ALABAMA STOP Equal Rights Amendment

Res file

CHAIRMAN
MISS OLIVE SPANN
P. O. BOX 42
CHAPMAN 36015

CO-CHAIRMAN
MRS. ALBERT LEE SMITH, JR.
4200 STONE RIVER CIRCLE
BIRMINGHAM 35213

March 10, 1975

TO MEMBERS OF THE ALABAMA LEGISLATURE:

In our constitutional form of government, all power originally rests with the people - people such as those who elected you. The government is to have only such power as the people consign to it through the process of constitutional ratification. Now you are asked to ratify the following amendment:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or 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.

We, the people, should know what powers we are consigning to the government, but in the case of the so-called Equal Rights Amendment ("ERA"), the governed do not know what powers or rights would be given up because NOBODY CAN SAY WITH CERTAINTY WHAT THE FEDERAL COURTS SHALL SAY ERA MEANS.

One of the more imprecise articles now in the constitution is the Fourteenth Amendment. It guarantees, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The framers and ratifiers of the Fourteenth Amendment could not have foreseen that its due process clause would some day be construed as banning school prayers or abolishing the death penalty - and that its equal protection clause would be used to mandate the destruction of neighborhood schools or outlaw state legislative apportionment on factors other than population, the latter having left Alabama with some districts having imaginary boundaries.

More than a century later, the courts are still finding meanings in the Fourteenth Amendment that the framers and ratifiers never knew were there. One of the recent pronouncements of the Supreme Court of the United States (Supreme Court), shocking to the conscience of reasonable men, set forth in two cases decided by it on January 22, 1973, is that a woman has the right under the Fourteenth Amendment, and possibly also under the Ninth Amendment, to procure the termination of her pregnancy at will if her fetus is up to seven months old, and thereafter for health reasons.

One of the lessons to be learned from the Fourteenth Amendment is that we cannot depend on the Supreme Court to interpret the language of the ERA in what we consider to be a reasonable manner. The ERA will mean what the Supreme Court will say, as did the Superior Court of Pennsylvania in Wiegand v. Wiegand, 226 Pa. S. 278, 310 A. 2d 426 (1973), that it means exactly what it says. The Pennsylvania court in that case struck down provisions of its state's divorce law giving wives, but not husbands, the right to obtain divorces from bed and board and to be allowed reasonable alimony pendente lite, counsel fees and costs in a divorce action. The court held said provisions were unconstitutional in light of the recently adopted equality of rights amendment to the Pennsylvania constitution.

That court overturned the lower court decision that said provisions of the Pennsylvania divorce law were not unconstitutional. The Superior Court thus brushed aside the lower court's following observations that:

> The thrust of the equal rights amendment is to insure full equality of political rights, . . . , full equality of educational opportunities at all levels, and full economic equality in the area of jobs and wages, as well as all types of benefits provided for workers. It was not intended to establish as basic law the decisions of the extremist wing of the so-called Women's Liberation Movement. (310 A. 2d 428).

The Pennsylvania Superior Court went on to state that while "the Amendment does not adopt the extremist views referred to by the court below, its application is not limited to the areas enumerated" by it. "Such a restrictive interpretation does not comport with either the plain meaning of the Amendment's words or its meaning as understood by the electorate which adopted it." (Emphasis added). (310 A. 2d 428) "Where in the Constitution 'the words are plain . . . [they] must be given their common or popular meaning, for in that sense the voters are assumed to have understood them when they adopted the Constitution (citation omitted)' " (310 A. 2d 429).

The equality of rights Amendment to the Pennsylvania Constitution, just as the ERA, specifically states that "equality of rights under the law shall not be denied . . . because of . . . sex." No exception is made for rights in the area of domestic relations. The Pennsylvania court in Wiegand v. Wiegand concluded:

> We therefore cannot judicially interpret the word 'wife' as meaning spouse, even to save the Act from falling as unconstitutional. To redraft § 46 in this manner 'would be to undertake a wholly inappropriate judicial activity amounting to judicial legislation' (citations omitted). (310 A. 2d 429).

The basic fallacy in the proposed amendment was pointed out in 1953 by Roscoe Pound and Paul A. Freund of the Harvard Law School. It is that the ERA attempts to deal with complicated concrete problems arising out of diverse human relationships in terms of a single abstraction, and that as a constitutional standard an abstraction is hopelessly inept. They predicted that it would open up a period of extreme confusion in constitutional law, and that it was highly probable that it would open an era of regrettable consequences for the legal status of women in this country.

There is no way for anyone to say positively how the Supreme Court will apply the ERA to conscription, combat duty, alimony, child support, wife support, divorce, homosexuality, public restrooms, separate gym classes and athletic teams, single sex education institutions, sexual crimes and prostitution. We do know that the desire and intent of the radical women's liberationists in almost every one of the aforementioned areas is contrary to present law and custom. We also know that a plain meaning interpretation of its language such as was used by the Pennsylvania Superior Court in Wiegand v. Wiegand, is highly probable and the results of such an interpretation will be in keeping with the demands of the extremist wing of the so-called Women's Liberation Movement.

It is these women's liberationists - a well-financed and vocal minority wishing to reconstruct the American family - who have the money and are eager to bring cases to court under ERA which would force the changes in our lives which they desire.

Finally, we are convinced that there are areas in our lives to which the ERA may be applied that no one has even thought about. "Consider, if you will, an essentially frivolous point. It is a fair assumption that virtually every

state and locality have a law against 'indecent exposure.' For good or ill, these statutes reflect the mores of the people; and for good or ill, people still take the laws seriously. Cocoa Beach, Florida, just held a referendum on topless bathing by women, and voted the proposition down. Now if men have a 'right' to go topless on the beach, once the ERA became operative, no state could deny the same right to women . . . but is this what the people want? Multiply the example by one million more serious examples and one begins to have second thoughts." ("ERA: What Will It Do?, James J. Kilpatrick, Birmingham News, December 2, 1974.) Enclosed are excerpts from an article entitled "The Case Against ERA written by Mr. Kilpatrick printed in the January, 1975 issue of Nation's Business, which concludes: "It seems to me highly doubtful that the people desire any such thing as 'unisex' in their law. But if five more states - or seven - ratify the pending amendment, that is what the people will get." (Note: Since North Dakota ratified the ERA in February, 1975, the number of states is now four - or six.)

Another lesson to be learned from the Fourteenth Amendment is that the ERA, if passed, would TAKE AWAY FROM THE STATES THEIR PRIMARY AUTHORITY IN EVERYTHING THAT INVOLVES THE RIGHTS OF WOMEN.

Section 5 of the Fourteenth Amendment and Section 2 of the ERA are identical. In 1966 the Supreme Court decided a case (Katzenbach & Morgan - 384 U. S. 641) on Section 5 of the Fourteenth Amendment. It ruled that, if a constitutional amendment contains a clause giving Congress the power to enforce by appropriate legislation, then Congress can preempt the field and the states lose jurisdiction to legislate on the subject covered. This means that THE ERA WOULD DEPRIVE THE ALABAMA LEGISLATURE OF THE POWER AND RESPONSIBILITY TO LEGISLATE ON THIS MOST SENSITIVE OF ALL SOCIAL RELATIONS.

It is a fact that the judiciary branch of our government is the least responsive to the wishes of the electorate. It is a fact that under the ERA the federal courts could strike down every sex-related law in the land and neither the state courts nor you as a state legislator would have the power to put anything in their place.

The ERA will further emasculate the state governments and courts. We should hesitate to mock the lessons of history and bind future generations to present fallacies.

We want to leave the rights of Alabama women in the hands of the Alabama legislature where they belong. Will you use your influence and your vote to oppose the insidious Equal Rights Amendment?

Yours sincerely,

Olive Spann

(Miss) Olive Spann
Chairman

Charlotte L. Railey

(Miss) Charlotte L. Railey
Member of the Bar of Alabama,
Tennessee and New York

Eunice Smith

Eunice W. Smith
(Mrs. Albert Lee Smith, Jr.)
Co-Chairman

Elizabeth D. Eshelman

Elizabeth D. Eshelman
(Mrs. Joseph W. Eshelman, Jr.)
Member of the Bar of Alabama

P. S. There is no affirmative case for ERA. ERA will add nothing to the Equal Employment Opportunity Act of 1972 and other laws already providing "Equal pay for equal work," promotions, etc. ERA will add nothing to Education Amendments Act of 1972, which guarantees educational opportunities regardless of sex. ERA will do nothing more in the field of credit than has been done by the Depository Institutions Amendment Act of 1974.

The Case Against ERA

Proponents of "women's liberation" will mount a determined drive in 1975 to win ratification of the pending Equal Rights Amendment to the Constitution. Because of legislative changes resulting from the November elections, the effort may well succeed. State legislators would be well-advised, in my own view, to stop, look and listen before they vote to write this amendment into the supreme law of our land.

The case in favor of ERA has been eloquently argued both in Congress and in the 33 states that already have voted to ratify. In coming months such organizations as the League of Women Voters and the Coalition of Labor Union Women will be lobbying hard for the proposition. The National Federation of Business and Professional Women's Clubs has raised $250,000 to finance a professionally managed campaign in eight target states.

As an abstract principle, the idea that "women should have the same rights as men" has undeniable political appeal.

The case against ERA has found few spokesmen and little organized effort. Mrs. Phyllis Schlafly's "Stop ERA Movement" is long on spunk but short on numbers. The opposition case merits a thoughtful hearing. In the opponents' view, the amendment—attractive as it seems at first glance—is (1) unnecessary, (2) uncertain and (3) undesirable. These arguments cannot be dismissed out of hand.

This amendment would write into the Constitution a single laconic sentence: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." If it is ratified by 38 states, the amendment would become operative two years later.

. . . .

opponents interpose their three-point case:

1. *The amendment is unnecessary.* It is a sound proposition that constitutional amendment should be viewed as a political act of last resort. Ordinary statutes come and go; Supreme Court decisions can be modified or reversed; but the pending Equal Rights Amendment, once ratified, is there to stay. If time should demonstrate the unwisdom or the undesirability of ERA, only a monumental effort could achieve its repeal. Ratification is radical surgery. If any other effective way can be found to cure a political illness, surely the alternatives ought first to be tried.

Such alternative remedies already are being applied. The principal complaint of the women's liberationists goes to discrimination in employment. But Congress already has prohibited discrimination in employment by reason of sex. The Equal Employment Opportunity Commission labors unceasingly to enforce the law. Over the past 10 years the federal statute that established EEOC has produced a virtual revolution in employment practices, and the federal statute has been echoed in scores of remedial statutes at the state level. One by one, outdated state laws are being repealed.

Doubtless, many women still suffer discrimination in employment, but their problems, for the most part, are not matters of law but rather of law enforcement.

Case by case, the Supreme Court slowly is writing ERA into the Constitution anyhow. In *Reed* v. *Reed* the Court in 1971 nullified an Idaho probate law which said that in the administration of certain estates, "males must be preferred to females." Without a dissenting vote, the Court held the law void: "The arbitrary preference cannot stand in the face of the Fourteenth Amendment's command that no state deny the equal protection of the laws to any person within its jurisdiction. . . . To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."

In 1972 the Court buttressed its position. In one case, the Court forbade Massachusetts to discriminate against single persons. In another, it voted eight to one against a Louisiana law discriminating against illegitimate children. In a third, it nullified an Illinois child custody law. In the spring of 1973, Mr. Justice Brennan wrote the Court's eight-to-one decision, in *Frontiero* v. *Richardson*, having to do with unequal pay allowances for women in the armed forces. Classifications based upon sex, said the Court, are "inherently suspect."

This judicial trend continues. The Court has prohibited newspapers from using sexual classifications for "help wanted" ads. It has prohibited school boards from discriminating against pregnant teachers. In June of 1974 the Court put an end to unequal pay for men and women inspectors in a glass manufacturing company. During its current term, the Court will consider a challenge to a Navy regulation that discriminates between male and female officers. The Court will review a Utah statute that fixes the age of minority at 18 for women and 21 for men. The Court also will consider another Utah statute, this one dealing with child custody, that provides a "natural presumption that the mother is best suited to care for young children." Court observers are confident that the trends developed in *Reed* and *Frontiero* will be pursued.

The point is that by legislative enactment and by court decision, most of the invidious and unwarranted discrimination against women can be corrected. If the point is well taken, the radical surgery of an amendment to the Constitution can be avoided.

2. *The amendment is uncertain.* More than a hundred years have passed since there has been a constitutional amendment as vague and ambiguous as the pending ERA. As it now stands, the Constitution, when it speaks of "rights," speaks almost without exception in specific terms: There is the right of the people peaceably to assemble, the right of the people to keep and bear arms, the right of the people to be secure against unreasonable searches and seizures.

We know of the right to a speedy and public trial and the right to trial by jury. The Fifteenth, Nineteenth and 26th Amendments deal with the right to vote.

But as a matter of law—as a matter of actual application—what is meant by a constitutional commandment that "equality of rights under the law" shall not be denied or abridged on account of sex? No one knows. What is "right"? It is a lofty and resounding word, ordinarily linked to the great objects of a free people—to the rights of free press and freedom of religion, to the right of an accused to have counsel. If we assume that, in some jurisdiction, law requires that employers provide separate facilities labeled Men and Women, what of the effect of this amendment?

Does it create a *right* to a door labeled Persons? If so, ERA put a cavalier construction on a constitutional noun that has enjoyed more serious meaning.

Whatever these rights may be, ERA says that no state shall deny or abridge them. The language stems from the first section of the Fourteenth Amendment. In constitutional shorthand, we are speaking of the doctrine of "state action." As the Fourteenth has been construed over the past century, and especially over the past two decades, the concepts of "state action" and "private action" have blurred. The concepts run together.

If all the gloss of the Fourteenth Amendment is to be transferred to the new ERA, a vast area of public-private actions will be affected—quite how, we do not know.

3. *The amendment is undesirable.* It is a truism that we live under the rule of law; it is a deeper truism that we live under the rule of the past, for "the law," at any given moment, is the embodiment of all that has gone before. The laws that today govern prostitution, adultery, child custody, divorce, inheritance and age of consent have ancient roots. We look to the Judeo-Christian ethic. We draw on civilizations and societies long forgotten. By some rough process of divining public opinion, known as the democratic process, we have acquired a body of law—including laws that treat women differently from men—that mirrors and protects our prevailing political desires.

This body of custom and tradition, so far as it involves sexual mores, cannot be treated as if it did not exist. People care about these things. If this were not so, the people of Cocoa Beach, Fla., would not have voted last November to prohibit topless bathing by women on the local beaches. Lawmakers would not have written laws providing special benefits for women factory workers, for abandoned mothers, for aged widows. Such laws reflect political and social realities. The legal structure is not perfect—of course it is not perfect, and of course it constantly changes—but the basic structure has been there a long, long time.

It is hard to believe that at a given moment in March of 1972, when Congress approved the Equal Rights Amendment and submitted it to the states, the people knowingly were demanding that this essential structure be destroyed. It seems to me highly doubtful that the people desire any such thing as "unisex" in their law. But if five more states—or seven—ratify the pending amendment, that is what the people will get.