
The
# Phyllis Schlafly Report

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# The Effect of ERAs in State Constitutions

*A new booklet called "The Effect of Equal Rights Amendments in State Constitutions" by Phyllis Schlafly has just been published by the Heritage Foundation and is available from the Phyllis Schlafly Report at $1 per copy. The following are brief excerpts from the 40-page booklet, which is extensively footnoted. Omitted sections include the effect of State ERAs on schools, same-sex marriage, massage parlors, criminal law, and insurance.*

In the span of years during which the proposed Equal Rights Amendment to the United States Constitution has received active consideration by the Congress and the various state legislatures, that is, during the decade of the 1970s, seventeen states have amended their state constitutions by provisions which have become popularly known as State Equal Rights Amendments (ERAs). Since these State ERAs are sometimes believed to be state enforcement of what the Federal ERA, if ever ratified, would require on a nationwide basis, and are believed, therefore, to forecast the eventual effect of a Federal ERA, it is important to analyze their language and the effect they have had in the various states that have enacted them.

At the outset, several fundamental differences between the State ERAs and the proposed Federal ERA should be noted.

(a) No State ERA governs federal law. Therefore, many of the principal effects anticipated under the proposed Federal ERA would never result from any State ERA (for instance, the application of the full-equality principle to the military, including conscription and combat assignment).

(b) State constitutions are interpreted principally by state courts. The proposed Federal ERA would, if ratified, be interpreted principally by the federal courts, which include some of the most activist courts in the country. While state courts would be bound to follow the U.S. Supreme Court interpretation of the Federal ERA, federal courts would not be bound to interpret the Federal ERA to produce the same result as any state court's interpretation of its State ERA. The proposed Federal ERA would give the federal courts a blank check to fill in after ratification. Thus, as Professor Paul Freund stated, "If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States."

(c) The legislative histories of the Federal and the State ERAs are different. The proposed Federal ERA has an extensive and well-recorded legislative history, including lengthy congressional debate in both houses and many roll-call votes on proposed modifications in language which establish a clear pattern of legislative intent for the guidance of the courts. In the U.S. Senate, Senator Sam J. Ervin, Jr., offered nine amendments variously exempting from the absolute-equality mandate compulsory military service; combat duty; the traditional rights of wives, mothers, widows and working women; privacy; punishment for sexual crimes; and distinctions made on physiological or functional differences. All amendments were defeated on roll-call votes, forcing the legal conclusion that the Federal ERA is designed to accomplish precisely what Senator Ervin and his supporters sought to exempt. In contrast, the legislative history of State ERAs is sparse or non-existent. Most state legislatures do not print committee reports. Many state legislatures do not keep a journal which records debates. Many state legislatures enacted State ERAs (as well as ratifications of the Federal ERA) with little or no debate. There is no significant evidence to prove that the legislative intent of the State ERAs requires an absolute standard of interpretation.

The proposed Federal Equal Rights Amendment, passed by Congress and sent to the states to start the ratification process on March 22, 1972, reads in full as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

No state, of course, has put the full Federal ERA language into its state constitution. No State ERA has a "Section 2" giving Congress the power of enforcement or shifting any power from the states to the federal government.

Just as the identical enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments have transferred from the states to the federal government the enforcement and preemption power over the subject-matter of Section 1 of those amendments, Section 2 of the Federal ERA would likewise transfer from the states to the federal government the enforcement and preemption power over the subject-matter of Section 1 of ERA, namely, all state laws that have traditionally made distinctions based on sex. This would include laws governing marriage, divorce, child custody, family property, inheritance, widow's privileges, homosexual activity, abortion, prison regulations, insurance rates, and private schools.

**Even if all fifty states were to adopt a State ERA, their cumulative effect on our unique American federal structure and on our methods of fighting wars would be miniscule compared to the vast changes that would be compelled by the Federal ERA.**

## Ambiguous Terminology

Nowhere in the Federal or in any State ERA are the

terms "equality of rights" or "sex" defined. The former is not a term of art for which there are legislative, judicial, or dictionary definitions. It is a nebulous phrase that can mean different things to different people, especially in situations in which different results would be obtained depending on which quality of the asserted right is being equalized. The phrase came into our constitutional lexicon without any judicial history to circumscribe its scope. "Sex" is a word with a half dozen different dictionary definitions which may be loosely divided into (a) the sex you are and (b) the sex you do. No ERA tells us which definitions of sex are covered. No ERA excludes any definitions of sex.

Despite the large number of states that are alleged to have State ERAs, the texts reveal a great difference in language, and experience reveals a great difference in effect.

When an ERA is put into any constitution, what becomes the law of the state is not merely an idea or a hope or a goal, but a specific set of words that must be obeyed. Those words either have definite meanings in the English language or, if the meanings are imprecise, they will be defined later by the courts.

Only six State ERAs have language sufficiently like Section 1 of the Federal ERA that they can reasonably be considered to offer guidance about the meaning and effect of the proposed Federal ERA: Colorado, Hawaii, Maryland, Pennsylvania, New Mexico, and Washington. The other eleven states which have put "sex" into their constitutions actually have State EPAs (Equal Protection Amendments).

The wide variations in the language of the various State ERAs, combined with the imprecision and lack of definition of the operative terms, mean that courts have a wide latitude to do as as they please in interpreting the State ERAs and the State EPAs (Equal Protection Amendments). There is absolutely no assurance that the courts of one state will follow the interpretation of another or that the federal courts will follow any state court.

So far there has been relatively little litigation based upon State ERAs. There is no indication that the women's movement is instigating test cases to force a speedy judicial clarification of what it would mean to our society to have ERA interpreted on an absolute standard. Enough litigation has taken place, however, to see that a general pattern is emerging in the courts. (a) If possible, courts are avoiding the interpretation of their State ERA by deciding cases on some other basis. (b) In states that have authentic State ERAs (those which contain language closely paralleling Section 1 of the Federal ERA), courts are generally using a literal and inflexible interpretation, following the plain meaning rule. (c) The rest of the so-called State ERA states (whether they have an equal-protection provision like Illinois, or a civil-and-political-rights provision like Utah, or a race-creed-color-sex provision like Texas, or provide for explicit exceptions like Virginia) are following the standard of review traditional under the Equal Protection Clause of the Fourteenth Amendment; that is, a legislature is permitted to classify on a rational basis when the classification is related to a permissible legislative goal and does not violate a fundamental interest.

Of course, where the equal protection analysis is used, the alleged State ERA becomes a constitutional redundancy because all fifty states now enjoy the full protection of the Fourteenth Amendment of the U.S. Constitution.

## Effect On Family Law

When proponents were presenting their case for passage of the Federal Equal Rights Amendment to Congress in 1971 and 1972, they used as their principal legal statement about its anticipated effects an article of some one hundred pages in the *Yale Law Journal*. The article was quite frank in proclaiming that the adoption of a Federal ERA "will give strength and purpose to efforts to bring about a far-reaching change which, for some, may prove painful."

The chief victims of these "painful" effects of the "far-reaching change" will be wives and mothers. This is the inescapable conclusion to be drawn from the family law litigation in the states that have adopted authentic State ERAs.

In Washington, which has a State ERA, the court admonished wives to face up to what ERA means:

> It is to be remembered that while the 61st amendment to the Constitution of the State of Washington, approved November 7, 1972, is commonly referred to as the Equal Rights Amendment, it firmly requires equal responsibilities as well. This amendment is the touchstone of the developing case and statute law in the area of marriage dissolution.

The holding in this case, *Smith v. Smith* (1975), was that ERA requires equal responsibilities of parents for child support and that the ex-husband can get his support obligations reduced to meet the ERA standard.

Wives have traditionally had in this country a great variety of extensive rights based on their marital status, as a result of our public policy to respect the family as the basic unit of society, and as a statutory and common-law balance to the biological fact that only women have babies. These rights, which vary from state to state, include the wife's right of financial support in an ongoing marriage, the right of separate maintenance and payment of attorney's fees during divorce litigation, the right to alimony after divorce, the right to a presumption of custody of her children, rights against her husband's alienation of his property during his life or by will, and a variety of special benefits accorded to widows.

Such benign discrimination is wholly in harmony with the Equal Protection Clause and was seldom challenged prior to the 1970s. The U.S. Supreme Court in *Kahn v. Shevin* made clear the current constitutionality and relevancy of such preferential statutes designed for the benefit of wives and widows. The Court held that, consistent with the Equal Protection Clause, a legislature can make a rational classification of widows as a class of people who need a special benefit. The Court upheld Florida's property tax exemption for widows. The challenge to the Florida statute was strongly supported by pro-ERA lawyers.

The states that have State ERAs are blazing the trail of the "painful" effects of applying an absolute standard of equality to the marital and parental relationships. They provide a window into which we can look to see what "equality of rights" means when applied to the husband-wife relationship.

Maryland is a State ERA state. In *Coleman v. Maryland* (1977), the Court of Special Appeals held that the statute which makes it a crime for a husband to fail to support his wife is unconstitutional under the State ERA. The court said that this statute "establishes a distinction solely upon the basis of sex" and "such distinctions are now absolutely forbidden" by the State ERA.

The court discussed the social policy and the history of the law which made it the duty of the husband to support his wife, calling it "warp and woof of the prevailing ethos" of the nineteenth century. All that is changed now, according to the court; "that view has been subjected to a series of violent cultural shocks. The Equal Rights Amendment of 1972 more accurately reflects the ethos or zeitgeist of this time." The court held that the support statute "is no longer the public policy of this state."

Newspapers which had been strong supporters of ERA were made very uncomfortable by this decision, calling it "an unfortunate conflict" of sexual justice, but admitted that the court had "no alternative" under the State ERA. The newspapers accurately pointed out that, while imprisonment for nonsupport is seldom imposed, the threat of imprisonment is a most valuable and necessary tool "to impress upon husbands their financial responsibility." It is almost the only tool available to reduce the welfare rolls.

## Wives Lose Right to Support

Pennsylvania is a State ERA state and, because of the State ERA, wives have lost their common law and statutory right to have their necessaries paid for by their husbands.

This common law right has been a right of wives for centuries and is an essential ingredient of the concept of the right of the wife to be supported in her home. The Pennsylvania statute read as follows:

> In all cases where debts may be contracted for necessaries for the support and maintenance of the family of any married woman, it shall be lawful for the creditor in such case to institute suit against the husband and wife for the price of such necessaries, and after obtaining a judgment, have an execution against the husband alone.

In *Albert Einstein Medical Center v. Nathans,* the issue was payment for medical and hospital services provided to the wife in an ongoing marriage which was conceded to be "necessary for her health, well-being and comfort." The court simply nullified the common law and statutory responsibility of a husband to pay for his wife's "necessaries," noting that these include not only medical care, but also food, clothing, and shelter.

The court waxed very righteous in applying the absolute standard under the State ERA. The court held that "all legal distinctions based on the male or female role in the marital relationship are rendered inoperative by the [State ERA] amendment" and that the common law concept obligating the husband to pay for his wife's necessaries is "repugnant to the Equal Rights Amendment." The court took judicial notice of what it called "medical and scientific advances which have increased both production and population . . . have made birth control a desirable social objective, and have been factors liberating her [a wife] from the common law requirements that tethered her to her husband and her husband's home."

A year later in *Nan Duskin, Inc. v. Parks* (1978), the same court "confirm[ed]" the *Nathans* decision, again calling the law that a husband is liable for his wife's necessaries "repugnant" to the State ERA. The court further explained that "reliance on the Support Law, 62 P.S. 1921, adds nothing to defendant's position [because the] duty to support based on family relationship depends on dependence and indigency." In other words, although the Support Law was not the principal issue in this case, the court clearly pointed the "developing" law in the direction of establishing indigency or dependency as the only basis for a wife's claim of financial support from her husband in a state with a State ERA. Under ERA, a wife will have no claim to the financial support of her husband just because she is a wife and mother.

The implications of these decisions for the social and economic integrity of the family unit are "far reaching" indeed. In the ERA world, there will be no right of the homemaker to make her career in the home unless she can prove she is indigent or about to go on welfare.

In *Henderson v. Henderson* (1974), the Pennsylvania Supreme Court ruled that the statute which allowed payment of alimony *pendente lite* (support during litigation), counsel fees and expenses to wives is unconstitutional under the State ERA. Before the court could nullify or extend the old law, the legislature extended liability for such payment to wives. Thus, the State ERA has cost wives their exclusive right to receive alimony *pendente lite,* counsel fees and expenses, and wives have acquired the new "right" to have the court hold them liable to make similar payments to their husbands.

The court again lectured wives on their new marital relationship under the State ERA:

> The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman. . . . The right of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.

This decision puts the Pennsylvania Supreme Court's imprimatur on the notion that, under ERA, the only wives who can claim support from their husbands are indigent wives.

In *Conway v. Dana* (1974), the Pennsylvania Supreme Court invalidated under the State ERA the statute that placed the primary duty of support for a minor child on the father. The court stated that this

> presumption is clearly a vestige of the past and incompatible with the present recognition of equality of the sexes. The law must not be reluctant to remain abreast with the development of society and should unhesitatingly discard former doctrines that embody concepts that have since been discredited.

Again, the court gave its views on how the marital relationship should be structured: "Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father." Note that the court did not say that the *duties* of parents are equal; the court said that *"every" duty* of parenthood is the "equal responsibility of both mother and father." One wonders how the court would equalize "every" duty of parenthood.

In any event, under *Conway* and the State ERA, wives have now lost their right to have their husbands provide the primary support for their minor children, and wives have acquired the new "right" to be equally liable for the financial support of their children.

In *Adoption of Walker* (1976), the Pennsylvania Supreme Court extended to unwed fathers the requirement for consent to adoption of their illegitimate children. The court held that the State ERA invalidated Section 411 of the Adoption Act which provided: "In the case of an illegitimate child, the consent [to adoption] of the mother only shall be necessary." The court held that this distinction between unwed mothers and unwed fathers is "patently invalid" under the State ERA.

The result of this decision is that an unmarried girl or woman, who is pregnant and wants to place her baby with loving adoptive parents so she can start a new life, will not be able to complete adoption proceedings unless she first identifies the father and secures his consent to adoption. This could be a great injustice to an especially vulnerable woman, invade her right to privacy, or induce her to have an abortion rather than have to identify the father.

In *Hopkins v. Blanco* (1974), the Pennsylvania Supreme Court extended the right to recover damages for loss of consortium to wives as well as husbands. ERA proponents claim that this is a gain for women under a State ERA since, under common law, this right belonged to husbands only. But the proof that ERA is not necessary to extend the right of consortium to wives is the fact that courts in non-ERA states have come to the same decision under the Equal Protection Clause. Among the numerous non-ERA states that have extended the right of consortium to wives are Arkansas, California, Delaware, Georgia, Iowa, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Rhode Island, and South Dakota.

Colorado is a State ERA state. The legislature was not satisfied with the failure of the court to impose an absolute standard in a felony nonsupport case and so accomplished the task legislatively by neuterizing the statute. Whereas the Colorado statute formerly obligated "man" to support "wife," the new law now reads "person" must support "spouse," which is not the same thing at all. Now a wife shares equally in the obligation to support her family under the threat of criminal conviction of a class-five felony.

One lawsuit in Hawaii, however, is worthy of mention.

On January 19, 1978, the Hawaii Right to Life brought suit against the State of Hawaii to enjoin the state from funding elective abortions. Two abortion doctors moved to intervene, alleging that they have a legal right to reimbursement for the performance of elective abortions. They alleged in their petition that this right to reimbursement rests on Hawaii's State ERA:

> Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Section 21 which provides that "equality of rights under the law shall not be denied or abridged by the state on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.

The judge denied the motion of the abortionists, but he did not address the ERA argument.

Interestingly, one of the attorneys for the intervenors was Judy Levin of the Reproductive Freedom Project of the American Civil Liberties Union in New York. This claim obviously reflects the argument which abortion lawyers will use in litigation under State and Federal ERAs. Abortion has already been legalized under *Roe v. Wade*. The State or Federal ERA may give a constitutionally-based claim to government-funded abortions, which is not a right under our existing Constitution.

**The cases in which a State ERA was at issue make it clear that any benefit to the women could have been gained just as easily under the Equal Protection Clause. Where the ERA made a unique constitutional difference, it always resulted in a loss to the woman, especially to the wife and mother. In nearly every case in which the State ERA changed prior law, women were needlessly deprived of longstanding legal rights.**

Turning now to the purported ERA state constitutions which do not have authentic Federal ERA-type language, the cases reveal an entirely different pattern. Courts in those states simply do not employ the absolute standard used in Pennsylvania and Maryland. Where the court uses equal protection analysis, the results are not significantly different from those that would be obtained under the Fourteenth Amendment.

Thus, in *Cooper v. Cooper* (1974), the court held that the Texas ERA was not violated by an unequal division of community property and child support obligations favoring the wife upon divorce. In *Friedman v. Friedman* (1975), the court held that the obligation to support children does not require mathematically equal contributions from both parents and that the care provided by the mother should be considered as well as money.

Illinois, an Equal Protection rather than an ERA state, has had a similar experience. In *Randolph v. Dean* (1975), the court held that the presumption favoring a mother's custody of her children may be constitutionally considered as one factor among several.

The Virginia Supreme Court specifically held that the State ERA is "no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." In *Archer v. Mayes* (1973), the court said ". . . women are still regarded as the center of the home and family life and they are charged with certain responsibilities in the care of the home and children."

The Louisiana Supreme Court uses the rational relationship test in interpreting its so-called State ERA. In *State v. Barton* (1975), the court held that a state criminal neglect statute applicable only against husbands is valid under the Louisiana Constitution.

In sum, therefore, the Equal Protection Clause is more than adequate to eliminate obsolete and unjust discriminations and more just, because it allows rational classifications based on the obvious physical differences and differing family responsibilities of women and men. In the states where the so-called State ERA is really just a variation of the Equal Protection Clause, wives have not lost their traditional rights.

In the six states which have an authentic State ERA, however, the courts are using an absolutist standard of review, and the result is indeed "painful" for wives and mothers. The authentic State ERAs provide guidance for what Section 1 of the Federal ERA would require on a nationwide basis. The result would indeed be "far-reaching" in its assault on the traditional family and "painful" in its deprivation of longstanding rights of wives and mothers.

## No Benefits, Only Losses

The experience of the seventeen states which allegedly have State ERAs provides conclusive proof that ERA is not needed to accomplish any reasonable objective or any objective at all that is beneficial to women. All reasonable and beneficial changes in existing law can be made by the passage or repeal of statutes by Congress or the state legislatures or by the courts' use of the authority of the Equal Protection Clause of the Fourteenth Amendment. In case after case, the federal and state courts, both in ERA and non-ERA states, have used the Equal Protection Clause to invalidate obsolete, unjust discriminations on account of sex or to extend the law to apply to both sexes.

The experience of the State ERAs also shows conclusively that ERA is of no unique value whatsoever to women in the economic sphere. The coverage of federal statutes and executive orders is much broader than that of any ERA, and the remedies, through federal agencies and courts, are much more extensive. Those who believe that ERA means "equal pay for equal work" or that ERA will result in higher pay, more promotions, and greater job opportunities for women are living in a dream world. The State ERA experience proves that ERA provides no gain for working women.

The experience of the State ERAs is more than adequate to convince us that ERA is unnecessary to achieve any beneficial goal for women or society, unreasonable in its absolute refusal to recognize obvious differences between the sexes, and unwanted in its potential to upset traditional objections to homosexual marriages, massage parlors, government-funded abortions, and other imaginative uses of the term "sex." Since there has been relatively little litigation under the State ERAs, we have so far seen only the tip of the iceberg of the harm ERA can do.

A Federal ERA would not only extend the harm already done in the State ERA states, but it would sex-neuterize all federal laws such as the military draft and combat duty. A Federal ERA would also compel the drastic changes mandated by Section 2 — the enforcement section which has the potential of causing such a massive shift of power from the states to the federal government that the changes accomplished by Section 1 would be dwarfed by comparison.

When the Equal Rights Amendment changes existing law, all its unique effects are unreasonable to society or harmful to women. ERA has no uniquely beneficial results.

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*Phyllis Schlafly is a member of the Illinois Bar and a graduate of Washington University Law School.*

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