# 21st Century Equal Rights Amendment Effort Begins

*by Twiss Butler and Paula McKenzie*

*EDITORS NOTE: A resolution passed at the 1993 National NOW Conference calls for members to review and consult on the Equal Rights Amendment. This commentary considers why the ERA is essential, and why it has been opposed.*

*In coming months, NOW activists will address another substantive question — what do we want constitutional equality for women and nondiscrimination on the basis of sex to mean? Only then can we address another strategic question — where do we go from here and how?*

Discrimination against women is a fact of life and law, but women's fight to end it is not a story every schoolchild knows -- even though it provides some fascinating history. For more than two centuries since this country was founded, men have deliberately refused constitutional recognition to women's legal and civil rights. Three key occasions when this was done:

* In 1776, Founding Father John Adams denied his wife Abigail's demand that the constitution of the new nation "put it out of the power of the vicious and Lawless to use [women] with cruelty and indignity with impunity" as English law allowed. His response? "Depend upon it," he wrote, "We know better than to repeal our Masculine systems."

* In 1868, after the Civil War, men legislators adopted the 14th Amendment which guaranteed to all "persons" the right to equal protection of the law. However in the second section, which determined the number of U.S. Representatives that each state would be due in Congress, the use of the words "male citizens" marked the specific and intentional exclusion of women for the first time in the Constitution. The 15th Amendment, passed in 1870, extended to all men — but no women — the right to vote. The fifty-year campaign to secure a guarantee of women's right to vote resulted in ratification of the 19th Amendment in 1920. This completed the 15th Amendment, but left the 14th Amendment with no counterpart for women. To remedy this gross deficiency, suffragist leader Alice Paul drafted the Equal Rights Amendment and began the campaign for ratification.

* In 1982, ratification of the Equal Rights Amendment was denied. In practical terms, the ERA is resisted for real, not "symbolic," reasons — it would invalidate men's legal power to use sex discrimination selectively when it is to their advantage to do so. Just because this legal power is not talked about in history or law books does not mean that men are unaware of it. In 1983, for example, when Justice Department attorney William Coleman Jr. argued before the Supreme Court that a college's ban on interracial dating violated the 14th Amendment, Justice Powell asked if his arguments applied to sex as well. Coleman assured him, "No. We didn't fight a Civil War over sex discrimination and we didn't pass a constitutional amendment against it."

Speaking about the ERA in Congress in 1971, Representative Stewart McKinney exposed both the real motive and the false excuses for opposing the ERA when he said, "Use the draft for an excuse if you like. Use child care. Use anything else. We [men] are simply trying in our own little way to preserve the right to stand up and say, 'We can declare the difference.' "

The accuracy of McKinney's analysis is repeatedly confirmed as courts and legislatures find pretexts for treating men and women differently. Comparisons of 14th Amendment decisions since 1870 consistently show the Supreme Court judging laws which disadvantage classes of men to be unconstitutional while seeing no constitutional barrier to discrimination against women. The only exceptions are token cases, such as *Reed v. Reed* (1971), which affirmed that a woman had the same right as a man to administer the estate of a deceased relative.

The court tends to follow the pattern set in early decisions when it arbitrarily invoked "the laws of God and Nature" to justify denying Myra Bradwell's right to be licensed to practice law (1872) and Virginia Minor's right to vote (1874). In *Fitzpatrick v. Bitzer* (1976), the court found it unconstitutional to deny backpay to men state employees who had received unequal early retirement pay based on sex, but ignored this precedent in denying backpay to women in a similar pension case, *Arizona v. Norris* (1983).

The Equal Rights Amendment has significance beyond issues of equal access and pay. John Adams' conviction that "masculine systems" would be endangered if men could no longer abuse women with impunity holds true centuries later. A 1977 rape study found that "All unequal power relationships must, in the end, rely on the threat or reality of violence to protect themselves." In a very real sense, then, the Equal Rights Amendment will rectify a profound constitutional imbalance that promotes violence against women.

The Equal Rights Amendment is essential because, without clear acknowledgement of women's right to equal protection of the law, sex discrimination is not unconstitutional. Legal discourse about "standards of review" ultimately must yield to the bleak reality that hard-won laws against sex discrimination do not rest on any constitutional foundation and can be enforced fully, inconsistently, or not at all. Women seeking enforcement of these laws must not only convince the court that discrimination has occurred, but that it matters. As legal scholar Catharine MacKinnon observes, "It is not difference that is important, but what difference difference makes."