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PANEL DISCUSSION

In response to the concern Professor Sowell expressed regarding the status-based nature of some affirmative action measures, Professor Ginsburg stated that the Equal Rights Amendment (ERA) "is not an amendment calling for parity, for sameness, for proportional representation."

Professor Ginsburg also responded to a question concerning the need for ERA in light of recent interpretations of the fourteenth amendment's equal protection clause, which have invalidated many classifications based on sex. Professor Ginsburg agreed that, "Eventually, if we should have no equal rights amendment, the equal protection clause will be pushed to about the same place." She maintained, however, that this would be "the back-alley way in; it's not the clear and clean way of doing it." She concluded that the ERA is needed for two reasons: "primarily, to get the legislatures to overhaul outdated laws so the judiciary is not forced to the rescue of individuals subjected to arbitrary, archaic legal provisions; second, to arm the courts with a principle explicitly stated in the Constitution so judges need not read in one the Founding Fathers and Reconstruction Congress didn't put there."

Professor Van Alstyne predicted that even if the ERA were ratified, courts would continue to exercise reasoned judgment in their review of statutes that classify on the basis of sex. He further predicted that there would be "far greater uncertainty than either proponents or opponents have been willing to acknowledge The most excited utterances of the proponents are premature and the foreboding glimpses of the opponents are quite mistaken." Nevertheless, Professor Van Alstyne favored enactment of the ERA, even though it may "simply be protectively redundant of the developments that have already taken place," to signal the Supreme Court and the legislative bodies "that circumspect justifications shall have to be given when the subject matter [of] regulation is sex."

The discussion at several points touched on the Civil Rights Act of 1964 and the dichotomy between its text, which speaks of a personal antidiscrimination principle, and its administration, which has developed "affirmative action" goals or quotas for certain beneficiary groups. Professor Dixon, the moderator, posed the dichotomy to the panel in the context of the proposed Equal Rights Amendment:

The fourteenth amendment states that no "person" shall be denied equal protection of the laws. It is phrased in terms of personal rights, and we have a similar approach in the Bill of Rights. Recently, the question has arisen whether rights can be shaped instead on a group basis, *i.e.*, whether the "personal" right can be derived from a person's group status. The question has come to the forefront in cases like *Bakke* and *Weber*, in the administrative interpretation of Title VII, and in the language of the Equal Rights Amendment now on the horizon. The ERA, unlike the fourteenth amendment, does not say no "person" shall be denied . . . ; rather, it says that "equality of right shall not be denied on account of sex." How will the Equal Rights Amendment operate in future controversies, like those in *Bakke* and *Weber*, in which one side claims a personal right and the other side defends on a status or group benefit theory?

Professor Ginsburg responded:

I don't think there is any real difference in the views of the ERA opponents and proponents in Congress on that question. There is almost nothing in the legislative history that speaks to any group rights concept. The emphasis is on the individual, on not prejudging the individual simply because of her sex or his sex. It is an equal rights amendment, after all, an amendment for men as much as it is for women.

Professor Sowell responded:

I must say that I am struck by the parallel between what you're saying and the debates preceding the passage of the Civil Rights Act of 1964 in which all these very same assurances in virtually the same words . . . were made. I remember one of the proponents of the Civil Rights Act saying that, indeed, any form of quota or preferential treatment would itself be illegal under the Act. Of course, that did not stop it from happening. I am not speculating about how far any law can be carried . . . My point is that the whole trend of what specifically has been happening over the last twenty years is precisely the kind of development that applies to this kind of law.

Professor Ginsburg concluded with a comment on women in law school:

In some law schools women have become a majority in the late 1970's, and that did not occur because of any preferential treatment. There has been only one change: The welcome sign, absent one and two generations ago, is now clearly posted.

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