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ERA Model: The Voting Rights Act

The Tremendous Powers of ERA's Section 2

Section 2 of the Equal Rights Amendment reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This wording is the same as the enforcement clauses of the 13th 14th, and 15th Amendments, so we have had more than a century of experience with what kinds of power these enforcement clauses transfer to Congress, to the Federal bureaucracy, and to the Federal courts.

The Voting Rights Act, enacted by Congress under the enforcement clauses of the 14th and 15th Amendments, shows how vast are the powers granted to the Federal Government. The Voting Rights Act proves that these enforcement clauses transfer the following powers from the states to the Federal Government:

1) to Congress and the Federal courts, the power to define a political/social goal and then take any relevant means to achieve it, no matter how discriminatory the laws and procedures required to attain it;

2) to Congress and the Federal courts, the power to knock out state laws based on their political/social effect rather than on their wording, intent, or purpose;

3) to Congress, the power to preempt state law, that is, to substitute Federal law for state law even though state law is admittedly constitutional and even though the state law concerns a subject which the Constitution specifically reserved to state (rather than Federal) control;

4) to the Congress, the Federal bureaucracy and the Federal courts, the power to enforce laws that are discriminatory in both intent and effect, that is, laws which are deliberately designed to impose different procedures and penalties on various states and even on various counties within various states;

5) to Congress, the power to force the states to submit all changes in their own state laws on particular subjects to the U.S. Justice Department for approval or disapproval, after which the states are bound by the Federal bureaucracy's decision;

6) to the U.S. Justice Department, the power to monitor, veto, and delay changes in state laws pertaining to particular subjects;

7) to Congress, the power to set up a triggering device that automatically prevents states from establishing their own regulations in certain areas which the Constitution specifically reserved to state (rather than Federal) control;

8) to the U.S. Justice Department, the power to send in Federal agents to supervise and manage local procedures which the U.S. Constitution specifically reserved to the states;

9) to the Federal courts, the power to approve and enforce all the above;

10) to the Federal bureaucracy, the power to make certain administrative decisions which cannot be appealed to the courts.

The 13th, 14th, and 15th Amendments were designed to eliminate unjust discrimination on account of race. The Voting Rights Act was specifically designed to eliminate discrimination on account of race in regard to elections -- a worthy goal with which most Americans agree.

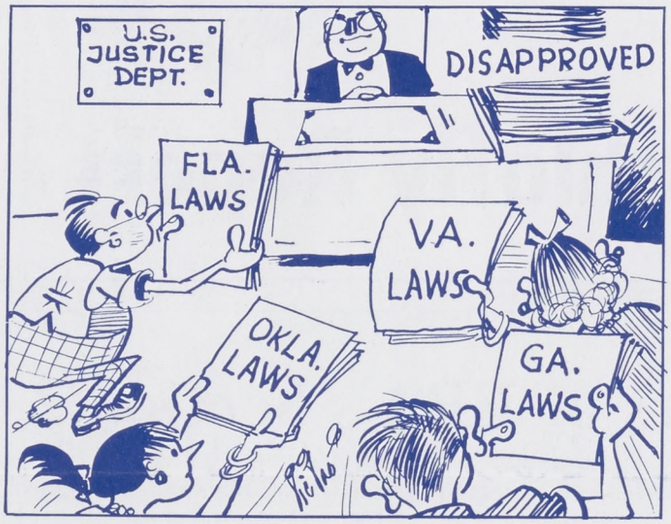
During the hearings on the Voting Rights Act, some argued that the enforcement clauses of the 14th and 15th Amendments gave Congress the power to pass only remedial legislation to prevent actual violations of Section 1. This argument was rejected. Since the language of the enforcement clause uses the word "appropriate," Congress and the courts decided that anything that is "relevant" is appropriate, even if it displaces state powers.

The Voting Rights Act was challenged in three cases, and upheld by the Supreme Court under the enforcement clauses of the 14th and 15th Amendments in *South Carolina v. Katzenbach*, *Harper v. Virginia Board of Elections*, and *Katzenbach v. Morgan*. The Voting Rights Act has been repeatedly extended by majority votes in Congress.

The Equal Rights Amendment applies to an entirely different subject -- sex. ERA's enforcement clause would give to the Federal Government the same kinds of vast powers over sex which the 14th and 15th Amendments granted over race. ERA's enforcement clause (Section 2) will open up a Pandora's box of Federal mischief. The Voting Rights Act is a model for the vast powers which ERA will give to the Federal Government.

The remainder of this report is devoted to examples of new Federal powers which ERA's Section 2 would give to Federal politicians, bureaucrats and judges.

Justice Department "Approval" Required for State Laws



Family law -- marriage, divorce, family property, adoptions, child custody, homosexual rights -- is one of the principal areas reserved to the states by the U.S. Constitution. Family law is also one of the most important areas governed by ERA's Section 1, since it is an area where state laws have traditionally made differences of treatment on account of sex. Therefore, family law is one of the most vulnerable targets for Federal takeover through ERA's Section 2.

Under ERA's Section 1, all state laws would have to be made sex-equal. Under ERA's Section 2, the power would move to Congress which could pass uniform laws in all those areas, thus preempting state laws even if they were sex-neutral and constitutional under Section 1.

If Congress chooses to use the Voting Rights Act as a model, the possibilities for mischief are endless. Congress could develop a fact-finding record that certain states have a history of partial discrimination on account of sex, and then pass a family law that is discriminatory among the various states.

Congress could establish an automatic triggering device (such as found in Section 4 of the Voting Rights Act), whereby, if less than 50 percent of ex-husbands receive custody of their children, those states would be automatically disabled from establishing or enforcing their own child-custody laws; or, if less than 50 percent of ex-wives were paying alimony to their ex-husbands, those states would be automatically disabled from establishing or enforcing their own alimony laws. Those states could then be required to submit any changes in their family laws to the Justice Department for approval or disapproval. The Justice Department could appoint Federal examiners to oversee family laws in those states.

The eagerness of the ERA lawyers to make family law a Federal matter is shown by the U.S. Commisssion on Civil Rights publication called *Sex Bias in the U.S. Code* written by ERA lawyer Ruth Bader Ginsburg. This report states that the concept of breadwinning husband and homemaking wife "must be eliminated from the Code if it is to reflect the equality principle." (p.206) This report also states that "no-fault divorce" should be adopted nationally. (p. 159) The Voting Rights Act is confined to the subject of elections. But the subject of "sex" is so broad that the opportunities for the mischievous exercise of Federal power are endless.

Universal Government Child-Care To Give "Equality" to Mothers

ERA's Section 2 would give Congress the power to establish child-care centers for *all* children, universally available, regardless of need. Some will argue that ERA will impose the *duty* on Congress to set up and to finance child-care centers for all children.

It is important to note that this area has nothing whatever to do with financial need. Under ERA, government child-care would not be a welfare program. (The Federal Government already provides more than $1 billion a year in child-care facilities to the needy.)

The ERA mandate for government-financed child care comes from the "equality principle" of Section 1, as affirmatively enforced by Section 2. The legal theory is that ERA is designed to give "equality of rights" to women, and that to achieve that goal, women must be relieved of society's expectation that mothers should take care of their children, in order that mothers can be in the labor force achieving their equal rights in jobs.

In 1975 the pro-ERA Governor of Ohio set up a Task Force for the Implementation of the Equal Rights Amendment. All members were pro-ERA. The Ohio Task Force Report concluded: "The equality principle embodied in the ERA requires consideration of a new public policy on the issue of child care. Women who are mothers need to enjoy the same freedoms and opportunities as men who are fathers. Mothers who desire to engage in activities outside the home, either on a full or part time basis, must have access to child care services so that they can fulfill these professional, educational or personal goals. . . . UNIVERSALLY AVAILABLE -- Quality child care must be available to all families who need such services irrespective of their income level. The cost of child care should be shared by the state and the families, according to their ability to pay."

In 1977, the pro-ERA U.S. Commission on Civil Rights published a book called *Sex Bias in the U.S. Code*, written by the pro-ERA lawyer Ruth Bader Ginsburg, which states that, in order to achieve the "equality principle" of ERA, "The increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care." (p. 214)

The Homemaker's Tax: Double Social Security Taxes

The supporters of ERA have worked for years to bring about a radical restructuring of Social Security in order to force the Homemaker (the dependent-wife) to pay a double Social Security tax in order to receive the same retirement benefit which the System has paid to Homemakers for the past 40 years. These ERA supporters want the Federal Government to decide how much a Homemaker's work in the home is worth, and then force her husband to pay a Social Security tax on that assumed amount. That Homemaker's Tax would cost the traditional family at least $1,000 a year in additional taxes for which they would get no extra benefits.

For example, the Commission on International Women's Year of 1977, funded by $5 million of our Federal tax dollars, in its official book called "To Form a More Perfect Union," recommended the Jordan-Burke bill which would treat the Homemaker as a "self-employed worker" and tax her $1,128 a year, *or* treat her as an employee of her husband and tax her lesser amounts.

The Carter Administration published a Federal Government document called "Social Security and the Changing Roles of Men and Women" in February 1979, which recommended three options of which one was the Homemaker's Tax: The Federal Government would set "a specific dollar value for work performed in the home . . . [and then] require homemakers to pay Social Security taxes on the imputed value of their services." (p. 105)

Would such changes be required by ERA? The financial columnist Sylvia Porter, in her syndicated column of April 9, 1975, described the Jordan-Burke bill, explained that the Homemaker's new Social Security taxes "would have to come out of the earnings of the husband," admitted that this would force him to pay "taxes twice -- once on the assumed earnings of his wife as a Homemaker." Then she added, "If some change along these lines is not enacted sooner, the Equal Rights Amendment, when finally passed, will require it."

Congress, of course, can change the Social Security law any time it chooses, but Congress has consistently rejected all proposals to impose the Homemaker's Tax. If ERA were ratified, ERA proponents can be expected to mount a new effort to get Congress to pass the Homemaker's Tax in order to achieve the goals of ERA. Section 2 would give Congress a mandate for this type of enforcement power.

Tax Funds for Abortions: Outlaw the Hyde Amendment

The U.S. Supreme Court in 1977 upheld the Hyde Amendment, which denies Federal funds for abortions. If ERA were put into the Constitution, the abortionists would take a new case to the Supreme Court and argue that ERA makes the Hyde Amendment unconstitutional and that ERA requires the payment of tax funds for abortions. How do we know? It is all set forth in the brief filed by the Civil Liberties Union of Massachusetts in the 1980 Massachusetts case called *Moe v. King*. CLUM asserted in its Complaint filed in Massachusetts court that the denial of state tax funds to pay for abortions is unconstitutional because it violates the Massachusetts State Equal Rights Amendment "by singling out for special treatment and effectively excluding from coverage an operation which is unique to women."

The CLUM newsletter of August 1980 (p. 8) explained: "The State Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the Federal level. The national Equal Rights Amendment is in deep trouble. . . . . It was our hope to be able to save Medicaid payments for medically necessary abortions through the Federal court route without having to use the State Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in *McRae* [the U.S. Supreme Court decision upholding the Hyde Amendment] was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions."

CLUM won its case in the highest Massachusetts state court, and Massachusetts is now forced by court order to pay state tax funds for abortions. The Massachusetts court, however, did not give its opinion on the relationship of ERA to abortion; the court upheld tax funds for abortions under another section of the Massachusetts Constitution.

It would be ridiculous to believe that the abortionists, backed up by the extensive legal talent and finances of the ACLU, would pass up the chance to take a new abortion-funding case to the U.S. Supreme Court under ERA. Will abortionists win? We know that the pro-abortion majority on the Supreme Court is 7-to-2, and that the decision upholding the Hyde amendment under the present Constitution (without any ERA argument) was only 5-to-4. The abortionists need only to convince one pro-abortion justice that ERA makes a constitutional difference in order to lock abortion-funding forever into the Constitution under ERA.

Marriage Licenses for Homosexuals
"Equality ... on Account of Sex"

ERA prohibits discrimination "on account of sex." It does not use the words "women," "men," or "gender." Marriage licenses are granted by a governmental agency only for a man to marry a woman. If a marriage license is denied to a man to marry a man, that is clearly a discrimination "on account of sex" (as well as gender).

Under ERA, Congress could pass a law requiring the granting of marriage licenses to homosexuals and could also pass other so-called "gay rights laws." Also under ERA, the Federal courts could hold that, regardless of any Congressional law, the "sex equality" principle of ERA prohibits the denial of marriage licenses to homosexuals and requires other "gay rights."

Senator Sam J. Ervin, Jr., the leading constitutional lawyer in the U.S. Senate for many years until his recent retirement, stated in Raleigh, North Carolina, on February 22, 1977: "I don't know but one group of people in the United States the ERA would do any good for. That's homosexuals."

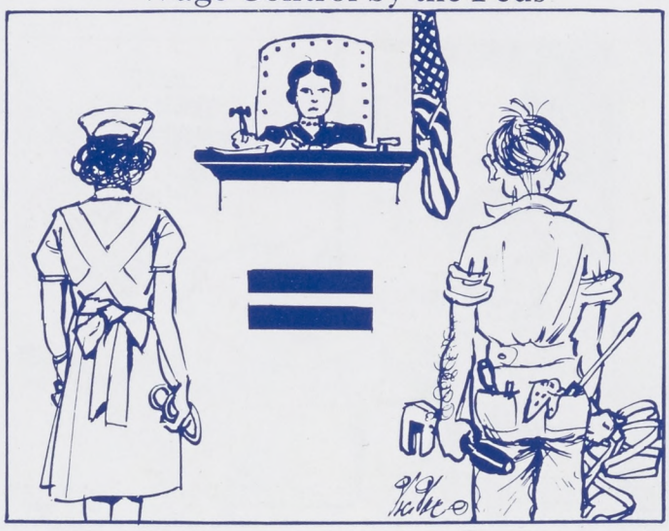
Rita Hauser, New York lawyer and U.S. representative to the United Nations Human Rights Commission, addressed the American Bar Association at its annual meeting in St. Louis in August 1970 on the subject of ERA, stating: "I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes."

The *Yale Law Journal* of January 1973 published a scholarly discussion called "The Legality of Homosexual Marriage" which concluded: "The stringent requirements of the proposed Equal Rights Amendment argue strongly for . . . granting marriage licenses to homosexual couples."

The homosexual community, in the last ten years, has waged a powerful campaign at local and state levels to enact "gay rights" legislation. It would be ridiculous to believe that the smart and aggressive homosexuals would pass up the chance to finance a Supreme Court case under ERA which would give them everything they have sought so unsuccessfully in state and local campaigns.

The homosexual community has been smart enough not to bring a case under the state ERAs because that would expose ERA too soon. One homosexual couple (without organized backing) brought a case in Washington State (which has a state ERA). The state court refused to grant them a marriage license, and ERAers sometimes cite this as a "precedent." However, this decision applies only to Washington State and is not binding on the Supreme Court. It's easy to see why the state court ruled against the homosexuals -- state court judges are elected. Federal judges, however, enjoy life tenure and never have to face the voters in elections.

Equal Pay for "Comparable Worth"
Wage Control by the Feds



"Equal pay for equal work" has been the law of the United States since the Equal Pay Act of 1963, as reinforced by the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. This issue is not controversial today.

"Equal pay for comparable worth" is what former EEOC Chair, Eleanor Holmes Norton, calls "the issue of the '80s for women." This means that the women's liberation movement wants a Federal agency or court to decide that unequal jobs held mostly by men or mostly by women have "comparable worth," and then force the employers to pay equal wages. The "comparable worth" advocates claim that it is sex discrimination that some jobs dominated by women receive less pay than other jobs dominated by men. Their solution is Federal wage control in order to eliminate the alleged "sex discrimination."

The "comparable worth" advocates won a major victory in the U.S. Supreme Court in June 1981 in the case called *County of Washington, Oregon v. Gunther*. The Supreme Court held that women can sue on the "comparable worth" theory and that sex discrimination in jobs is *not* limited to the concept of "equal pay for equal work." This case involved female prison guards who demanded equal pay with male prison guards who admittedly guarded ten times as many male prisoners who are far more dangerous, while female guards spent part of their time in clerical duties.

NOW president Eleanor Smeal called the decision "a great victory." *Newsweek* explained why the pro-ERA lawyers were so "elated": "They had wanted a narrow case for their first test so that a majority of the Justices would not be horrified by the prospect of wholesale salary restructuring."

This decision is expected to cost employers billions of dollars in legal expenses. Women activists will try to get the Federal Government to set wages after making such arbitrary determinations as that nurses are "worth" just as much as plumbers, secretaries are "worth" just as much as electricians, etc. ERA's Section 2 would give power to Congress and especially to the Federal courts to order wholesale wage restructuring.

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