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THE CONSTITUTIONAL PRINCIPLE OF EQUALITY AND SEX-BASED DIFFERENTIAL TREATMENT IN AMERICAN LAW †

ALLEN SULTAN*

It is not possible to substitute other high moral principles for ones now existing in . . . The United States. American ideals, as I look upon them, are excellent; they have a great deal of meaning. In America most people stand united for those higher principles of Justice, Equality and Democracy. It is part of the American Dream to do so. Also, it is built into the fabric of Americans not to dominate the world by force but to show by example that free democracy can create happiness for all people, regardless of their origins.†

—GUNNAR MYRDAL

When a good friend and colleague suggested that I deliver a paper to this august congress, I immediately grasped the dual opportunity presented by his invitation: to once again meet with my many friends in International Pax Romana and to inform them of the developments in my country relating to both the theme of “Church, Christian Jurists and Human Rights” and to many of the detailed areas that have been chosen for discussion.²

† This paper was delivered at the biennial congress of the International Movement of Catholic Jurists, meeting at Dublin, Ireland on August 28 to September 3, 1976.
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1 A Swedish Scholar Sizes Us Up, Detroit Free Press, July 6, 1975 (Editorial Section), at 1.
² Evolution of the Family Law in Christian Perspective:
   A. Descriptive analysis of the principal developments which occurred in domestic law since 1946; . . . woman’s rights
   B. Prospective analysis of the new trends
      —Challenge directed to the institutions of the family
      —A new structure for the married couple and for the family . . .
      —Protection of the woman as wife and mother
      —Problem of a new concept of social organization in the area of marriage and the family, inspired by Christian principles.
As Swedish sociologist and expert on the United States Gunnar Myrdal correctly pointed out, the American people are not only very proud of their national values or principles, but they also, without abashment or the slightest semblance of modesty, broadcast them to the rest of the world. In what may appear to be a form of national arrogance, we Americans, in effect, proclaim that the rest of the world should follow our example; we do this because we are raised to view America’s principles as the universal political standard, the true key to secular happiness and prosperity.

As you no doubt know, this Congress meets in our bicentennial year, the two hundredth anniversary of our Declaration of Independence from British colonialism. Reflection on the latter reveals that the seeming audacity of the American people is readily explainable. Our Declaration of Independence not only commenced a worldwide movement of self-determination that remains extant, but it also invoked the principles of democracy and political equality in justification of an act of revolution. So if we Americans, perhaps myopically, act as if we are the Greece of the modern world, our posture should be attributed not to arrogance but rather to our relative youth and to our pride in the ever-increasing success of our “novel experiment” begun a mere 200 years ago. Because of this spirit, one can always expect a little malapertness when the young have proven a point to their elders.

Of the three main principles enumerated by Mr. Myrdal which permeate our Declaration of Independence, the last two, political equality and popular democracy, are inextricably interwoven. In fact, true and full political equality inexorably results in popular democracy. The importance of these two principles and their interrelationship with each other justified the bloodiest war in the history of my country, a civil conflict fought over the issue of slavery in which brother killed brother and father killed son. When it was all over, and these constitutional protections were extended to non-white Americans, the two principles of political equality and popular democracy were reaffirmed in our organic law, the United States Constitution.

In spite of these events, it took half a century for the principle of democracy to be extended to all Americans regardless of gender. Although agitation for reform began during the administration of President Andrew Jackson, it was not until after their exemplary service in World War I that

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1 At this time, American Indians were not citizens of the United States and thus were denied the benefit of many constitutional provisions. See Elk v. Wilkens, 112 U.S. 94 (1884). This was changed by a series of statutes enacted between 1887 and 1906. As a result, native Americans are now citizens. See 8 U.S.C. § 1401(a)(2)(1970).
2 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person . . . the equal protection of the laws”); U.S. CONST. amend. XV, § 1.
3 See U.S. CONST. amend. XIX, § 1.
4 LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1571 (1973 ed.).
women were granted the right to participate in the government that con-
trols so many aspects of their life, health, and prosperity. This apparent
inequity is easily explained by the basic character of American constitu-
tional government. The founding fathers of the United States proclaimed
our national values as abstract propositions, leaving their application,
their implementation, and the delimitation of their breadth to future gen-
erations. As moralists, missionaries, and political philosophers, the found-
ing fathers sought to establish and perpetuate the best in human nature
and human society. As practical politicians, aware that the art of politics
is the realization of the possible, they were willing to achieve as much as
circumstances permitted, secure in the satisfaction that future develop-
ments generally would be in the right direction. They fashioned that direc-
tion by placing the nation's basic principles in the Constitution which
established the government that was intended to implement those values.

Thus, we in the United States have a constitutional system that in one
of its major aspects is conceptually similar to the legal methodology of
those systems which adhere to the Roman law tradition; it utilizes the
deductive reasoning inherent in the code-oriented systems employed by
the majority of those present today. Similar to those systems, the reach of
a legal proposition, in this case a constitutional precept, is limited by
political considerations of the broadest sense, namely, what the people,
who have the final say in any true democracy, are willing to accept. A good
example of this process can be seen in the prohibition against cruel and
unusual punishment contained in our Bill of Rights. While whipping and
other forms of corporal punishment were not considered "cruel" or
"unusual" in nature in 1791 when the prohibition of cruel and unusual
punishment became an American principle, they clearly have been so con-
sidered in the latter half of this century. Currently, physical punishment
is usually deemed to be a form of torture because it violates the public
sense of justice. Consequently, its prohibition comfortably fits under a
constitutional precept.

Thus, American government, in the final analysis, is supported and

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1 U.S. CONST. amend. VIII.
3 "But see Baker v. Owen, 423 U.S. 907, aff'g without opinion 395 F. Supp. 294 (M.D.N.C. 1975), which sustained the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes.
characterized by something outside the four corners of our written Constitution. The values, the attitudes, and the political temper of the body politic not only guarantee that the Constitution is more than a piece of paper which can be ignored at will, but also create the ultimate foundation for its interpretation.

The attitude which perhaps most affected gender-based rules in Anglo-American society during the last century was Victorianism. It lifted women to a pedestal with all its attendant demands and treated "the fairer sex" in a manner that often was justified as protective but was in reality simply male chauvinism. Perhaps no better statement of this social posture exists than an 1873 decision by the United States Supreme Court, which, as you know, is the final arbiter of the meaning of our national Constitution. It resulted from a challenge to an Illinois statute that prohibited females from practicing law. Denying the alleged right "of women as citizens to engage in any and every profession, occupation, or employment in civil life," Mr. Justice Bradley declared:

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. 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 constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as 'that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one

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The ultimates, identified with transcendent values, must in their very nature lie outside the Constitution, just as basic rights have their source outside the Constitution... In the end its decision on ultimate values must be sustained by some higher law rooted in the common consciousness and understanding... the conscience of the nation lies outside the Constitution and supports it. The conceptions rooted in common understanding are the stuff of a nation's aspiration and moral vision. It is in the shaping of a common ethic of the people which draws its inspiration from religious, moral, and philosophical sources...
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circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.13

This prevailing attitude was tempered somewhat by the Married Women’s Acts.14 These statutes, enacted by various states of the Union during the last half of the nineteenth century,15 granted additional rights to women beyond those already existing in the rules and doctrines of equity while at the same time maintaining the basic responsibilities of both parties to the marital relationship. Despite these developments and the subsequent granting of the right to vote, at the turn of the century women, especially married women, retained many of the “advantages” and disabilities of their earlier status. Although they enjoyed the right to property16 and domicile,17 they still remained somewhat protected and disadvantaged. Indeed, in 1908 a landmark decision in constitutional law upheld the right of a state to legislate protective conditions for employing females in a factory or a laundry.18 This case is considered a milestone because in connection with it the United States Supreme Court, for the first time, permitted nonlegal, empirical data to be given judicial consideration in constitutional determinations.19 The Court specifically used such data in finding that the physical structure of women placed them “at a disadvantage in the struggle for subsistence,” and that “as healthy mothers are

14 See, e.g., N.Y. DOM. REL. LAW § 50 (McKinney 1964); N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1964).
17 See id. at 51-53.
19 Id. at 421-23. The instrument by which empirical data is submitted for judicial consideration is known as the Brandeis Brief. The brief is named for Louis Brandeis who was the attorney for the State of Oregon in the Muller case and was generally reputed to be the most outstanding practicing attorney of his time. Mr. Brandeis later became one of the most influential Justices in the history of the Supreme Court.
essential to vigorous offspring, the physical well-being of woman becomes an object of public interest."

21 Id. at 421. Again reflecting the prevailing attitudes of the time, the Court explained its conclusion in the following statement:

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother.

Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.

Id. at 421-22. For a criticism of the Court's position see Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 699 (1971) [hereinafter cited as Johnston & Knapp], wherein it is said that the following incidents of sex-based discrimination existed as of March 1970:

1. State laws placing special restrictions on women with respect to hours of work and weightlifting on the job;
2. State laws prohibiting women from working in certain occupations;
3. Laws or practices operating to exclude women from State colleges and universities (including higher standards required for women applicants to institutions of higher learning and in the administration of scholarship programs);
4. Discrimination in employment by State and local governments;
5. Dual pay schedules for men and women public school teachers;
6. State laws providing for alimony to be awarded, under certain circumstances, to ex-wives but not to ex-husbands;
7. State laws placing special restrictions on the legal capacity of married women or on their right to establish a legal domicile;
Three general areas of development have increasingly accelerated change in the legal consequences of this preexisting public philosophy. True to the political formula, they in turn have resulted from changing public attitudes regarding the meaning of the principle of equality as it applies to sex-based differential treatment. As a consequence, the past decade has experienced both state and federal judicial activity mandating equality of treatment between the sexes and an effort to establish the prohibition against differential treatment as a constitutional tenet. These two areas of development were to a large degree kindled by a single addition to a congressional enactment passed a little more than a dozen years ago. This enactment resulted in a third area of development that continues to the present day. As it is the oldest, I will discuss it first.

The decade of the 1960's was a turbulent period in the history of the United States. The tumultuous events resulted from the belated insistence that the promise of political equality for non-white Americans be respected. It was like an outstanding note or draft one hundred years overdue; satisfaction of the obligation had to be swiftly implemented. One of the principal efforts to do so was the Civil Rights Act of 1964, a very broad promulgation that prohibited discrimination in virtually all hotels, motels, restaurants, and other places of public accommodation. During the congressional debate on Title VII, the statute which contains the employment provisions of the Civil Rights Act, Congresswoman Martha Griffiths was able to have sex added to the list of prohibited bases for differential treatment. The consequence of this amendment, which went virtually unnoticed at the time, was that an arsenal of federal remedies, which are

8. State laws that require married women but not married men to go through a formal procedure and obtain court approval before they may engage in an independent business;
9. Social Security and other social benefits legislation which give greater benefits to one sex than to the other;
10. Discriminatory preferences, based on sex, in child custody cases;
11. State laws providing that the father is the natural guardian of the minor children;
12. Different ages for males and females in (a) child labor laws, (b) age for marriage, (c) cutoff of the right to parental support, and (d) juvenile court jurisdiction;
13. Exclusion of women from the requirements of the Military Selective Service Act of 1967;
14. Special sex-based exemptions for women in selection of State juries;
15. Heavier criminal penalties for female offenders than for male offenders committing the same crime.

Id. at 677 n.5 (citing 116 Cong. Rec. 9685 (1970)).


42 U.S.C. §§ 2000a to 2000a-6 (1970). It is of interest that the Civil Rights Act of 1964 was promulgated more than a year after President John F. Kennedy had urged that comprehensive civil rights legislation be passed. It is also interesting to note that its enactment was dependent upon the first successful (71 to 20) cloture vote on a civil rights bill in the history of the country, a vote that occurred only after weeks of Senate debate.

11 The others are race, color, religion or national origin. See id. § 2000e-2 (1970).
supreme over preexisting state law was made available to ensure equal employment opportunity. Thus, the authority of the United States was recruited in the cause: sex-based differential treatment in employment was, and continues to be, clearly prohibited. It is significant to our discussion that of all the areas of possible differential treatment based upon sex, the American people then viewed sex-based discrimination in the area of employment as the most significant violation of the principle of equality.

"Equal pay for equal work" was a precept comprehended by the body politic and finally evoked the public's sense of justice.

The provisions of Title VII were added to the existing "protective" legislation previously discussed. In the field of employment, these earlier enactments dealt with minimum wages, limitations on the hours of work, restrictions with respect to certain types of occupations such as employment as a bartender, and regulation of conditions of employment including limitations on the amounts of weight that women could be required to lift. Complete coverage of the impact of Title VII with respect to sex-based differential treatment would be beyond the scope of this paper.

The breadth of Title VII's reach can be seen, however, from several recent decisions.

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24 See U.S. Const. art. VI, cl. 2; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
26 As of 1975 "all but nine states have passed legislation prohibiting employment discrimination on the basis of sex." Conlin, supra note 15, at 294.
27 Id. at 294-95. Title VII and state protective legislation originally were conceived to be consistent with each other, but the Equal Employment Opportunity Commission later determined that the state statutes conflicted with the language and purpose of Title VII, and thus were superseded by the federal law. See id. at 295-300.
Ever since the promulgation of Title VII, labor lawyers and lower courts have been struggling with the impact of that legislation upon the sacred cow of the American labor movement, the seniority system. This

The limits on the reach of Title VII are expressed in the Supreme Court’s recent decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), wherein the Court held that the exclusion of pregnancy from the coverage of a disability benefit plan did not constitute sex discrimination in violation of the statute. General Electric provided nonoccupational sickness and accident benefits to its employees but excepted pregnancy related disabilities from coverage. Several female employees challenged the company’s denial of their disability claims on the ground that it is unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of... sex.” 42 U.S.C. 2000e-2(a)(1) (1970). The Supreme Court determined that the exclusion of pregnancy from the disability plan did not amount to gender-based discrimination. 429 U.S. at 133-40.

Justice Rehnquist, writing for the majority, relied heavily on the Court’s opinion in Geduldig v. Aiello, 417 U.S. 484 (1974), in which it was held that a similar disability plan was not violative of the Equal Protection Clause. The Justice reasoned that a distinction based upon pregnancy does not necessarily constitute sex-based discrimination since such a classification “divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” 429 U.S. at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 497 (1974)). Although it recognized that proof of discriminatory effect may establish a prima facie violation of Title VII, 429 U.S. at 136-37, the Court declared that the plaintiffs had not shown such an effect, since the evidence introduced tended to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others. The “package” going to relevant identifiable groups we are presently concerned with—General Electric’s male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory. As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer’s disability benefits plan is less than all inclusive.

Id. at 138-39.

Justice Brennan, in a vigorous dissent, pointed out that the Court had reached its conclusion by focusing upon the mutual disabilities covered by the plan rather than upon the single risk excluded by it. The plan insured against all “male-specific” disabilities, Justice Brennan declared, and against all female-specific disabilities except pregnancy. It was Justice Brennan’s view that the determinative question must be whether the social policies and aims to be furthered by Title VII and filtered through the phrase “to discriminate” contained in 42 U.S. § 2000e-2(a)(1) fairly forbid an ultimate pattern of coverage that insured all risks except a commonplace one that is applicable to women but not to men.

Id. at 155 (Brennan, J., dissenting).

In a separate dissent, Justice Stevens argued that since the plan placed pregnancy disability in a class by itself, it necessarily discriminated on the basis of sex; “it is the capacity to become pregnant which primarily differentiates the female from the male.” Id. at 161-62 (Stevens, J., dissenting). The language of the statute, he contended, dictates that the exclusion of pregnancy from such a plan be adjudged discriminatory.

Id.
system mandates that the last hired be the first fired or laid-off if circumstances necessitate a smaller work force. In fact, respect for this practice was built into Title VII by permitting varying conditions of employment if they result from application of a bona fide seniority system. A question arose, however, concerning the consequences of a direct clash between workers who claim seniority rights based upon a period of faithful service and those who would have had such rights were it not for past discrimination by employers. Stated another way, should employees who are innocent of any discriminatory acts have to forego some seniority so as to permit a meaningful remedy for victims of discrimination? When it had to decide the question, it appears that the Supreme Court chose to uphold the principle of equality. The Court held, in Franks v. Bowman Transportation Co., that an award of retroactive seniority was the only "full relief" available to the victims of past discriminatory hiring practices.

An interesting comparison may be drawn between the recent decisions of two United States Courts of Appeal. In Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), the Second Circuit considered a challenge to the seniority system of the New York City Police Department, a system that was nondiscriminatory on its face. Since the police department prior to 1973 had limited the number of women that could be on the force, the seniority system led to discriminatory treatment. Id. at 649. After 1973 officers were hired on a ratio of four males to every female irrespective of their relative examination grades. Id. at 650. As a result of this gender-based differential treatment, the policewomen who could prove that they would have been hired earlier if it were not for this discriminatory practice were granted retroactive seniority. Id. at 654. The Second Circuit reasoned that a bona fide system of seniority does not exist until past discrimination is remedied. Thus, the grant of retroactive seniority was not a gender-based preference to the female officers, but rather an exercise of the court's remedial power to restore the victims to the position they would have enjoyed but for the illegal discrimination. Id. at 656. The Fourth Circuit seems to have taken what may be considered the opposite approach. In Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976), it held that Title VII does not require the demotion of incumbent employees who are not responsible for the employer's past racial and sexual discrimination. Although the victims may be granted monetary relief, they may not take the positions of white male employees. Id. at 267-70.

The Bowman Court reasoned in part:

Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest . . . . The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement . . . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests.

The *Franks* decision was quickly followed by *Williams v. Saxbe*, where the United States District Court for the District of Columbia held that a male supervisor violated Title VII by sexually harassing a female employee. In this most interesting litigation, the female employee was fired for refusing to provide "sexual consideration" to her male supervisor. In holding that this amounted to sex-based employment discrimination, the court characterized the employer's demands as an artificial obstacle to employment which the employer imposed upon one sex and not the other. Thus, the court reasoned, the condition was similar to "no marriage" and "no preschool-aged children" restrictions, both of which had previously been declared illegal. Another interesting point made in *Williams* was that the prohibition was a double edged sword affecting both sexes. Thus, female employers cannot make sexual cooperation a condition of male employment.

Constitutional and labor attorneys in the United States continue to monitor the effect of Title VII. Analysis of the situation suggests that the impact of Title VII in its second decade of existence will be even greater than its impact to date. As a consequence, neither sex-based classification nor any of the other prohibited classifications will prevent continual progress in the United States toward the ultimate goal of equal opportunity in employment, hiring, working conditions, and compensation. The American people have by now clearly expressed the attitude that the principle of equality requires no less.

The second general area of accelerated change in preexisting American attitudes toward gender-based differential treatment is the result of ever-increasing judicial activity on the part of both federal and state courts. It is the function of the American courts not only to interpret and apply statutory provisions, as in the civil law systems, but also to interpret and apply constitutional provisions. Thus, federal courts apply the United States Constitution and state courts apply their own respective state constitutions. Moreover, because of the supremacy of federal law, the state courts also are required to apply federal law, including provisions of the United States Constitution, as construed by the federal courts. This function of the state courts renders them "natural auxiliaries" of the federal courts for the implementation of federal law. It is a role clearly intended

(E.D. Pa. 1976), wherein the United States District Court for the Eastern District of Pennsylvania held that Title VII is not violated by Section 228(b) of the Railroad Retirement Act, 45 U.S.C. § 228b (1970), which permits female employees to retire with full benefits five years earlier than male employees.

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35 Id. at 657-58.
36 Id. at 659 n.6.
37 Id.
38 See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Day v. Walker*, 124 Neb. 500, 247 N.W. 350 (1933); *The Federalist No. 78* (A. Hamilton); A. Sutherland, *Constitutionalism in America* 261, 307-41 (1965) [hereinafter cited as *Sutherland*].
39 See note 24 and accompanying text supra.
by the framers of our federal Constitution⁴⁰ and recognized and supported by authority from the early days of the nation's existence.⁴¹

The principle of equality embodied in the equal protection clause of the fourteenth amendment was added to the United States Constitution after the Civil War.⁴² Although designed as a guarantee against differential treatment based on color or race,⁴³ the equal protection clause also has been construed to proscribe a variety of other discriminatory treatment.⁴⁴ Even though the text of the fourteenth amendment itself is directed at the states, the principle of equality is to a certain degree applicable to the federal government as well.⁴⁵ It even has been held applicable in various situations involving a private citizen who functions in a quasi-official capacity.⁴⁶

Probably the most outstanding opinion to date from a state court is one that is now five years old. In it a unanimous California Supreme Court invalidated a state law which prohibited the employment of females as bartenders unless they were the owner or the wife of the owner of the establishment.⁴⁷ Although the court found the statute infirm on a number of grounds, the value of the decision lies in its reasoning that the law violated the principle of equality contained in both the California and United States Constitutions.⁴⁸ If followed by other jurisdictions, the influence of this reasoning would be prodigious. It would be difficult to find a statement better reflecting the direction of changing public attitudes regarding the implementation of the principle of equality. Additionally, the opinion clearly expresses the close relationship between differential treatment based upon gender and discrimination based upon race or color. The court stated:

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex

⁴⁰ See The Federalist No. 82 (A. Hamilton).
⁴² See note 4 supra.
⁴⁵ See, e.g., Schneider v. Rusk, 377 U.S. 163 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954), which held that the due process clause of the fifth amendment proscribes discriminatory treatment.
⁴⁷ Sail' er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc).
⁴⁸ For a full discussion of this decision see Johnston & Knapp, supra note 20, at 686-91.
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from nonsuspect statuses, such as intelligence or physical disability, and
aligns it with the recognized suspect classifications is that the characteristic
crrently bears no relation to ability to perform or contribute to society. The
result is that the whole class is relegated to an inferior legal status without
regard to the capabilities or characteristics of its individual members. Where
the relation between characteristic and evil to be prevented is so tenuous,
courts must look closely at classifications based on that characteristic lest
outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the
stigma of inferiority and second class citizenship associated with them.
Women, like Negroes, aliens, and the poor have historically labored under
severe legal and social disabilities. Like black citizens, they were, for many
years, denied the right to vote and, until recently, the right to serve on juries
in many states. They are excluded from or discriminated against in employ-
ment and educational opportunities. Married women in particular have been
treated as inferior persons in numerous laws relating to property and inde-
pendent business ownership and the right to make contracts.

Laws which disable women from full participation in the political, busi-
ness and economic arenas are often characterized as “protective” and benefi-
cial. Those same laws applied to racial or ethnic minorities would readily be
recognized as invidious and impermissible. The pedestal upon which women
have been placed has all too often, upon closer inspection, been revealed as
a cage. We conclude that the sexual classifications are properly treated as
suspect, particularly when these classifications are made with respect to a
fundamental interest such as employment.\(^9\)

It was in this emerging tradition of state court activity that Massachu-
setts’ highest court recently struck down, as violative of the principle of
equality, a state criminal statute that punished any man who became the
parent of an illegitimate child.\(^5\) Similarly, a New York court invalidated
a law that permitted the civil arrest of a man but not a

Passing from state level courts\(^2\) and turning to the federal judiciary,
one finds an uncertain scenario in the United States Supreme Court. That
all-powerful tribunal at first proved to be hesitant and then appeared to
display commendable decisiveness. At the present time, its position can
perhaps be characterized as confused. The hesitation was visible shortly
after World War II, when the Supreme Court upheld the constitutionality

\(^9\) 5 Cal. 3d at 18-20, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.
held that the distinction between men and women contained in the civil arrest statute, ch.
308, § 610(1), [1962] N.Y. Laws 1475, was unjustified despite a feeling of “squeamishness”
about incarcerating females, a concern about their domestic responsibilities, and a belief that
they are more trustworthy. Id. at 81-82, 372 N.Y.S.2d at 846-47. Accord, Gould v. Gould, 82
Misc. 2d 835, 371 N.Y.S.2d 267 (Sup. Ct. Nassau County 1975). The New York statute was
subsequently amended to exempt persons who have the primary responsibility of caring for
\(^3\) For a more complete coverage of the activity of state courts see Johnston & Knapp, supra
note 20; Conlin, supra note 15.
of a Michigan statute that was even more restrictive than the statute involved in the decision discussed above. Then, at the beginning of the last decade, the Court upheld a Florida statute that required women to register in order to be eligible for jury service while permitting men to serve without prior registration. Surprisingly, it took ten years for the Court to seem to take a decisive stand. The first major case in which the Court applied the principle of equality to disallow sex-based differential treatment, *Reed v. Reed,* was decided as recently as 1971. *Reed* involved an Idaho law dealing with decedents' estates, or what those of you from the Roman Law tradition know as succession of property. Under the Idaho probate code, men were preferred over women in the same class for appointment as administrator of an estate. Thus, in *Reed,* the father rather than the mother was chosen to administer the estate of their child. Speaking for a unanimous Court, Mr. Chief Justice Burger concluded that the statutory preference was arbitrary. In reaching this conclusion, the Chief Justice pointed out that the state interest in the efficiency of the probate courts, which was allegedly promoted by the discriminatory treatment, could not be achieved in a manner that is inconsistent with the principle of equality.

Two years later, in *Frontiero v. Richardson,* the Court expressed another clear indication of an increasingly decisive attitude concerning sex-based differential treatment. Since *Frontiero* involved a challenge to a gender-based distinction utilized in calculating the pay and allowance of members of the Armed Forces of the United States, the litigation also is another example of the principle of equality limiting the authority of the federal government. The *Frontiero* Court held, in effect, that the United States Air Force must pay a female lieutenant the same quarters allowances and the same housing and medical benefits for her husband as it pays a male lieutenant for his wife. Yet, it was not the holding, but rather certain language in the Court's opinion that raised expectations for the future. The following excerpt of that opinion is very similar to the previously quoted statement made by the California Supreme Court. In it, the Court explicitly rejected the 1873 declaration of Mr. Justice Bradley:

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54 *See note 47 and accompanying text supra.*
57 *Id.* at 76.
58 *Id.* at 76-77.
60 *See Conlin, supra* note 15, at 266.
61 *See note 45 and accompanying text supra.*
62 411 U.S. at 679, 690-91.
SEX-BASED DIFFERENTIAL TREATMENT

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.

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout 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. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

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, in the job market and, perhaps more conspicuously, in the political arena.

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of 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. . . ." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex 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 invidiously relegating the entire class of females to inferior legal status without regard to the actual capacities of its individual members.3

Based upon this reasoning, four Justices of the Court declared sex to be a "suspect classification,"4 thus indicating that laws containing gender-based distinctions should be subjected to "strict scrutiny."5 Under this standard, sex-based classifications would not be upheld unless they are shown to be necessary to the attainment of a "compelling" governmental objective. With only one more vote sex would have joined race, alienage, and national origin as an "accident of birth" deserving of the highest form of judicial protection from unequal treatment.

Although Frontiero at first blush appears to be a great victory for the

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3 Id. at 684-87 (footnotes and citations omitted). Three Justices concurred in a separate opinion and one Justice authored his own concurring opinion. Justice Rehnquist was the sole dissenter.
4 Id. at 688.
5 Id.
proponents of change, the decision falls far short of that mark. Since the opinion was approved by less than a majority of the Supreme Court, its precedential value is quite limited. It is not surprising, therefore, that the Supreme Court’s decisions since 1973 have been “a mixed bag,” some supporting application of the principle of equality and others ruling that it does not apply. Indeed, one commentator has concluded that one of the holdings in the latter group of decisions is without “logical foundation” and that as a result of the decision, “[o]ne of the most deep-seated and pervasive of all sex-role attitudes... became something of a constitutional sacred cow.”

Turning to the recent decisions of the lower federal courts, one finds an almost consistent pattern of support for application of the principle of equality. Aside from one court of appeals decision which permitted public school systems to maintain single-sex high schools, equal treatment has been mandated for female members of the United States Marine Corps and for men who seek certain benefits under the social security laws of the United States. One court of appeals even distinguished a 1948 Supreme

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46 See Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); cf. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). See also Taylor v. Louisiana, 419 U.S. 522 (1975), wherein the Court held that a jury selection system similar to the one previously sustained in Hoyt v. Florida, 368 U.S. 57 (1961), see note 55 and accompanying text supra, was violative of the jury trial guarantee of the sixth amendment. The Court characterized the Hoyt holding, to the extent that it automatically exempted women from jury duty on the basis of sex, as “no longer tenable.” 419 U.S. at 537.


49 Johnston, Sex Discrimination and the Supreme Court—1975, 23 U.C.L.A. L. Rev. 235, 244 (1975). The attitude referred to is “the notion that women are physically, mentally or emotionally unfit for combat—or that such activity is otherwise ‘unseemly’ for them.” The author expressed the opinion that such an attitude is “mainly attributable to social conditioning.” Id. at 243.

50 Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976). Interestingly, the court stated that sex is not a “suspect classification.” See note 67 supra.

51 Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (women Marines who become pregnant may not be automatically discharged).

52 Moss v. Secretary of HEW, 408 F. Supp. 403 (M.D. Fla. 1976). The Moss court held that men who seek derivative spouses benefits do not have to prove that they were dependent on their wives for support. This opinion is at least the fourth district court decision in a six-month period that invalidated the requirement embodied in 42 U.S.C. § 422(b) and (c). In so ruling, the court relied heavily on Frontiero v. Richardson, 411 U.S. 677 (1973), and Weinberger v. Weisenfeld, 420 U.S. 636 (1975).
Court decision in invalidating an ordinance of the City of Milwaukee that prohibited female employees of taverns from sitting with male customers and sitting or standing at the bar. In sum, the lower federal courts presently seem to be more active than the Supreme Court in applying the principle of equality.

The third general area of contemporary development is the political movement to add an Equal Rights Amendment (ERA) to the United States Constitution. Proposed by Congress in 1972, the amendment has been ratified by thirty-five states, three short of the number required for its incorporation as the twenty-seventh amendment to the Constitution. Although approximately half of the ratifications occurred in the first few months after the 1972 congressional action, it is currently uncertain whether the requisite thirty-eight states will approve the amendment within the seven-year ratification period mandated by Congress. This is true in spite of ongoing massive efforts by politically influential pro-ERA special interest groups to prevent rescission of the existing ratifications and obtain a relatively few additional state endorsements.

The uncertainty of the ultimate success of the ERA is occasioned by a number of factors, including the diversity in attitudes in the United States toward the roles of the sexes. It cannot be denied that such differing attitudes were to be expected; indeed, the founders of the nation provided constitutional protection for diverse viewpoints. It also was anticipated that generally held regional attitudes would be reflected in the state legislatures and that this would have an impact on the amending process. These are necessary and proper aspects of our system of federalism. A second, more prevalent reason why the ERA might ultimately fail is the continuing controversy over the necessity for and wisdom of the amend-

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73 Goessaert v. Cleary, 335 U.S. 463 (1948), discussed in note 53 and accompanying text supra.
74 White v. Fleming, 522 F.2d 730 (7th Cir. 1975). The court concluded that it is not permissible to assume that a female employee is more likely to engage in promiscuous sexual activities with customers than a male employee. Id. at 737.
75 Gunther, supra note 43, at 786.
76 See U.S. Const. art. V.
78 See note 83 and accompanying text infra.
79 The most recent effort was made by twenty-five magazines which proclaimed July, 1976, "ERA Month." The magazines involved in this effort, which include most of the women's magazines, each promised to publish at least one article on the ERA that month. Frontline, Mar.-Apr. 1976, at 11, col. 3 (Common Cause Wash. D.C.) [hereinafter cited as Frontline].
81 See U.S. Const. amend. I. It is not surprising to those familiar with America's regional diversity that the two geographical areas possibly most opposed to the ERA are the Southeast and the Southwest. See Frontline, supra note 79.
82 Although only The Federalist No. 43 (J. Madison) discusses the amending process, and the debates of the framers offer little additional authority, the structure of article V leads to this conclusion. See U.S. Const. art. V.
ment. Indeed, at least two state legislatures that had ratified the ERA have since voted to rescind their ratification, touching off a debate over the still unresolved constitutional issue where such rescission is permissible.

It is clearly beyond the scope of this paper to enter into a detailed discussion of the various arguments advanced for and against the ERA. It is sufficient to say that there are those who claim that the present legislative and judicial approach is too slow, or inadequate, or both. Conversely, there are others who call for hesitation. For this latter group gradual change is far preferable to the untoward substantive consequences and bureaucratic intervention that they feel would almost certainly result from the adoption of the ERA. Typical of the statements made by those who call for adoption of the ERA is the following:

Equal treatment under the law is a goal toward which women have been reaching for more than 150 years. The progress has been slow and painful. To expect another generation of women to wait patiently for judges and legislators to allow them one right at a time is unreasonable and unrealistic. One-half of the population has been constrained by law to accept a role designated for them at birth. One-half of the population has been deprived of certain fundamental rights and responsibilities. Habits of mind that automatically attach characteristics to one sex or the other are deep and persuasive. The law of the land is based on those habits of mind.

In response to this and other similar arguments, those opposed to the

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81 The two states that voted to rescind their ratification are Tennessee and Nebraska. See Frontline, supra note 79, at 11, col. 2.
82 See id., wherein it is said that states may not rescind their ratification. See also AMERICAN ENTERPRISE INSTITUTE, A CONVENTION TO AMEND THE CONSTITUTION 32 (1967); ERIKKSSON & ROWE, AMERICAN CONSTITUTIONAL HISTORY 280 (1933); S. Rep. No. 293, 93d Cong., 1st Sess. 146 (1973); 1973 Op. Mich. Atty Gen. No. 4779. The only relevant Supreme Court decision, Coleman v. Miller, 307 U.S. 433 (1939), does not definitively resolve the issue.
84 Conlin, supra note 15, at 334-35. One should not conclude that the ERA is only a single-edged sword. See Kanowitz, The Male Stake in Women's Liberation, 8 CAL. W.L. REV. 424 (1972).
85 See, e.g., Brown, supra note 15, at 979, wherein it is contended:

The transformation of our legal system to one which establishes equal rights for women under the law is long overdue. Our present dual system of legal rights has resulted, and can only result, in relegating half of the population to second class status in our society. What was begun in the Nineteenth Amendment, extending to women the right of franchise, should now be completed by guaranteeing equal treatment to women in all areas of legal rights and responsibilities.

We believe that the necessary changes in our legal structure can be accomplished
ERICA contend that it would abrogate the state laws that oblige a husband to support his wife,\(^8\), transfer authority over various matters from the states to the federal government,\(^9\), and destroy labor laws that protect women.\(^9\)

Most of the immediate and emotional objections to the ERA concerned the claim that the amendment would require that women engage in military combat in defense of their country.\(^10\) Human nature abhors relinquishing an advantage such as the exemption from military combat. Moreover, one questions whether the American people desire or possess the capability to produce in the near future a nation of young females able to take part in combat. Industries involved in cosmetics, female apparel, and advertising probably would oppose such an objective. The second section of the ERA, which grants Congress the power to enforce the amendment, probably could be used to avoid this specter. As a specific delegation of legislative authority, this section permits Congress the broadest possible discretion.\(^9\) In my opinion, it clearly is sufficient to permit distinctions with respect to required military service.\(^9\)

effectively only by a constitutional amendment. The process of piecemeal change is long and uncertain; the prospect of judicial change through interpretation of the Fourteenth Amendment is remote and the results are likely to be inadequate. The Equal Rights Amendment provides a sound constitutional basis for carrying out the alterations which must be put into effect. It embodies a consistent theory that guarantees equal legal rights for both sexes while taking into account unique physical differences between the sexes. In the tradition of other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process, it supplies the fundamental legal framework upon which to build a coherent body of law and practice designed to achieve the specific goal of equal rights.

See Fordham & Fordham, supra note 85, at 19, col. 1.

See id.

Sherrill, supra note 85, at 98, col. 3. Mr. Sherrill pointed out that due to the serious questions concerning the impact of the ERA, "[s]ome prominent women's organizations—the National Council of Jewish Women, the National Council of Negro Women and the National Council of Catholic Women, for example—are actively opposing passage of the amendment." Id. col. 1.

In fact, when the ERA was considered by the Senate in 1970, a proposal was made to add to it specific language exempting women from military service. Brown, supra note 15, at 888.


It has, however, been said:

The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military. Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women. Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination.

Brown, supra note 15, at 969 (footnotes omitted). Most importantly, these authors note:
One possible consequence of the ERA that should be fully considered is the amendment's impact on capital punishment.

As you may know, in 1972 the United States Supreme Court, by the narrowest majority possible, ruled that the capital punishment laws of two states violated the constitutional prohibition of cruel and unusual punishment. Since then, thirty-five states have enacted new laws imposing capital punishment. Many of these new statutes, supported by a substantial majority of the American population, recently were upheld by the Supreme Court. Only the mandatory imposition of capital punishment was held to be unconstitutional.

From 1930 to 1970, 3,859 individuals were legally executed in the United States. So few of those executed were female that sex is not even mentioned in the statistical tables, the assumption being that only males were subject to the death penalty. If the ERA becomes part of the American Constitution, the first competent attorney representing a condemned male will challenge the validity of capital punishment on the ground that it violates that amendment. Then American society most probably will be forced to choose between the abolition of capital punishment or the execution of females. Given the public mood over the ever-increasing crime rate, the choice probably will be for the latter. Another female “advantage” will have been lost. Call it male chauvinism or call it Victorianism, I for one do not look forward to that prospect with any happy anticipation. The character of a society is determined to a large degree by the nature of its criminal law. If capital punishment reflects negatively on American society, as I believe it does, the execution of females will only add to its condemnable dimensions. It is both a legal and moral trap to be avoided at all costs.

**CONCLUSION**

Behind the Capital Building in Washington, D.C. stands the white marble edifice of the Supreme Court of the United States. Its noble pres-
ence commands the attention of passersby. It serves as a monument to the American judiciary which is the most powerful and least dangerous branch of government. Emblazoned across the top of its portico are the words "equal justice under law" indicating that the basic commitment of the judiciary of the United States is to justice and equality. This commitment is not to justice and democracy, nor to justice and free expression, nor to justice and freedom of conscience, but to justice and equality. Clearly, these other principles are highly treasured and protected by the Constitutional system of the United States. Perhaps the reason for the ultimate choice in favor of the principle of equality is the recognition that there is no better measure of a civilization that its willingness to provide equality and justice to all who are subject to its authority.

We have seen that fundamental equality of treatment is an idea that cannot be dismissed without basic changes in present public attitudes and the obvious future direction of American society—changes that are highly unlikely to occur. It is clear that the inclusion of the ERA in the United States Constitution would be a symbolic act gratifying to many Americans. Our Constitution, however, is a general one which avoids specificity. This has been one of the main reasons that it has proven to be a viable instrument requiring very few amendments in the two centuries of its existence. The diverse ethnic, racial, and religious makeup of the United States would suggest the need for authoritarian government to maintain public order. The fact that a non-authoritarian democratic government exists in the United States is in large part due to the general nature of our Constitution. Relatively recent events have shown that it is unnecessary to encrust that organic law with amendments for the purpose of achieving the symbolic objectives of a group of American citizens.

It is not insignificant that two years ago the field of sex discrimination achieved the mark of academic respectability represented by the publication of a casebook completely devoted to that area of the law. K. Davidson, R. Ginsberg & H. Kay, Cases and Materials on Sex Based Discrimination (1974). The casebook is designed for use in the separate course of study that has become a general offering at a number of law schools.

See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816). The Martin Court noted:

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interest should require.

Id. at 326-27.

On January 23, 1964, the twenty-fourth amendment was ratified, prohibiting the poll tax in federal elections. Two years later, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Supreme Court struck down the tax in state elections. Since this result was not directed by statute, the Court based its decision completely on its judicial power.
One federal judge recently indicated that current Supreme Court decisions on sex discrimination leave the rest of the federal judiciary with "an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea." The principle of equality subsists as a fundamental norm in our constitutional order. If the Supreme Court would promptly recognize the commitment of American society to that principle and its application to this area of the law, the need for the ERA probably would be swiftly obviated, the sea of uncertainty surrounding Supreme Court decisions would no longer exist, and the possible adverse impact of the ERA upon existing beneficial provisions of the law would be averted. Most importantly, "equal justice under the law" would be more fully realized without the need for potentially archaic amendments.

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