



## The “Equal Rights Amendment” (ERA) is About Abortion

August 30, 2018

Dear Legislator,

By now you have probably heard that in May of this year, Illinois became the 37th state to formally approve the so-called “Equal Rights Amendment” (ERA)<sup>1</sup>, thereby leaving the possibility for its formal recognition in the U.S. Constitution just one state shy of the 38 needed for ratification. Now Virginia has become the primary battleground in a national effort to push the ERA over the edge.

The Family Foundation is grateful for conservative legislatures that have wisely and consistently declined to adopt the ERA, even in the face of its spirited resurgence as a Leftist rallying cry in the past few years. For most of that time, there was little need for us to emphasize many of the substantive policy reasons for opposing the ERA since those had been thoroughly vetted in the 1970s and early 80s when bold women like Phyllis Schlafly led a successful campaign opposing what they recognized then to be a Trojan Horse. We considered it sufficient to point out the well-established procedural problems that have rendered the ERA a moot issue, having failed to receive the be minimum number of states needed for ratification by the 1979 deadline and again in 1982 after Congress voted to extend the deadline.<sup>2</sup>

While we firmly maintain that the ERA is still a moot issue, unfortunately after eight years of the Obama administration’s packing the federal courts with activist judges, this sound and widely-regarded legal conclusion seems much less reliable today than it once did. What has been considered settled law on the matter could now suddenly be open for reinterpretation in various federal courts when litigation inevitably ensues, making the situation before us much like a game of “ratification roulette.” Consequently, this calls for revisiting the ERA at the substantive policy level.

Unlike how some have treated the ERA in past years, your 2019 vote on the ERA will not be merely a symbolic gesture to certain constituent groups or a benign nod to the universally shared ideal of equality. Notwithstanding many of its supporters’ good intentions, this Amendment’s true impact, if legitimized, will strike at the very heart of life, liberty, and privacy. We do not need to speculate about this. It has already played out in many ways in states that have ratified the ERA into their state constitutions – and with grave consequences.

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<sup>1</sup> ERA 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.”

<sup>2</sup> See *NOW, Inc. v. Idaho*, 1982 U.S. 3006 (dismissing the ERA as moot)

**That is why I am taking this special opportunity to make you aware that The Family Foundation considers your vote this year on the ERA to be a vote either for or against abortion.**

As crazy as it may seem, among the possible consequences of Virginia's ratification of the ERA – and by far the most troubling – is that it could be interpreted as enshrining in our Constitution a right to taxpayer-funded abortions at any time for any reason. This is what happened in Connecticut. In the case of *Doe v. Maher* the Connecticut Supreme Court held that, "Since only women become pregnant, discrimination against pregnancy by not funding abortions ... is sex-oriented discrimination ... The Court concludes that the regulation that restricts the funding for abortions ... violates Connecticut's Equal Rights Amendment."<sup>3</sup> In *New Mexico Right to Choose, NARAL, et al v. Johnson*, the New Mexico Supreme Court unanimously held that, in light of its state version of the ERA, the state could not differentiate between abortions and medically necessary procedures sought by men, and ordered the state to pay for elective abortions under Medicaid.<sup>4</sup>

As much as anything else, the ERA is about elevating abortion and forcing every citizen to sacrifice their hard-earned tax dollars to pay for it. If an ERA does not support abortion, it will not pass. Consider, for example, that when the state legislatures in Wisconsin and Minnesota attempted to pass a state version of the ERA, but one that contained a clause to make it abortion-neutral, the ERA supporters killed the bills.<sup>5</sup> Even during the original attempt to ratify the ERA, the connection between the ERA and abortion was clearly recognized. University of Notre Dame Law professor Charles E. Rice said in 1975, "The potential effects of ERA on abortion are sufficient, it seems to me, to cause all those who oppose abortion to oppose the ERA."<sup>6</sup> Forty-three years later, the Amendment's language and goals have not changed.

But the ERA's effects are not limited to the issue of abortion. Contrary to its purported goal of ensuring that women are seen as equal to men, the ERA will unequivocally and disproportionately *harm* women and girls. Here are a few of the other consequences we can reasonably expect to see nationwide if the ERA is formally ratified:

- 1) **The term "sex" could be interpreted to provide special legal rights on the basis of "sexual orientation" and "gender identity," and in turn, severely threaten religious liberty.**
  - o The ERA would empower the federal courts to determine the meaning of "equality of rights" and "sex." This very phenomenon is happening in several federal courts across the country and also recently in President Obama's EEOC "Dear Colleague" Letter pertaining to Title IX.

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<sup>3</sup> *Doe v. Maher*, 40 Conn. Supp. 394, 395, 1986 Conn. Super. LEXIS 32, \*2, 515 A.2d 134, 135

<sup>4</sup> *N.M. Right to Choose/Naral, Abortion & Reprod. Health Servs., Planned Parenthood of the Rio Grande v. Johnson*, 126 N.M. 788, 792, 1999-NMSC-005, 2, 975 P.2d 841, 845, 1998 N.M. LEXIS 466, \*4, 38 N.M. St. B. Bull. 6

<sup>5</sup> <https://concernedwomen.org/images/content/MoreEvidencAgainstERA.pdf>

<sup>6</sup> Charles Rice, "ERA: Easy, Rampant Abortion," *The Wanderer* 13 February 1975, folder 4, box 6, KFDC; Lee Wysong interview.

- 2) **Gender designations for bathrooms, locker rooms, hospital rooms, nursing homes, etc. would be nullified because they make distinctions based on sex.**
  
- 3) **Elimination of all-male and all-female school sports teams**
  - In *Pennsylvania v. Pennsylvania Interscholastic Athletic Association* (1975), the state Supreme Court invalidated sex segregation policies in athletics, including contact sports, citing their state ERA.<sup>7</sup>
  - In *Darrin v. Gould* (1975), the Supreme Court of Washington held that because of the state's ERA, all school sports must be open to both sexes.<sup>8</sup>
  
- 4) **Women must be allowed to go topless in public the same as men.**<sup>9</sup>
  - See Va. Code § 18.2-390 (Definition of “nudity”)
  
- 5) **Women will be drafted on the same terms as men into military and combat roles.**
  
- 6) **Increased auto and life insurance costs for women**
  - In *Hartford Accident & Indemnity Co. v. Insurance Commissioner* (1984), Pennsylvania's gender-based automobile insurance rates were invalidated because of the state's ERA, forcing women to pay the same rates as men even if they statistically have better driving records.<sup>10</sup>
  - Virginia life insurance policies would become more expensive for women.<sup>11</sup>
  
- 7) **Integrated male/female prisons and harsher prison conditions for women**
  - Supreme Court Justice Ruth Bader Ginsberg has stated that under the ERA, prisons would have to be sex-integrated.<sup>12</sup>
  - In *DuPont v. Wyzanski* (2004), Massachusetts' state ERA was used to overturn the practice of using stricter discipline with male inmates who are much more violent in jail than female inmates. As a result, female inmates may be subjected to equally harsh discipline.<sup>13</sup>
  
- 8) **The ERA will transfer large amounts of power from the state government to the federal government since it empowers Congress to enforce it.**<sup>14</sup>

<sup>7</sup> *Commonwealth by Packel v. Pennsylvania Interscholastic Athletic Asso.*, 18 Pa. Commw. 45, 334 A.2d 839, 1975 Pa. Commw. LEXIS 859

<sup>8</sup> *Darrin v. Gould*, 85 Wn.2d 859, 877, 540 P.2d 882, 893, 1975 Wash. LEXIS 937, \*35

<sup>9</sup> See <https://mic.com/articles/170583/free-the-nipple-founder-lina-esco-turns-her-sights-to-passing-the-equal-rights-amendment#.pXujhba8Z>

<sup>10</sup> *Hartford Accident & Indemnity Co. v. Insurance Commissioner*, 482 A.2d 542 [Pa. 1984] and 543-44

<sup>11</sup> See Va. Code §§ 38.2-1369, -3206, -3207, -4125, and 8.01-419

<sup>12</sup> United States Commission on Civil Rights., . (1977). *Sex bias in the U.S. Code: a report of the U.S. Commission on Civil Rights*. [Washington]: U.S. Govt. Print. Off..

<sup>13</sup> *Dupont v. Wyzanski*, 2004 Mass. Super. LEXIS 462

<sup>14</sup> ERA Section 2. “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”

- In essence we would be handing the state's legislative power on many areas that impact women and family law to Congress and the unelected judges of our federal courts.

In reality, both women and men already have full claim to equal rights through the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution. (i.e. "No *person* shall be deprived...") In fact, the U.S. Supreme Court affirmed that the 14<sup>th</sup> Amendment applies to women in the well-known case of *United States v. Virginia*, involving cadets at VMI.<sup>15</sup> There are also numerous other laws in virtually all areas of American life (e.g. employment, education, credit eligibility, housing, public accommodations, etc.) that prohibit sex discrimination. Moreover, women are already guaranteed equal pay for equal work under both federal and state law<sup>16</sup>.

If one thing is clear in all of this, it's that this so-called Equal Rights Amendment really has nothing to do with equality. And in light of recent developments, it has become very important for me to ensure that you fully comprehend what it *really is* about. In view of the very real possibility that a single federal judge could unilaterally decide to resurrect the ERA if Virginia becomes the 38<sup>th</sup> state to approve it, the importance of your vote this year cannot be overstated. Therefore, I urge you to oppose the ERA if you should have occasion to vote on it. The Family Foundation will be here backing you up when you do.

Sincerely,



Victoria Cobb, President  
The Family Foundation

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<sup>15</sup> *United States v. Virginia*, 518 U.S. 515 (1996)

<sup>16</sup> See Va. Code § 40.1-28.6. Equal pay irrespective of sex.