necessarily mean that neither may men be made subject to that form of military service.) Even reasonable attention, however, to Supreme Court interpretations of fully equivalent provisions elsewhere in our Constitution, construed in light of the special force of the several war powers clauses within the Constitution, should settle one's thoughts against the plausibility of that wooden interpretation.

The first amendment is quite absolute in the expression of its central premise respecting one's freedom of speech. Thus, it provides no enumerated list of exceptions to its general command that "Congress shall make no law . . . abridging the freedom of speech." Despite that command, however, the first amendment is acknowledged to be subject to construction in light of certain enumerated powers of Congress including, most importantly, the war powers. Indeed the amendment is not read to protect speech in disregard of all other circumstances even when the war power itself is not involved. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Despite the breadth of the first amendment's command, in the first modern case in which it was drawn into question Mr. Justice Holmes read it as subject to restraints of compelling justification. Thus, he observed that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Most pertinently, he further observed:

When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight, and that no Court could regard as protected by any constitutional right.

*Id.*

The power to prepare for and to engage in war is aggregated from a half-dozen explicit and quite special provisions in the Constitution—from the powers vested in Congress in article I, § 8 (to raise and support armies, to provide and maintain a navy, to make rules for the government of those forces, to declare war), through those vested in the President in article II (as Commander in Chief of the Army and Navy of the United States), to that stated in article IV, § 4 (providing that the United States shall protect the states from invasion). Not only are these powers committed to the Congress and to the President rather than to the courts, but the principal responsibility respecting the enforcement of the twenty-seventh amendment itself is also committed to Congress rather than to the courts. Therefore, it is extraordinarily implausible, as well as remarkably unhis-

(when certitude was becoming even more elusive), virtually a sufficient reason for perpetual agnosticism. Only more recently, nearly two years after I laid aside this distraction to return to more general interests in constitutional law, did it occur to me that the central premise of the twenty-seventh amendment is really quite plain and that I had been reacting with my characteristic mistrust of *any* proposal to amend the Constitution. It also became quite plain that had equally hostile mistrust similarly characterized the disposition of Congress and of the several state legislatures between 1789 and 1791, there never could have been a sufficient consensus to "risk" the Bill of Rights itself. Most certainly, there never could have developed the national consensus essential to the enactment of the only other amendment that in any fundamental way compares favorably with the Bill of Rights—the fourteenth amendment.

Indeed, there is scarcely any portion of the original Constitution of continuing significance that, as framed, could prevail over a general fear that regards a constitution with the same anxiety of an impending criminal indictment, to be attacked until such time as a detailed bill of particulars should also be produced. Provisions most fit for inclusion in a constitution are least appropriate for inclusion in a transient statu-

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tory, to suppose that if the Congress and the President were mutually of the view that the insertion of women into combat infantry was not appropriate to the enforcement of that amendment, but rather, that such a step would seriously compromise the related war powers entrusted to Congress and to the President, then the Supreme Court would nonetheless presume to "overrule" their combined judgment on both matters at once.

It has been observed by the Court itself that the power to wage war is the power to wage war successfully. *Lichter v. United States*, 334 U.S. 742, 782 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). A far less defensible treatment of "equal rights" than a determination to avoid the deployment of women in combat units has been sustained in the Supreme Court, even with respect to persons set apart exclusively because of their race and made to endure extraordinary hardships. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944).

None of this is to insist that Congress should necessarily exempt women from combatant training and combatant service, for without doubt there may be eminently reasonable differences of opinion about the wisdom or need to do so. This is to say, however, that the twenty-seventh amendment should not be thought to foreclose that judgment. The most zealous proponents of a unisex combat infantry may find this outcome galling and even renegade. The most zealous proponents of absolute free speech, even speech that incites desertion under fire of the enemy, may sometimes find the actual judicial interpretation of the first amendment galling and even renegade. But each, albeit in respect to a different issue, is equally mistaken on how a *constitution* is to be interpreted if they believe that courts will regard any amendment, or any other part of that constitution, as wholly unaffected by the structure and relation of other powers and provisions within it.

tory code. Each was not in the beginning and cannot even now be framed to foreclose the future.

To agree with this much is not, of course, to counsel at once against further reflection. It does, however, very much alter one's perspective on the proper objects of that reflection. These objects, in the instance of a proposed amendment, are the three substantial questions of constitutional statecraft that have resulted in the defeat of petty or ill-advised proposals assembled from some ad hoc distemper. They are also the substantial questions of constitutional statecraft that have provided us in the past with constitutional progress. In applying them to the proposed twenty-seventh amendment, I believe they firmly operate to commend its ratification. The subject of its concern is quite plainly of sufficient importance to warrant recognition in our Constitution, it is a subject most inadequately addressed elsewhere in that document, and the manner in which its central premise is framed compares extremely well with the manner that we have found most satisfactory in the past:

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.

## II. A BRIEF GENERAL COMPARISON OF THE TWENTY-SEVENTH AMENDMENT

Since the adoption of the original ten amendments, sixteen additional amendments have been passed into law. The majority of these, however, make only very limited revisions and lay down no very important principles. They are simply not comparable to the best known amendments of the original Bill of Rights. The twelfth, twentieth, twenty-second, and twenty-fifth amendments while, of course, not trivial, principally effect adjustments in the selection and terms of office for the President and Vice President. The sixteenth amendment merely frees the levy of certain income taxes from an apportionment formula previously required under article I. The eighteenth amendment "enacted" national prohibition—an adventure in abstinence that the twenty-first amendment repealed.

In fact, there are probably only two amendments that compare in significance with the original Bill of Rights. The thirteenth amendment, which prohibits slavery, is undoubtedly one of these. Aside from its importance, the occasion and necessity for its adoption are instruc-



tive in two other ways. First, the thirteenth amendment is a permanent and sober reminder that until its ratification, human slavery was itself accommodated by other provisions within our own Constitution,<sup>13</sup> the Bill of Rights notwithstanding. Second, it is also a most helpful reminder that the original Bill of Rights was itself by no means perfect, that it left several important issues unresolved.

Slavery was one of these issues. The general protection of most fundamental civil liberties from abridgement by the states, not merely from abridgement by the national government, was another.<sup>14</sup> An amendment addressed to this shortcoming was adopted in 1868. Its most important provisions state:<sup>15</sup>

Section 1. 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.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

This fourteenth amendment is itself now 111 years old. During that time its remarkable and delphic passages—"due process," "equal protection," "privileges and immunities"—have had an extraordinary career. On the one hand, the privileges and immunities clause was immediately interpreted by the Supreme Court in a manner virtually depriving it of any significance whatever,<sup>16</sup> an interpretation that almost surely would have amazed many of its principal sponsors. On the other hand, its remaining clauses—the due process and equal protection clauses—have been construed to include an astonishing assortment

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13. More precisely, although the word "slavery" never appears in the Constitution, it was very carefully accommodated and protected throughout the entire document. U.S. CONST. art. I, § 2, cl. 3 (apportionment of Representatives); U.S. CONST. art. I, § 9, cls. 1 & 4 (importation of "such persons" guaranteed until 1808; capitation or other direct taxes to be imposed on same apportionment formula as Representatives [five "other persons"—meaning slaves—to count as three free persons]); U.S. CONST. art. IV, § 2, cl. 1 (constitutional duty of each state to return runaway slaves); U.S. CONST. art. V (precluding any amendment prior to 1808 that would alter some of these pro-slavery clauses).

14. The Bill of Rights, of course, was a set of restrictions that operated only upon the United States and imposed no limitations upon the states. *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

15. U.S. CONST. amend. XIV.

16. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

of more particular subjects ranging all the way from laws mandating racial apartheid<sup>17</sup> to laws fixing the retail price of milk at nine cents a quart<sup>18</sup>, an interpretation that might likewise have startled many of its sponsors.

The sheer breadth of the fourteenth amendment readily distinguishes it from all others enacted since the original Bill of Rights. Indeed, that breadth distinguishes the amendment from nearly all of the original Bill of Rights as well. Most of these, broad as they are, nonetheless focus on identifiable subjects—whether so general a subject as freedom of speech or so particularized a subject as the quartering of soldiers. The fourteenth amendment is broader by far. It is also, by the same breadth, much more indiscriminate.

In one sense this breadth may well be one of its virtues, quite apart from the exhilarating role it creates for the judiciary. The sheer indiscriminateness of its breadth, however, has also been a large part of its greatest vice: an amendment that speaks so broadly to all possible subjects of state action tends, in the same voice, to speak distinctly of none. The resulting difficulty has long since become quite evident. Is there but one standard of justification that all laws must meet insofar as they affect “life, liberty, or property” or produce unequal degrees of “protection,” or are there different kinds of standards that different laws, addressing different subjects of classification or regulation, must meet? If some matters are more important than others, or if some kind of subjects are not to be subordinated to the same kind of regulation or classification as are other kinds of subjects, how are courts to determine which are which when neither the Constitution nor the fourteenth amendment itself declares the distinction? Questions of this sort are not merely the grist of law school courses in constitutional law. They are at the center of judicial perplexity<sup>19</sup> and of our own perplexity as well. They are the occasion for the more particular provisions of the twenty-seventh amendment.

There is in our Constitution no identifiable provision directed to the specific and recurring tendency to treat men and women unequally. Insofar as the fourteenth amendment is said to be such a provision, there

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17. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled sub silentio* in *Gayle v. Browder*, 352 U.S. 903 (1956).

18. *Nebbia v. New York*, 291 U.S. 502 (1934).

19. For a single, exquisite example of the difficulty, see the several opinions (covering 137 pages) in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

is nothing on the face of the amendment to suggest that the propriety of this tendency is of any greater *constitutional* concern than the acknowledged discretion of legislatures to favor some kinds of business activity over other kinds, to distinguish between minors and adults, or to permit some to sell land for a larger profit (*e.g.*, for use as a gas station) while limiting others to less profitable resales (*e.g.*, for use as a single-family dwelling).<sup>20</sup> In brief, unlike most of the Bill of Rights, which register a concrete solicitude for specific concerns such as freedom of speech or religion, there is nothing in our fundamental law concretely committing us to the determination that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”

Actually, the contrary is more nearly true; so far as the Constitution itself provides, the sole provision concerned with inequality of treatment related to gender implies a general indifference to the question. The nineteenth amendment addresses the issue of gender discrimination and provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.<sup>21</sup>

Insofar as this amendment addresses the subject, but solely forbids such inequality as to voting, the most sensible inference is that the Constitution is otherwise indifferent to gender-based laws—that all other kinds of legal inequalities between men and women are of no greater concern than the inequalities that may be imposed to distinguish adults from minors, corporations from partnerships, opticians from ophthalmologists—and is content to cast all other matters back into the indifferent net of the equal protection clause,<sup>22</sup> the “usual last resort of constitutional arguments.”<sup>23</sup>

To be sure, the indifferent generality of the equal protection clause can be pressed into service. Indeed, as we well know, it has been pressed into service. Since 1970 an unstable line of Supreme Court

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20. *See, e.g.*, *City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

21. U.S. CONST. amend. XIX.

22. Indeed, this was until quite recently the settled position of the Supreme Court. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948).

23. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

decisions has forced from that clause a special standard of equal protection for the review of laws that treat men and women unequally.<sup>24</sup> By patching together analogies based on the race-inequality laws<sup>25</sup> that were the particular, specific, and overwhelming object of the fourteenth amendment,<sup>26</sup> which gender-inequality laws were not,<sup>27</sup> the Supreme

24. The unsteady adjustment of the equal protection clause to gender-related laws commenced with *Reed v. Reed*, 404 U.S. 71 (1971). An effort to provide that case with a suitable post-hoc rationale was immediately thereafter supplied in Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Virtually all of the ensuing Supreme Court decisions are noted and reviewed in Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161. During the current term of the Supreme Court, the Court held that a state law exempting women from the possibility of having to pay alimony (while subjecting men to that possibility) denies equal protection to men. *Orr v. Orr*, 99 S. Ct. 1102 (1979).

25. The most elaborate effort to perfect this comparison appears in Mr. Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). See also *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. (1971). Compare *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

26. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873):

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history . . . ; [that] no one can fail to be impressed with the one pervading purpose found in [the 13th, 14th, and 15th amendments], lying at the foundation of each, and without which none of them would have been even suggested; . . . the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

*Strauder v. West Virginia*, 100 U.S. 303, 306 (1879):

It was in view of these considerations the 14th Amendment was framed and adopted. It was designed to assure [black people] the enjoyment of all the civil rights that under the law are enjoyed by white persons . . . .

*Ex parte Virginia*, 100 U.S. 339, 344-45 (1879):

One great purpose of these Amendments was to raise the colored race . . . into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.

27. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (state restriction of women from the practice of law sustained); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (state restriction of women from voting sustained). In neither case did plaintiff press the equal protection issue with vigor, but relied principally upon the "privileges and immunities" clause, just as the plaintiffs had done in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The overall evidence does not so much suggest that women were uniquely or even specially disfavored vis-à-vis other kinds of plaintiffs seeking relief under the equal protection clause as it does suggest that the clause was generally regarded to impose very little restriction on the police powers of the states except in regard to the civil rights of racial minorities. See text accompanying note 21 *supra*. See also Mendelson, *ERA, The Supreme Court, and Allegations of Gender Bias*, 44 MO. L. REV. 1 (1979). The subject is additionally complicated, however, insofar as § 2 of the fourteenth amendment explicitly provides that states may lump women together with criminals and with males under the age of twenty-one for purposes of disfranchisement without risking any loss of representation in Congress as otherwise contemplated by that section. Cf. *Richardson v. Ramirez*, 418 U.S. 24 (1974) (disenfranchising convicted felons who have completed their sentences and paroles does not violate the equal protection clause).

Court has to that extent supplied by case law what we mutually understand the Constitution itself to not supply: a distinct constitutional boundary expressly directed to this independently important subject.

How satisfactory is the jerry-rigged, judicially improvised substitute? Surely, "not very," from almost everyone's point of view. Instead of a properly framed and duly ratified express provision appropriately addressed to this basic and recurring issue, we have enormously prolix opinions from a badly divided Court struggling to explain why laws that weigh unequally upon men and women involve a "quasi-suspect" classification subject to a "middle tier scrutiny" under the fourteenth amendment<sup>28</sup>—an amendment not framed to deal with this issue in any particular fashion, nor aided by anything in the original Bill of Rights<sup>29</sup> or any other part of the Constitution directed to the issue; an amendment bogged down in judicial disagreement whether the Court has any proper business in struggling so hard to supply what the Constitution does not provide.

In brief, the problem with the fourteenth amendment as an adequate substitute for the twenty-seventh amendment is basically the problem of "The Emperor's New Clothes." On the Court's part, it may be an entirely honorable gesture to avoid leaving the subject nearly naked. On our part, it is entirely unworthy. The principle that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" is an important one. It well warrants an express place in our Constitution.<sup>30</sup> That place is not

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28. For an recent example of a federal district court's exhaustive (and exhausting) recapitulation (once again) of these matters, in which these inelegant phrases appear, see *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978).

29. As the Court has noted, "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First [Amendment], is much more definite than the test when only the Fourteenth is involved." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

30. An additional advantage reasonably to be expected from ratification of the twenty-seventh amendment is a disentanglement of future analyses of gender-related laws from the very imperfect and often confusing comparison currently made with race-related laws—an entanglement currently encouraged by their common treatment under the equal protection clause of the fourteenth amendment. Identification of gender-related laws to a separate constitutional provision should provide the basis for acknowledgment of distinctions that current "squeezings" from other constitutional provisions tend to disallow or, at least, to make exceedingly awkward.

One such issue concerns "separate but equal" facilities, or "separate but equivalent" opportunities. Such a doctrine, offered in justification of laws mandating racial apartheid, is utterly unacceptable under the equal protection clause. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956), *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *overruling sub silentio Plessy v. Ferguson*, 163 U.S.

properly filled by a mere cluster of unruly cases discoverable by "Shepardizing" a fragment of the fourteenth amendment.

### III. THE TIMELINESS OF APPROVAL

The twenty-seventh amendment is but a few votes short of approval, principally for reasons of the very same kind that left the original Constitution without any Bill of Rights at all—reasons of timidity and fear that had they finally controlled the outcome of the Bill of Rights, would also have spelled its defeat. Ironically, insofar as the amendment is

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537 (1896). Governmental actions placing a *cordon sanitaire* (or "quarantine line") around the lives of black Americans in the public sector and mandating an equivalent exclusion in the private sector, *see, e.g.*, *Berea College v. Kentucky*, 211 U.S. 45 (1908), were the unworthy successors of the more infamous Black Codes in the South and were the legal deposit of a more gentile racism in the North. *See* R. KLUGER, *SIMPLE JUSTICE* (1976); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (—). *See also* *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

The tendency to maintain separate bathroom facilities, or even different athletic programs for men and women, however, need not necessarily and may not ordinarily rest on sentiments of animosity or fear by either side, and is not by any means either deliberately or inadvertently disparaging of a full and genuine "equality of rights." That particular facilities may very well not be so arranged—*e.g.*, on buses and on airlines the self-same washroom is alternatively used by men and women alike—is very far from the conclusion that whenever such facilities are provided, someone is being denied an "equality of rights" on account of sex. To the contrary, in a variety of circumstances the most genuine realization of such equality of rights may be fulfilled neither in a unisex program nor in gender-segregated but identical programs, but rather in gender-responsive *equivalent* programs. A single example may be helpful.

If a public school provides but a single varsity sport and that sport is football for which boys and girls are all "equally" welcome to try out, the *de facto* consequence surely must be that all or all but a few positions will be held by boys; girls will be foreseeably disadvantaged because of gender. As well, if the same school provides "separate but equal" *football* teams as its sole organized athletic opportunity, surely the "equality of rights" thus provided to girls is likely to be regarded as more derisive than genuine. When the normal range of both interests and abilities characteristically differs, an accommodation of those differences in gender-specific ways need not require mere "stereotypes" nor disparage the skill or competitive excellence of either men or women, but may approximate a fuller "equality of rights" than any plausible alternative consistent with providing any kind of athletic program whatever. It is not supposed that the twenty-seventh amendment forbids such programs. Neither should it be supposed that the validity of such programs, *i.e.*, whether they provide an "equality of rights," would be examined under the false light of racial analogy, *e.g.*, whether such a gender-based program may be compared with a program that provides two football teams, one for whites only and the other for blacks only, or that provides two different kinds of teams, football for blacks only and tennis for whites only. Rather, the advantage of the twenty-seventh amendment is to avoid this kind of comparison by disentangling the consideration of gender-related arrangements from the frequently false analogy of the race cases to which they are currently tied by fourteenth amendment analysis alone. In this respect, the twenty-seventh amendment is not only an idea whose time has come, but also an amendment whose ratification should prove positively helpful.

now at risk, that risk arises not because the amendment has received too little attention, but because it has received too much attention. Had the language of the first amendment or of the fourth amendment or of the fifth amendment been parsed, worried over, and scrutinized for conceivable flaws to the same repetitive extent that has hostilely characterized the protracted seven-year review of the twenty-seventh amendment, it almost certainly would have produced such a confused welter of differing explanations and interpretations that by sheer attrition would have destroyed the whole enterprise—the same enervating ennui that threatens this amendment.

Most certainly, there are margins of ambiguity at the edges of this amendment. There are also the suggestions of certain partisans, both those in favor of and opposed to the amendment, who confuse the basic issue by reading it with such wooden disregard as to forget that it is a provision meant for a constitution rather than an internal revenue code. Both are mistaken insofar as they suppose that courts will regard any amendment or any other part of the Constitution with the same insensibility as a procrustean bed. No conscientious state legislator even reasonably familiar with the lack of rigidity that has characterized Supreme Court interpretations of other amendments should entertain concern that this amendment somehow might be treated differently, *i.e.*, that it will uniquely demand a rigidity of construction wholly indifferent to considerations of common sense.

Frankly, legislators who nonetheless wish for greater refinements and more detailed elaborations in this amendment unfairly ask for more articulation than constitutional principles can ever provide. They also ask for more than we have previously found acceptable in other important subjects charged with at least as much controversy as this one, and for an elaboration that is even less likely to secure consensus the more nearly it is made to resemble an administrative regulation. To embark all over again, or to recast this amendment in an attempt to list some factors or circumstances that might govern its meaning in each possibly doubtful case, is plainly a misplaced enterprise.

The questions that now should be sufficient to answer are the same questions that were sufficient to answer in the past. First, is not the principle articulated in this proposed amendment unexceptional and worthy of the Constitution? Second, is it not preferable to establish clearly this principle in our Constitution than to rely upon the awkward means by which legislatures and courts have attempted to develop

cumbersome substitutes from the bare bones of the fourteenth amendment, the fifth amendment,<sup>31</sup> and the mere shadows of other clauses in the Constitution? Third, is it not true that the manner in which the proposed amendment addresses "equality of rights under the law" compares very favorably with the manner in which other vital subjects have been similarly addressed in the Constitution?

So very close to ratification are we, and so very far from any reasonable likelihood that any other framing of the principle would be superior, that we need to be much less timorous and much more satisfied in this accomplishment. Indeed, how strange people should feel some years hence if the best they can say of their contributions to our fundamental law is that they assisted in the defeat of a constitutional principle that proclaims: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

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31. According to its own terms, the equal protection clause of the fourteenth amendment is not applicable to acts of Congress. The fifth amendment has no equal protection clause; nor does anything else therein look even vaguely suitable as a textual substitute. Nevertheless, the fifth amendment has been construed to limit Congress in the same manner as the states are limited by the fourteenth amendment's equal protection clause. See Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).