The Phyllis Schlafly Report

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DEAR STATE LEGISLATOR: THE BUCK STOPS WITH YOU

Whether or not the proposed Equal Rights Amendment will become the 27th Amendment to the United States Constitution now depends on the State Legislators. The average State Legislator is a conscientious, hard-working family man or woman who wants to do the best thing for his or her constituents and is favorably inclined toward any legislation to benefit women.

When the average State Legislator is first confronted by the Equal Rights Amendment, he thinks to himself: Congress passed ERA by lopsided majorities, so who am I to get out on a limb with a negative vote?

Frank-talking U.S. Senators have been revealing the hitherto-hidden truth that they were unhappy about voting for ERA, but did so simply to get themselves off the hook and to pass the buck to the State Legislatures. When asked why he voted for ERA, one prominent Republican Senator stated on May 8, 1972: "I voted for it to get those militant women off my back, and I figured I'd leave it up to the States to decide." *Washingtonian Magazine* quoted Senator Thomas Eagleton as admitting off the record that he and other members of Congress knew it was a bad piece of legislation, but voted for it anyway.

In considering ratification of the Equal Rights Amendment, it is extremely important for State Legislators to realize that the House Judiciary Committee which voted out ERA did **not** approve ERA in its present form. The House Judiciary Committee approved the Equal Rights Amendment **only** with the attachment of the Wiggins Modification, which said:

"This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people."

After the ERA-with-the-Wiggins-Modification reached the full House of Representatives, the Congressmen who had **not** heard the pro and con testimony caved in to the women's liberation lobbyists and struck out the Wiggins Modification. Then they passed ERA and sent it to the Senate, which passed it, too.

The Report of the House Judiciary Committee is extremely important because it proves that the majority of the Congressmen who held the hearings and heard the witnesses concluded that the Equal Rights Amendment by itself is very hurtful to women. Because this Report is so valuable to State Legislators, we reprint below significant passages from House Report No. 92-359:

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"Danger of Judicial Chaos"

"During the course of your Committee's extensive deliberations on this proposal, thorough consideration was given to the record of the hearings conducted by Subcommittee No. 4 in March and April of this year, as well as to the lengthy legislative history of similar proposals in past years. That consideration has led us to the conclusion that, in the form in which it was introduced, House Joint Resolution 208 would create a substantial amount of confusion for our courts. To a large extent this confusion emanates from the fact that there is widespread disagreement among the proponents of the original text of House Joint Resolution 208 concerning its legal effects. These disagreements are so great as to create a substantial danger of judicial chaos if the original text is enacted.

"Although some of the proponents of the original language argue that the original text would permit both the Congress and State legislatures to make reasonable legal classifications into which sex is taken into account, other proponents argue strenuously that the use of the word 'equality' in the original text is intended to assure that men and women are given 'identical' legal treatment. In your Committee's view the latter construction would compel the courts to interpret the new Amendment as a mandate to sweep away all statutory sex distinctions per se. Such a per se rule would be undesirably rigid because it would leave no room to retain statutes which may reasonably reflect differences between the sexes.

"The rigidity of interpretation advocated by many of the proponents of the original text of House Joint Resolution 208 could produce a number of very undesirable results. For example, not only would women, including mothers, be subject to the draft but the military would be compelled to place them in combat units alongside of men. The same rigid interpretation could also require that work protective laws reasonably designed to protect the health and safety of women be invalidated; it could prohibit

governmental financial assistance to such beneficial activities as summer camp programs in which boys are treated differently than girls; in some cases it could relieve the fathers of the primary responsibility for the support of even infant children, as well as the support of the mothers of such children and cast doubt on the validity of the millions of support decrees presently in existence. These are only a few examples of the undesirable effects that could be produced by the enactment of the original text of House Joint Resolution 208 [which is, of course, the present text of ERA now being considered by State Legislatures].

"To obviate the possibility of such effects and of judicial chaos, your Committee has recommended that the proposal be amended in such a way as to make it clear that Congress could exempt women from compulsory military service and that neither Congress nor State legislatures would be paralyzed from taking differences between the sexes into account when necessary to promote the health and safety of our people. This amendment to House Joint Resolution 208 is embodied in Committee Amendment No. 2 described above [which is the Wiggins Modification].

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"The Committee Amendment No. 2 would avoid these pitfalls. It would, for example, allow us to retain reasonable laws designed to protect the health and safety of women, while striking down those laws based solely on sex that inhibit women in their efforts to seek gainful employment.

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"Under the text of the proposed Constitutional Amendment as amended by your Committee, the courts would be directed to eliminate all unfair and irrational sex distinctions. Just as statutes classifying by race are subject to a very strict standard of equal protection scrutiny under the 14th Amendment, so too any State or Federal statute classifying by sex would likewise be subject to a strict standard of scrutiny under the proposed new Constitutional Amendment. Under such a strict standard a heavy burden would be placed on the State to show that any legal distinction between the sexes was compelled by some fundamental interest of the State in the health and safety of people. Yet while being strict the court could also apply rules of reason in those cases in which an overriding State interest relating to the draft or to health and safety calls for judicial recognition of the differences that do, in fact, exist between the sexes.

"In your Committee's view, the final effect of the Constitutional Amendment that we propose would accord with basic notions of fairness and with logic. The proposed Amendment would invalidate those invidious laws which discriminate improperly on the basis of sex. At the same time, however, it would permit us to retain those laws which realistically and rationally take sex into account and which equitably bring benefits to the majority of our citizens of both sexes.

"On June 22, 1971, the full Committee on the Judiciary approved House Joint Resolution 208 in executive session and ordered it favorably reported with amendments by a vote of 32 yeas, 3 nays." [This means that the Equal Rights Amendment **with the Wiggins Modification** was voted out of the Judiciary Committee by a vote of 32 to 3.]

"Who Is Bearing the Children?"

There were three House Judiciary Committee members who voted against the Equal Rights Amendment even with the Wiggins Modification because they believe that an Equal Rights Amendment in any form is hurtful to women. Here are some excerpts from Congressman Emanuel Celler's Minority Views:

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"I stress we are dealing with a constitutional amendment. Every word thereof should have exacting scrutiny. It would be irresponsible to dismiss the language as a mere declaration of policy without consideration of the possible injurious effects that could flow therefrom. In all the swirling arguments and differing interpretations of the language of the proposal, there has been very little thought given to the triple role most women play in life, namely, that of wife, mother and worker. This is a heavy role indeed, and to wipe away the sustaining laws which help tip the scales in favor of women is to do injustice to millions of women who have chosen to marry, to make a home, to bear children, and to engage in gainful employment as well.

"For example in most States the primary duty to support rests upon the husband. One possible effect of the Equal Rights Amendment would be to remove that primary legal obligation. The primary obligation to support is the foundation of the household. I refuse to allow the glad-sounding ring of an easy slogan to victimize millions of women and children. As one witness put it in hearings before the Committee: 'It is very doubtful that women would agree that a family support law is a curtailment of rights. Divorced, separated, or deserted wives struggling to support themselves and their children may find claims to support even harder to enforce than they are right now.'

"It has even been suggested by a proponent of the Equal Rights Amendment that the 'underlying social reality of the male as provider and the female as child bearer and rearer has changed.' May I, in turn, ask who is bearing the children and who is rearing them? As far as I know the Fallopian tube has not become vestigial.

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"A host of questions would surround us should the Equal Rights Amendment be adopted which relate to State laws on the age of consent to marry, domicile, courtesy and dower rights, to cite but a few. These questions at this point are unanswerable. They become, with the adoption of this Amendment, litigable issues bringing the Federal courts into the delicate fabric of domestic relations.

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"There will be no righting of wrongs if wrongfully done."

"Shifting Power to the Courts"

Here are some excerpts from Congressman Edward Hutchinson's Minority Views:

"Legislative power already exists to strike down every vestige of inequality between the sexes. A constitutional amendment is not needed either to create that power, to extend it, or to perfect it. If

inequality between the sexes still exists in the law and public policy demands complete equality, then why not remove those inequalities legislatively?

"The proponents of a Constitutional Amendment answer that question by expressing their impatience with the piecemeal approach of the legislative process. They want to remove all inequality at one time by denying the power of government to recognize any inequality. But what they apparently fail to see is that they are simply trading one piecemeal approach for another. Instead of working with State legislatures and the Congress to write laws, amend laws, and repeal laws to remove such vestigial inequalities as yet remain, they will be suing in the courts to define the word equality, case by litigated case.

"All they will have accomplished is to change the forum, from the legislature to the courts. They will transfer the power to determine public policy in this important and rather fundamental area out of the legislative branch of government, the branch most directly responsive to the public will, and place it in the judiciary, the branch least responsive; and the Federal judiciary is not reachable by the people at all. My deep concern and, I trust, knowledge of the rightful and proper relationship between the legislative and judicial functions persuade me that the public interest will be best served if the legislative power is not diminished and if the courts are not imposed upon to do the legislature's work of deciding public policy.

"Far different than enacting a statute which may be amended to reflect the changing times or to correct court interpretations of it, once Congress assents to the placing of language in the Constitution it puts that language beyond its reach. The language then becomes the tool of the Supreme Court to interpret it at will, and that Court has been known to find meanings and powers in Constitutional amendments undreamed of and unintended by the Congresses which proposed them and the State legislatures which ratified them. In the light of this history, Congress should painstakingly and exhaustively inquire into and even speculate upon all possible interpretations the Court may place upon the language if it would truly understand the scope of the restriction upon legislative power this proposed Amendment encompasses.

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"The phrase 'Equality of rights under the law' will mean whatever the Supreme Court says it means, and that meaning may change from time to time as the membership of the Court changes. Within whatever meaning the Court may give that phrase, Congress is empowered by the second section of the article to make laws enforcing it.

"Without this Amendment, the States may legislate within the limits of the equal protection and due process clauses of the Fourteenth Amendment. With this Amendment, the states may not legislate at all on the subject of rights under the law, except as the Supreme Court may find their laws free of sexual inequality.

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"A Revolutionary Change in the Family"

"It is not beyond the realm of possibility that the Court may find, sometime in the future, that by this Amendment, particularly the second section thereof, Congress was vested with power to take from the States the whole body of domestic relations law and perhaps part of their property law as well. These vast powers, further destroying the strength of our Federal system, would of course be exercisable by Congress only under the definitions given by the Court to the 'Equality of rights' phrase.

"The proponents say this Amendment will not reach nongovernmental action because the denial of equal rights is prohibited to the United States and any State. Under the Fourteenth Amendment only State action is prohibited, and still the Court has stretched the language to reach private covenants and trusts. The thing was accomplished by a holding that the courts could not be used to enforce such covenants and trusts. Similarly under this Amendment the Court may hold that a private school for girls cannot use the courts to enforce its contracts, or that a testamentary trust cannot be set up wherein a father may direct the distribution of the corpus to his daughters at a different age than to his sons. Would the Court compel a private military school for boys to admit girls, or a summer camp for girls to take the boys along? I am satisfied that the Court would have no difficulty in extending this Constitutional Amendment into the nongovernmental sector and will probably do so.

"The committee hearings confirm that one effect of this Constitutional Amendment would be to deny Congress the power to subject only men to the military draft. Some proponents argue that because women are not subject to the draft they are denied veterans benefits. This does not follow. Women may enlist in the military service, and those who join the military do so with all benefits accruing. The draft would bring women into the military against their will, and the hearings point out the difficulties and complexities which would spring from subjecting young mothers to the draft so long as young fathers are subject. The committee therefore amended the proposal to save Congress its present discretionary power over the draft. Of course, Congress has the present power to draft women but the proposal in its original form would compel Congress to draft women if men are drafted.

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"The hearings also establish that there can be no inequality on account of sex in public institutions supported in whole or in part by governmental funds. The question of sexual segregation in prisons and penitentiaries, in educational institutions, and in medical and mental hospitals arises. Proponents say the requirement for equality of rights between the sexes will not destroy the right of privacy. I would hope they are right on that, but once the words are written into the Constitution it would be up to the courts to say. The right of privacy is not clear in the law at the present time. Until now it has been asserted only as a personal right. Could the legislative power make it a criminal offense to violate the segregation of sexes in institutions if consenting persons chose to waive their personal rights of privacy?

"Proponents want to leave all these policy decisions to the courts. I believe they should be left in the legislatures and in the Congress, and the way to leave them here is to defeat this Amendment.

"I am apprehensive the courts may in the future find within this Amendment Constitutional power to

effect a revolutionary change in the institution of the family, a change to which I am opposed.

"Men and women are already equal under the law and I believe that whatever vestiges of inequality discriminatory against women still remain should be removed. I believe they can be removed legislatively and favor the legislature over the courts to accomplish that goal."

ERA "Quite Clearly" Drafts Women

Here are some excerpts from Congressman David W. Dennis' Minority Views:

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"Again, the proposed Amendment, in its original form, quite clearly operates to subject women to the military draft. This would make for a fundamental change in American society which I would regard as highly undesirable and which, I am well satisfied, a clear majority of the American people does not desire.

"In like manner I see no good reason why Congress, or the Legislatures of the several States, should not retain full power to enact reasonable legislation to safeguard the health and safety of the people, including that reasonably designed to protect the health and safety of women."

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"Women Must Serve On Combat Duty"

When the Equal Rights Amendment was reported out of the Senate Judiciary Committee, Senate Report No. 92-689 contained not only the comprehensive Minority Views of Senator Sam Ervin, Jr. (which have been quoted in previous issues of this newsletter), but also an important statement by Senator Hiram L. Fong. Here are some excerpts from Senator Fong's views on compulsory military service for women:

"Once women are registered, the question arises whether women must be assigned on an equal basis for all types of military service. If women are found physically qualified (under the same tests administered to determine men's qualifications) they will, in all likelihood, be required to serve in combat.

"The Majority Report chooses not to face this reality. On the one hand they want equal treatment in drafting women for compulsory military service, but then, not being willing to face the consequences of this action, they fall back on the words of Congresswoman Martha Griffiths, the primary sponsor of H.J. Res. 208, on the floor: 'The draft is equal. That is the thing that is equal. *But once you are in the Army you are put where the Army tells you where you are going to go.*' (Emphasis supplied.)

"Fortunately, these words were uttered by a woman. A man would have been accused of male chauvinism and of advocating discriminatory treatment of women.

"The Majority Report is replete with 'expectations'; including that women will not be 'assigned to combat posts, nor . . . required to engage in physical combat,' as is the case of the Israeli Army. They overlook the realities. Israeli women do not serve in the Armed Forces because of their demands for equal treatment regardless of sex, but because of Israel's small population, the services of each individual is indispensable to the defense of the country. Hence, different treatment of the women and the men in the Israeli Army is acceptable, even though incompatible with the concept of the Equal Rights Amendment.

"Interestingly, on the subject of the present service of men and women in the Israeli Army, the maintenance of 'separate and independent facilities' for women soldiers, is conceded, as is the fact that women soldiers perform tasks 'in the clerical, communication, electronics and nursing field.' These tasks are characterized in the Report as 'critical noncombatant tasks,' -- yet, women are assigned these tasks on the basis of sex.

"Hence, under H.J. Res. 208, as reported out by the Senate Judiciary Committee, it is my firm conviction that if women pass the same tests as given men prior to assignment to duty, they must also serve on combat duty, if found qualified for such duty.

"Furthermore, the Department of Defense points out that if women could not be assigned to field duty, it might result in a disproportionate number of men serving more time in the field and on board ship because there would be a reduced number of positions available for their reassignment to non-combat duty. That would clearly be discriminatory against men -- unless all persons who serve on combat duty are released from service in a shorter period of time. This same situation applies to the Army, Navy, Marine Corps, Air Force, Merchant Marine and the Coast Guard.

"Separate units for women will, I believe, be abolished just as separate ethnic and racial units in the Armed Forces have been abolished -- both men and women will serve in the same units. What privacy women will be able to be afforded, if any, is uncertain. The Department of Transportation has already published in the Federal Register its notice of proposed rule-making to amend Coast Guard regulations to allow female members of the crew to use washrooms and toilet rooms that are used by male crew members. This, I believe, is indicative of the future if women are subjected to the draft."

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"For all the above set forth reasons, I am not ready or willing to support compulsory military service. If and when an all-volunteer military force comes into being, of course those women who wish to volunteer and serve in the field or on board ships may do so. But, so long as we have a draft law, I intend to vote to exempt women from compulsory military service, and to support such modification of the Equal Rights Amendment."

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Do you have access to a "Sony video cassette recorder"? If so, we have available for rental an excellent one-hour program on ERA. *Please*, this program *cannot* be played on any other equipment.

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