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The E.R.A.-Abortion Connection

Testimony of Congressman Henry J. Hyde to the U.S. Senate Judiciary Committee, Constitution Subcommittee May 26, 1983

Is there a connection between the proposed Equal Rights Amendment and abortion or abortion funding?

Logically, there should be no connection. But, as Justice Holmes has reminded us, the life of the law has not been logic; it has been experience. And recent experience suggests that the E.R.A., if it is proposed and ratified without an explicit provision against its use as a pro-abortion device, will in fact be used to sweep away the minimal protection of unborn children that the courts currently allow, and also to mandate tax funding for abortions.

Laws, including constitutional amendments, should be interpreted in accordance with the intentions of those who wrote and adopted them. Some of the most important supporters of the E.R.A. have argued and stated publicly that they regard restrictions on abortion — and even the refusal of legislatures to finance abortions — as a form of "sex discrimination." And judges, including some Justices of the United States Supreme Court, have given reasons to believe that they will be receptive to such arguments.

One important source of evidence about how the E.R.A. would be interpreted is litigation under the state Equal Rights Amendments in various *state* constitutions. In several recent controversies involving state E.R.A.s, it has become clear that the pro-abortion movement regards E.R.A. as a valuable tool in the fight against abortion-funding restrictions.

In the 1978 case of *Hawaii Right to Life v. Chang*, a group of doctors argued that they had a constitutional right to be paid for abortions with state funds. The abortionists were represented by the American Civil Liberties Union, which has been prominent both in the pro-abortion and the pro-E.R.A. causes. They argued that the state E.R.A. secured a right to abortion funding because:

> 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.

In the 1980 case of *Moe v. King*, the Massachusetts affiliate of the A.C.L.U. urged that state's highest court to hold that:

> By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment.

In the 1983 Pennsylvania case of *Fischer, Planned Parenthood, et al v. Department of Public Welfare*, the American Civil Liberties Foundation of Pennsylvania argued that it is unconstitutional under the Pennsylvania State ERA to deny state tax funds for abortions because:

> Pregnancy is unique to women. 62 P.S. §453 and 18 Pa. C.S.A. §3215(c) which expressly deny benefits for health problems arising out of pregnancy, discriminates against women recipients because of their sex. 62 P.S. §453, 8 Pa. C.S.A. §3215(c) and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article I, §28 of the Pennsylvania Constitution.

These Hawaii, Massachusetts and Pennsylvania cases were decided on other grounds (albeit favorably to abortion funding). The argument advanced by the abortionists in all three cases, however, is firmly grounded in past decisions of the United States Supreme Court. The Court's holdings have denied the constitutional right to a government-financed abortion on the ground that poor women who desire abortions are not within any of the so-called "suspect classes" against whom no law can discriminate without triggering "strict scrutiny" by the courts.

"Strict scrutiny" almost always results in the law's being struck down as unconstitutional; if either sex or poverty had been designated by the Court as a "suspect classification," then the Court would almost certainly have found a right to abortion funding. Since 1970, the E.R.A. advocates have emphasized that the Amendment's principal legal effect would be to make sex a "suspect classification" under the Constitution.

The most important "suspect classification" at present is race. If sex discrimination were treated like race discrimination, government refusal to fund abortions would be treated like a refusal to fund medical proce-

dures that affect members of minority races. Suppose that the Federal Government provided funding for procedures designed to treat most diseases, but enacted a special exclusion for sickle-cell anemia (which affects only black people). The courts would certainly declare that exclusion unconstitutional.

Other laws regulating abortion would be treated similarly. "Conscience clauses," for instance, which give doctors and nurses in state-supported institutions the right to refuse to participate in abortions, would be treated like laws giving state officials the right to deny services to blacks but not to whites.

Nor would it avail the state to plead that abortion deserves special treatment because of the interests of the unborn child: the Court's decision in *Roe v. Wade* expressly declared that argument impermissible, at least where a woman is seeking an abortion during the first six months of her pregnancy.

It should be remembered that the abortion-funding cases were decided by a divided Court. A shift of two votes in the 1977 cases, or of only one vote in the 1980 case, would have resulted in a Supreme Court order that abortions be funded on the same basis as other operations. Unless abortion- related cases are clearly and explicitly excluded from the scope of E.R.A., this constitutional amendment making sex a "suspect classification" would provide the A.C.L.U. and other pro-abortion litigants with the argument they need to persuade the crucial Justice.

Some of the principal architects of the E.R.A. have been vague or silent about the effects of the amendment on issues such as abortion funding. One reason for this is suggested by the newsletter of the Civil Liberties Union of Massachusetts, explaining the organization's decision to argue the connection between abortion and the E.R.A.:

> 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. . . . [I]t was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in *McRae* 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.

If a Federal E.R.A. were ratified, there would be no need for silence or evasion, so we would see all laws regulating abortion challenged vigorously on the argument that they are unconstitutional discriminations against women.

In the meantime, many of those who are committed both to abortion and to the E.R.A. will continue to avoid discussing the connection. A particularly egregious example of one frequently-encountered evasive tactic is found in the conflicting statements of Professor Thomas Emerson of Yale Law School, the co-author of the 1971 article in the *Yale Law Journal* that is frequently cited by E.R.A. proponents as the authoritative guide to the Amendment's legal effects. Testifying before the Connecticut legislature, Professor Emerson said:

> The ERA has nothing to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon wholly different constitutional considerations, primarily the right of privacy, and would not be affected one way or the other by passage of the ERA.

In a letter written in 1974, however, Professor Emerson took a different view:

> I think that the ratification of the Equal Rights Amendment, while it would not affect the abortion situation directly, would indirectly have an important effect in strengthening abortion rights for women.

Professor Emerson gave a hint about the nature of this "indirect" effect in a brief he filed with the United States Supreme Court in *General Electric v. Gilbert* (1976), along with the other co-authors of his 1971 E.R.A. law journal article. Urging the Court to hold that a pregnancy exclusion in a health insurance plan violated Federal laws against sex discrimination, these pro-E.R.A. scholars stated that, if the E.R.A. were ratified, pregnancy-related classifications would be "subject to strict scrutiny," and that state laws discriminating against women with "disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment."

Thus, according to Professor Emerson and his co-authors, the Supreme Court's "right to privacy" may be *sufficient* to secure a right to abortion, but if the E.R.A. is ratified the "right to privacy" will no longer be *necessary* as a basis for abortion-related constitutional claims. Indeed, the E.R.A. will then provide a basis for striking down *all* laws that discriminate against "pregnancy-related disabilities" — the most important of which are the abortion-funding restrictions and other abortion regulations that have survived challenges based on the "right to privacy."

Among the lawyers who joined Professor Emerson and his co-authors in their brief on "pregnancy-related disabilities" was Ruth Bader Ginsburg, who was then the preeminent legal scholar of the E.R.A. movement and who is now a Federal judge. This is significant not only because it shows that the E.R.A. movement's scholars and advocates are virtually unanimous in their belief that E.R.A. will ban "pregnancy-related" discrimination, but also because it reminds us of *who* will be interpreting the E.R.A.

It is not *logically necessary* that the Federal judiciary hold restrictions on abortion unconstitutional under the E.R.A.; but it was not necessary — indeed, it was palpably, grotesquely incorrect — for the courts to create a constitutional right to abortion in the first place. In 1973 the federal judiciary found a right to abortion as a corollary of a "right to privacy" that is not even mentioned in the Constitution. The judiciary is quite capable of finding an even broader right to abortion and abortion funding in the E.R.A., whose advocates have already provided the arguments for such a right. Congress should not give the courts this opportunity.

Supporters of the E.R.A. have said that an amendment which expressly excludes its application to abortion is unacceptable to them. One is left to ask why. A question has been raised about the possible effects of a constitutional amendment being considered by Congress. This is a serious question about an important question of public policy. Those who argue that pro-life people must *prove* that the E.R.A. will enhance the right to abortion are misallocating the burden of proof. Nobody can prove what the judges will do with the amendment. As legislators, however, it is our responsibility to answer the questions that we can answer, rather than leaving the judiciary free to choose whatever answers the judges like.

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Tsongas Admits ERA Gives Vast New Powers to the Courts

Excerpts from Transcript of Questioning of Senator Paul Tsongas, Chief E.R.A. Sponsor, by Senator Orrin Hatch, Chairman, Senate Constitution Subcommittee at the Hearing on E.R.A., May 26, 1983

Senator Hatch: Let me give you another illustration. That is the issue of abortion. You know, one of the major controversies about the Equal Rights Amendment has been its relationship to the issue of abortion. A number of individuals have suggested that the Equal Rights Amendment, for example, might mean that the so-called Hyde Amendment — which limits public funding for abortion — would be rendered unconstitutional. Indeed, it is my understanding that it was the state Equal Rights Amendment in your own state, Massachusetts, which served as a basis for that argument. In addition, Professor Emerson has written, again, that the E.R.A. "would have an important effect in strengthening abortion rights for women." What would be your view on the impact of E.R.A. upon the federal, state and local limitations on the public funding of abortions? Would such limitations continue to be constitutional or, in your opinion, would they be unconstitutional?

Senator Tsongas: I can give you a personal view.

Senator Hatch: Sure, that's all I'm asking, whatever you think, as the chief sponsor, that the Equal Rights Amendment would stand for. That's all I'm asking.

Senator Tsongas: I happen to believe that the Supreme Court was correct in the decision of *Roe v. Wade,* that the issue of abortion is a matter between a woman and her physician. That is a decree by the Supreme Court. There have been matters adjudicated in terms of state legislative action. I don't see that that is changed by the E.R.A. passage.

Senator Hatch: So, therefore, you would feel that it would overrule the Hyde Amendment which would prohibit federal funding of abortions.

Senator Tsongas: I am telling you, Mr. Chairman, as I said before. That issue would be resolved in court.

Senator Hatch: Let me give you another illustration. Another controversy relating to E.R.A. concerns its impact upon private colleges, on private colleges or schools which are women-only or men-only. There are, of course, many such institutions across the country. I would be interested in knowing the impact of the Equal Rights Amendment upon such institutions. For instance, the California Commission on the Effect of the Equal Rights Amendment has said that, after the effective date of E.R.A., "litigation attempting to place private educational institutions under the E.R.A. is virtually certain to ensue." Other pro-E.R.A. commentators have said that, at the very least, the E.R.A. will make it unconstitutional for governments to provide any of these institutions with financial subsidies or tax-exempt status, or financial assistance for their students. Do you agree with any of these assessments of the impact of the Equal Rights Amendment? And would it be unconstitutional, for example, for governments to provide tax-exempt status to such institutions? Would it be unconstitutional for them to provide scholarships or other public assistance to students attending those private colleges or schools?

Senator Tsongas: I will give you my personal view that it would not. I happen to feel that there is no apparent problem with all-male or all-female schools. But I repeat. These issues are going to be decided by the courts.

Senator Hatch: Would you agree, then, that E.R.A. would certainly outlaw single-sex public schools and universities? Would you agree with that?

Senator Tsongas: That they would outlaw single-sex public schools and universities? I don't know. I can see the arguments that would be made. And again, this would have to be resolved in the courts.

Senator Hatch: Let me give you another issue that is extremely important, and I think your views on it are extremely important. There are many churches in this country which deny various rights to women in the exercise of their religious doctrine. The Roman Catholic Church, for instance, denies priesthood to women. The Mormon Church limits certain positions to men. The Orthodox Jewish Synagogue segregates men and women. In your opinion, would the Equal Rights Amendment allow such churches to continue to have tax-exemptions and other public benefits under the Equal Rights Amendment?

Senator Tsongas: In that case, Mr. Chairman, I believe that you have the issue of the E.R.A. and the issue of freedom of religion in some conflict, and what would happen in that case is that they would go to the courts and that would be resolved.

Senator Hatch: You are saying that, again, the courts would have to resolve this issue.

Senator Tsongas: As they would a lot of the issues that we raised by the Human Life Amendment. . . .

Senator Hatch: Let me just say this. How does this issue differ from the freedom of religion issue involved in the Bob Jones case, where the government was successful in denying tax exemption to Bob Jones, a private church-related institution which discriminates in its practices with respect to whites and blacks. The government argued in that case that tax exemption ought to be denied to Bob Jones because, whatever its religious doctrine, it is violating an important public policy — equal treatment of the races. How does the Bob Jones situation differ from the situation of the Orthodox Jewish school that segregates children on the basis of sex for certain classes?

Senator Tsongas: Mr. Chairman, to follow the rationale through, the Bob Jones issues will have to be resolved by the Supreme Court. . . .

Senator Hatch: [The Senator read from a long National Organization for Women resolution demanding that that tax exemption be denied to churches and seminaries that make "sexist" differences between men and women, or that oppose abortion or oppose ordaining women.] Would you agree or disagree with N.O.W. that the assigning of different roles in churches and seminaries to men and women is "sexist"? And would the E.R.A., as you propose it, tolerate government accommodation of these types of policies?

Senator Tsongas: Again, Mr. Chairman, you would have an interpretation of the freedom of religion compared with the interpretation of equality on account of sex. You would have exactly the same situation as if you would have a conflict between freedom of religion and racial equality. . . .

Senator Hatch: The Commission on Civil Rights has also observed that the Equal Rights Amendment would prohibit "sex-based discrimination in insurance wherever governmental action is involved." Given the degree of government regulation of the insurance industry, some people would say that the Equal Rights Amendment would flatly prohibit sex-based discrimination in insurance policies and actuarial tables. That is, despite the fact that men and women, on the average, have different life expectancies, they will pay the identical amounts for annuities and pensions, and despite differences in accident records, they would pay the identical amounts for automobile and casualty insurance policies. Let me just ask you this, would there be any impact on sex-based insurance policies as a result of the Equal Rights Amendment, in your opinion?

Senator Tsongas: Mr. Chairman, if we pass this Amendment the issue will end up in Court. . . .

Senator Hatch: Let me ask you this one. Proponents of the E.R.A. have made great fun of critics who have suggested that the E.R.A. would render unconstitutional state laws against homosexual marriages. These critics make the point that, since the purpose of E.R.A. is to equate race and sex discrimination, with respect to their traditional standard of review, that laws against homosexual marriages would be no more constitutional than laws against interracial marriages. An article in the *Yale Law Journal* has argued that "The stringent requirements of the proposed E.R.A. argue strongly for removal of the stigma [of deviance] by granting marriage licenses to homosexual couples who satisfy reasonable and nondiscriminatory classifications." My question is, what would be the impact of the E.R.A.? Would it make laws against homosexual marriages unconstitutional?

Senator Tsongas: I would be glad to work that into my reply.

Senator Hatch: I might mention that Barbara Babcock, who will probably testify on this issue (I would like her to), and who is one of the authorities on sex discrimination in the law, and who is for the Equal Rights Amendment, said that "The effect that E.R.A. will have on discrimination against homosexuals is not clear. It is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discriminations."

James White, a professor of constitutional law at the University of Michigan, said: "Conceivably a court would find that the state had to authorize marriage and recognize marital legal rights between members of the same sex."

Paul Freund, who is the renowned Harvard Law School professor, on of the most distinguished constitutional scholars of the 20th century, said that "If the law must be as undiscriminating concerning sex as it is toward race [again, we are talking about the standard of review], it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the opponents shrink from these implications is not clear."

Finally, Rita Hauser, who is a distinguished New York City lawyer and was our U.S. representative to the U.N. Human Rights Commission, said the E.R.A., "if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes.

Senator Tsongas: Is the Chairman suggesting that the issue of legalizing gay marriages will not be litigated if the E.R.A. were adopted?

Senator Hatch: No, I think they may be litigated, and the legislative bodies will still have a right to do legislatively what they think is best in their judgment, in their collective judgments. But if the Equal Rights Amendment is passed, I personally believe that the laws that forbid homosexual marriages will, I think, go down the drain. I think the courts will have to resolve it that way because of the way the Equal Rights Amendment is written so absolutely. I agree with Professor Emerson who is for the Equal Rights Amendment. It is written so absolutely that these laws will be stricken down, and that there will be a wholesale changing of the laws in this society as a result of this very simply worded Amendment that looks good on its face, but that has many, many serious anticipated problems that most people in this country would like to have resolved before it is locked into the Constitution, without a resolution by, say, the courts who are not elected.

Senator Tsongas: I would be glad to give you the positions of myself and Senator Packwood if you give me your positions on the same issues, to see which ones we have conflict on, and try to sit down together and vote.

Senator Hatch: Well, see, I admit I don't know the answers to ll these things. I'm just saying that we would like to have the answers. For instance, the Equal Rights Amendment, back to that last point, uses the term "sex": "Equality of rights shall not be denied or abridged on account of sex." Well, let me just read a little bit of legislative history with you, if I can. Is it the case that the term sex in this instance refers only to the distinctions between male and female, and that it does not refer in any way to the concept of sexual preferences or sexual orientation or sexual affection? Am I accurate in stating this, in your opinion?

Senator Tsongas: I believe that it does, Mr. Chairman, but I would like a chance to review that. . . .

(Continued from page 2)

I can only explain the resistance to the insertion of clarifying language in the E.R.A. as additional evidence that many of its proponents do intend to use it as a tool in the abortion struggle. Indeed, in February 1983 the sponsors of a proposed state E.R.A. in Minnesota *withdrew* the amendment after a committee added a clause to exclude abortion from the scope of the amendment. I believe it is unprofessional for us as legislators — whether or not we particularly care about abortion — to leave such an important and sensitive question unanswered after it has been raised. It would be especially tragic if legislators who *do* wish to minimize the killing of unborn children were to give pro-abortion lawyers and pro-abortion judges a new and powerful tool with which to enhance and extend the abortion right, especially by mandating the use of tax funds to pay for abortions.

An effort will be made to insert clarifying language in the E.R.A. so that it cannot be used to expand abortion rights. There is simply no good reason for the rejection of such a clause, unless the E.R.A. *is* intended as an abortion rights and abortion-funding amendment. By voting for clarifying language to exclude abortion and abortion-funding from the scope of E.R.A., members of Congress who are genuinely committed to the E.R.A. and who are also genuinely committed against the expenditure of tax funds for abortion will have an opportunity — perhaps their only opportunity — to honor both commitments.

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