The Phyllis Schlafly Report

VOL. 17, NO. 4, SECTION 1 | BOX 618, ALTON, ILLINOIS 62002 | NOVEMBER, 1983

Why Congress Must Amend the E.R.A.

Excerpts from Testimony by Phyllis Schlafly to the Subcommittee on Civil and Constitutional Rights of the U.S. House Committee on the Judiciary October 20, 1983

. . . I propose a series of amendments which would address the major criticisms of the Equal Rights Amendment.

(1) This article shall not be construed to secure, expand or endorse any right to abortion or the funding thereof.

The most immediate and costly effect of ERA would probably be to mandate taxpayer-funding of abortion by making the Hyde Amendment unconstitutional. This would reverse the 5-to-4 U.S. Supreme Court decision in *Harris v. McRae* (1980). This effect is foreshadowed in the recent U.S. Supreme Court decision in *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission* (77 L. Ed. 2d 89, June 20, 1983), in which Justice Stevens, joined by six other Justices, wrote: "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."

In a footnote, Justice Stevens quoted Representative Augustus F. Hawkins, speaking *for* the Pregnancy Discrimination Act during the House debate, as saying, "It seems only common sense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy." (123 Cong. Rec. 10582, 1972)

The scope of the *Newport News* case is limited to employment matters under Title VII, but the definition of "sex" discrimination enunciated in that law and in the Supreme Court decision constitutes the most authoritative legislative definition of what the word "sex" would mean in ERA or in any other federal legislation (unless a contrary or limiting definition is specifically included). There is an exception in the Pregnancy Discrimination Act (42 U.S.C. sec. 2000e-(k)) to prevent compulsory funding of abortions. But there is *no exception in ERA* as presently written; the absolute language of ERA would be a constitutional mandate against *all* sex discrimination and would nullify any exceptions in existing laws.

It is clear from briefs filed by pro-abortion groups in three states with a State ERA in their state constitutions that pro-abortion lawyers will use ERA as a major argument to persuade the courts to force taxpayer-funding of abortion.

In the 1983 Pennsylvania case of *Fischer, Planned Parenthood, et al v. Dept. of Public Welfare*, the American Civil Liberties Foundation of Pennsylvania argued in its Complaint that it is unconstitutional under the Pennsylvania State ERA to deny state tax funds for abortions because this would "constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment."

In the 1980 Massachusetts case of *Moe v. King*, the Civil Liberties Union of Massachusetts argued in its Complaint that it is unconstitutional under the Massachusetts State ERA to deny state tax funds for abortions because "singling out for special treatment and effectively excluding from coverage an operation which is unique to women . . . constitute(s) discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment."

In the 1978 Hawaii case of *Hawaii Right to Life v. Chang*, the American Civil Liberties Union brief argued that "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."

Would the pro-abortion lawyers be successful with their argument in the U.S. Supreme Court under the Federal ERA? *Harris v. McRae*, the decision which upheld the constitutionality of the Hyde Amendment under the present Constitution, was a 5-to-4 decision. The pro-abortion majority on the Supreme Court is at least 6-to-3. Therefore, the pro-abortion-funding advocates — using the definition of "sex" accepted by seven Justices in *Newport News* — would need to convince only one pro-abortion Justice that ERA makes the "sex discrimination" difference.

Congressmen who oppose taxpayer-funding of abortion should not give the Supreme Court this opportunity to overturn every vote Congress has ever taken in approval of the Hyde Amendment. The sensible course of action is to amend ERA to remove abortion and abortion-funding from ERA's grasp.

Something happened in Wisconsin this year which provides further proof that the pro-ERA advocates admit the ERA-abortion connection. In an attempt to put an ERA into the Wisconsin state constitution (in a state where ERA had already once been defeated on a referendum), the *pro*-ERA advocates added a clause to prohibit the use of ERA for abortion purposes. This shows that ERA advocates themselves know that ERA will give constitutional protection to abortion and abortion funding *unless* the language of ERA specifically prohibits this result. After this amendment was added, the Wisconsin Civil Liberties Union opposed the Wisconsin State ERA "unless the objectionable anti-civil libertarian [i.e., anti-abortion] language is removed."

Clearly, the burden of proof is on the ERA advocates to prove that ERA will *not* require the spending of tax funds for abortions — and this burden of proof is impossible to meet *unless* specific language is added to the text of ERA to prohibit that result. We recommend an amendment which would make ERA abortion-neutral; it would not overturn *Roe v. Wade* — it would simply prevent ERA from being used to mandate taxpayer-funding of abortions or to grant any other abortion rights. *All* pro-life groups are united that it is absolutely essential to have an abortion-exclusion amendment to ERA.

(2) This article shall not be construed to grant or secure any rights to homosexuals or lesbians.

The leading textbook on sex discrimination used in U.S. law schools, written by nationally-known pro-ERA advocate Barbara Babcock, states: "The effect that the Equal Rights Amendment will have on discrimination against homosexuals is not yet clear. The legislative history suggests that it was not the intent of Congress [in 1971-72] to prohibit such discrimination. On the other hand, it is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discrimination." (Barbara Babcock, *Sex Discrimination and the Law*, 1975, p. 180)

An article called "The Legality of Homosexual Marriage" in the *Yale Law Journal* of January 1973 (p. 589) refutes the "legislative history" argument and states: "The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma [of deviance] by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications." The authors support ERA, homosexual marriages, and the ERA-homosexual connection.

In *Baker v. Nelson* (291 Minn. 310, 191 N.W.2d 185, 1971), the Minnesota court refused to permit same-sex marriages. The homosexuals' appeal from this decision under the 9th and 14th Amendments was dismissed by the U.S. Supreme Court (409 U.S. 810, 1972). The *Yale Law Journal* article quoted above is widely cited as a forecast that ERA would compel a contrary result.

Harvard Law School Professor Paul Freund testified in the original ERA hearings: "Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation." (Cong. Rec., Mar. 22, 1972, p. S5478)

Senator Sam J. Ervin, Jr., the leading constitutional lawyer in the U.S. Senate until his 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."

A leading pro-ERA lawyer, Rita Hauser, gave a major address on the Equal Rights Amendment to the 1970 Annual Meeting of the American Bar Association in St. Louis in which she stated: "I also believe that the proposed [ERA] 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 word used in ERA is "sex," not "women," and the "sex" in ERA is not defined or limited in any way. One would have to be blind, deaf and dumb not to be aware of the political activism of the homosexual community and their attempts (usually unsuccessful) to legislate their "gay rights" agenda at the Congressional, state legislative, and city council levels. To hypothesize that they would not litigate under ERA to get everything they have failed to get by legislation would be unrealistic, especially when prominent lawyers are already on record as confirming the ERA-homosexual connection.

The questions posed by the ERA-"gay rights" connection are endless — and unanswerable —unless Congress adds an amendment to clarify its intent. Would ERA prohibit us from denying marriage licenses to homosexuals and lesbians, and from denying them the tax benefits and spousal employment and medical benefits now accorded to husbands and wives? Would ERA prohibit the U.S. Armed Forces

from discharging homosexuals and lesbians? Would ERA prohibit a judge from considering homosexuality -lesbianism in awarding child custody, adoptions, or artificial insemination rights? Would ERA make all anti-sodomy laws unconstitutional? Would ERA prevent a private school or church from dismissing a homosexual or lesbian employee? Would ERA force the hiring of homosexuals as local policemen? Would ERA prohibit landlords from refusing to rent apartments or rooms to homosexuals? Would ERA prohibit the Scouts from refusing to have homosexuals or lesbians as troop leaders? Would ERA force public school sex-education curricula to present homosexuality as an acceptable "alternate lifestyle"? Would ERA prohibit colleges from denying campus recognition and funding to homosexual/lesbian student groups? Would ERA give "minority status" to homosexuals and lesbians under the Civil Rights Act and make them eligible for "affirmative action" benefits?

Then come the questions about disease, especially about AIDS for which the incubation period is two years, during which time no test can identify the disease carriers. Would ERA prohibit us from refusing homosexuals the right to give blood to blood banks? Would ERA prohibit cities from closing down the homosexual bathhouses as public health nuisances? Would ERA prohibit police, paramedics, dentists, health personnel, and morticians from taking what they believe are adequate precautions to defend themselves against AIDS and other homosexual diseases? Would ERA prohibit cities from denying the use of public facilities to large gatherings of homosexuals (such as the "gay pride" demonstrations and the "gay rodeo")? Would ERA prohibit restaurants from barring homosexuals from food-handling jobs? . . .

Some people will claim that the "sex" in ERA does not refer to "sexual preference." But the burden of proof is on those who make that claim, and there is no way they can prove it unless they put explicit language in ERA to prevent ERA from being used by the courts to grant privileges to homosexuals? . . .

The 1983 experience with the proposed Wisconsin State ERA referred to above (in the abortion section of my testimony) applies equally to the ERA-"gay rights" connection. The pro-ERA advocates in Wisconsin added language to the proposed State ERA forbidding its use for "sexual preference."This proves that the pro-ERA advocates admit the connection. When the Wisconsin Civil Liberties Union testified against what it called the "anti-civil libertarian language" added to the Wisconsin ERA, this criticism included the "gay rights" exclusion language.

Congress, the states, and the American people are entitled to know for sure whether or not ERA includes the "gay rights" agenda. It would be unreasonable and irresponsible to leave it to the courts to resolve this sensitive issue. If Congress does not intend an ERA-"gay rights" connection, then why not say so by adding our proposed amendment?

(3) This article shall not be construed to require the drafting of women or the assignment of women to military combat.

The effect of ERA on the draft and on military duty is certain and is not disputed by pro-ERA lawyers. The House Judiciary Committee which reported out ERA in 1971 stated: "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 1977 U.S. Civil Rights Commission book entitled *Sex Bias in the U.S. Code*, written largely by pro-ERA lawyer Ruth Bader Ginsburg (now a federal judge), stated: "The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual capacity rather than sex." (p. 218)

The premier piece of pro-ERA literature, the 100-page article by Professor Thomas I. Emerson in the *Yale Law Journal* of April 1971, stated about ERA: "As between brutalizing our young men and brutalizing our young women there is little to choose . . . . Women will be subject to the draft . . . . Women will serve in all kinds of units, and they will be eligible for combat duty." (see pp. 969-978)

President Jimmy Carter called for the equal draft registration of women in 1980. This proposal was soundly rejected by Congress; the House and Senate both voted overwhelmingly to exempt *all* women from the draft registration law. The pro-ERA advocates then took their case to the U.S. Supreme Court and lost. In *Rostker v. Goldberg* on June 21, 1981, the Supreme Court upheld the exemption of *all* women (a sex classification) from the military draft and from draft registration, and described the necessity to exclude women from military combat as a self-evident truth which is obvious in a civilized society.

ERA would reverse *Rostker v. Goldberg* and make unconstitutional the male-only draft registration law plus the laws exempting women from military combat (10 U.S.C. §6015 and §8549). . . .

(4) This article shall not be construed to affect any benefit or preference given by the United States or any State to veterans.

. . . One of the effects of ERA would be to eliminate veterans preference. That this would not only be an effect of ERA, but is one of its purposes, was made clear in the testimony to this Subcommittee presented by Dorothy S. Ridings, president of the League of Women Voters, on September 14, 1983. She stated bluntly that ERA would overturn the Supreme Court decision in *Massachusetts v. Feeney,* which upheld veterans preference under our present Constitution.

The pro-ERA position is that veterans preference is sex discriminatory within the meaning of ERA because veterans are 98% male. This is the same type of rationale used in the ERA-abortion connection; since abortions are performed exclusively on women, it is a violation of "equal rights" to deny funding for abor-

tions. Likewise, since 98% of veterans preference goes to men, it is a violation of "equal rights" to give veterans this advantage over non-veteran women.

In order to prevent ERA from substantially hurting veterans, an amendment should be added to ERA to prohibit it from affecting veterans preference.

(5) This article shall not be construed by the Internal Revenue Service or by the courts to deny tax exemption to private schools, seminaries or churches which treat men and women differently.

This Amendment to ERA is made absolutely essential by the 1983 Supreme Court decision in *Bob Jones University v. United States*. In this decision the Court held that the Internal Revenue Service has the right to withdraw tax-exempt status from any school (including religious schools) which has any rule or regulation contrary to public policy, even though the regulation pertains to something so private as dating and marriage, and even though the regulation concerns a matter of religious principle. The Court recognized "the primary authority of the I.R.S. . . . in construing the Internal Revenue Code," so that the I.R.S. can make these decisions without express authority in the statute.

The court said: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." . . .

If ERA means anything at all, it certainly means a policy of eradicating sex discrimination. For ten years, ERA lawyers (including presidents of the American Bar Association) have testified that the legal impact of ERA would be to treat "sex" exactly as we now treat "race."

Therefore, if ERA were ever added to our Constitution, it would give the Government a fundamental overriding interest in eradicating sex discrimination; and this interest would override the First Amendment rights of all religious schools. That means that churches which do not ordain women (or which treat women differently in any way) would lose tax exemption for their schools and seminaries.

(6) This article shall not be construed to deprive wives or widows of any right or benefit granted by any state, or to interfere with state laws that obligate husbands to support their wives.

. . . It cannot be denied that one of the far-reaching effects of ERA — and indeed a continuing goal of the pro-ERA advocates — is to make all federal and state laws sex-neutral or gender-free. However, "spouse must support spouse" simply does not have the same meaning, grammatically or legally, as "husband must support wife." An amendment to ERA is urgently needed to prevent ERA from sacrificing the traditional legal rights of wives on the altar of the feminist sex-neutral society.

(7) This article shall not require the sex-integration of private schools, churches, hospitals, prisons, or public accommodations, or require treating males and females the same where differences tend to accommodate personal modesty.

. . . The U.S. Commission on Civil Rights, in a 1978 booklet called *Statement on the Equal Rights Amendment*, says, "Unlike Title IX, federal funding will not be required to trigger its [ERA's] application. . . . [ERA] will be a clear mandate of the highest order that sex bias is not acceptable in our nation's schools."

(8) This article shall not require insurance to ignore factual or actuarial differences between men and women.

ERA would have a massively costly effect on young women buying automobile accident insurance and on women of all ages buying life insurance, because the statistical facts that women have fewer accidents and tend to live longer than men could no longer be taken into consideration in the setting of lower rates for women. . . .

(9) Delete Section 2 of ERA.

Section 1 of ERA would require every federal and state law to be sex-neutral; but Section 2 of ERA would transfer from the states to the Federal Government the final decision-making power over all those areas of state law which traditionally have made differences of treatment on account of sex. These would include: marriage and marriage property laws, child custody and adoptions, divorce and alimony, abortion, homosexual laws, sexual crimes, private and public schools, school sports, protective labor laws, prison regulations, public accommodations, and insurance rates. . . .

It would be irresponsible to leave all these sensitive issues for the federal courts to decide. They are legislative, not judicial, issues. Whether individual Congressmen support one side or the other of these sensitive issues, we are entitled to know what ERA means before it is voted on. The only way we can know for sure is to add amendments to ERA to clarify what it means.

Phyllis Schlafly is a member of the Illinois Bar. She received her J.D. from Washington University Law School and an honorary LL.D. from Niagara University. She has testified before at least 50 Congressional and State Legislative committees on various subjects.

The Phyllis Schlafly Report
Box 618, Alton, Illinois 62002
ISSN0556-0152

Published monthly by The Eagle Trust Fund, Box 618, Alton, Illinois 62002.
Second Class Postage Paid at Alton, Illinois.
Subscription Price: $10 per year. Extra copies available: 50 cents each; 4 copies $1; 30 copies $5; 100 copies $10.