Women's Lib

EQUAL RIGHTS AMENDMENT

Excerpts from the Minority Views of
Senator Sam J. Ervin, Jr. (North Carolina)

To abolish unreasonable and unfair discriminations against women is a worthy goal. No one believes more strongly than I that discriminations which society makes against women in certain areas of life ought to be abolished and they ought to be abolished by law in every case where they are created by law.

To stop discriminations against women we are considering Constitutional amendments which would abolish all legal distinctions between men and women. Therefore, the question to be resolved by the Senate is that: Should all laws which treat men and women differently be abolished and should the Federal government and the State legislatures be forbidden by the Constitution to pass any such legislation in the future?

Before we abolish all legal differences in the treatment of men and women to reach the admittedly unfair discriminations which do exist against women, I believe that we should consider the following questions:

1. What is the character of the unfair discriminations which society makes against women?

2. Does it require an amendment to the Constitution of the United States to invalidate them?

3. If so, would the Equal Rights Amendment constitute an effective means to that end? In other words, would the ERA reach areas in which the Congress does not really want to act?

It is the better part of wisdom to recognize that discriminations not created by law cannot be abolished by law. They must be abolished by changed attitudes in the society which imposes them.

One of the recurring myths that surround the equal rights for women amendment is the allegation that all women are for the amendment. This is not so. . . .

HOW WOULD THE ERA BE INTERPRETED

If the Equal Rights for Women amendment is approved, I believe that the Supreme Court will reach the conclusion that the ERA annuls every existing Federal and state law making any distinction between men and women however reasonable such distinction might be in particular cases, and forever robs the Congress and the legislatures of the fifty states of the Constitutional power to enact any such laws at any time in the future. I am not alone in entertaining this fear.

When the so called Equal Rights Amendment was under consideration in 1953, Roscoe Pound of the Harvard Law School and other outstanding scholars joined one of America's greatest legal scholars, Paul A. Freund of the Harvard Law School, in a statement opposing the Equal Rights Amendment upon the ground that they feared that this devastating interpretation might be placed upon it if it should be adopted. This statement made these indisputable observations:

"If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily forseen, but it would certainly embrace such diverse legal provisions as those relating to a widow's allowance, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and the maximum hours of labor for women in protected industries.

"Not only is the range of the amendment of indefinite extent, but, even more important, the fate of all this varied legislation would be left highly uncertain in the face of judicial review. Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. A more flexible view, permitting reasonable differentiation, can hardly be regarded as the object of the proposal, since the Fourteenth Amendment has long provided that no state shall deny to any person the equal protection of the laws, and that Amendment permits reasonable classifications while prohibiting arbitrary legal discrimination. If it were intended to give the courts the authority to pass upon the propriety of distinctions, benefits and duties as between men and women, no new guidance is given to the courts, and this entire subject, one of unusual complexity would be left to the unpredictable judgments of courts in the form of constitution decisions.

"Such decisions could not be changed by act of the legislature. Such a responsibility upon the courts would be doubtless as unwelcome to them as it would be inappropriate. As has been stated, however, the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. This branch of the dilemma is as repelling as the other."

After analyzing in some detail the laws whose validity might be jeopardized by the Equal Rights Amendment, the statement concluded with these observations:

"The basic fallacy in the proposed amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity on human relationships in terms of a single and simple abstraction. This abstraction is undoubtedly a worthy ideal for mobilizing legislative forces in order to remedy particular deficiencies in the law. But as a constitutional standard, it is hopelessly inept. That the proposed equal rights amendment open up an era of regretable consequences for the legal status of women in this country is highly probable. That it would open up a period of extreme confusion in constitutional law is a certainty." . . .

SPECIFIC AREAS AFFECTED BY THE EQUAL RIGHTS AMENDMENT

Time and space preclude me from an attempt to picture in detail the constitutional and legal chaos which would prevail in our country if the Supreme Court should feel itself compelled

to place upon the Equal Rights Amendment the devastating interpretation feared by these legal scholars.

For this reason, I must content myself with merely suggesting some of the terrifying consequences of such an interpretation.

While the amendment would affect all areas of our society, I will mention only a few of the specific areas including: the military, the criminal law, privacy, domestic relations, and protective labor legislation.

MILITARY

The impact of the ERA on the military will be *massive.*

The Congress and the legislatures of the various states have enacted certain laws based upon the conviction that the physiological and functional differences between men and women make it advisable to exempt or exclude women from certain arduous and hazardous activities in order to protect their health and safety.

Among Federal laws of this nature are the Selective Service Act, which confines compulsory military service to men; the acts of Congress governing the voluntary enlistments in the armed forces of the nation which restrict the right to enlist for combat service to men; and the acts establishing and governing the various service academies which provide for the admission and training of men only. There is no question that these laws will be abolished. As Professor Paul Freund of the Harvard Law School said, "And so women must be admitted to West Point on a parity with men; women must be conscripted for military service equally with men . . ." Professor Phil Kurland of the Chicago Law School agrees.

The position of the Justice Department and the Defense Department is that women will be subject to the draft. In a letter to Senator Bayh dated February 24, 1972, the General Counsel for the Defense Department, J. Fred Buzhardt, dealt with some of the problems which would be caused by the ERA in the military. Mr. Buzhardt said:

"Further, there is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.

"On the other hand, if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.

"If this amendment allowed no discrimination on the basis of sex even for the sake of privacy, we believe that the resulting sharing of facilities and living quarters would be contrary to prevailing American standards.

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce." . . .

A very complete analysis of the ERA's effect on the military was compiled in the *Yale Law Journal* in April 1971. The significance of this article that Congresswoman Griffiths has said that the article ". . . will help you understand the purposes and effects of the Equal Rights Amendment" and Senator Bayh has called it a "masterly piece of scholarship." Thus, the supporters of the amendment feel that it will have the following effect on the military and I agree with them. No clearer or more unique history of legislative intent can be presented of the amendment and the military because both the opponents and proponents agree on the amendment's effect in this area.

Significant excerpts from the *Yale Law Journal* which is supported by the amendment's proponents are as follows:

1. "The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military."

2. "Women will serve in all kinds of units, and *they will be eligible for combat duty.* The double standard for treatment of sexual activity of men and women will be prohibited."

3. "Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women."

4. "Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination."

5 "These changes will require a *radical* restructuring of the military's views of women."

6. "The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men."

7. "A woman will register for the draft at the age of eighteen, as a man now does."

8. "Under the Equal Rights amendment, all standards applied through (intelligence tests and physical examinations) will have to be neutral as between the sexes."

9. "The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the statute."

10. "First, height standards will have to be revised from the dual system which now exists."

11. "The height-weight correlations for the sexes will also have to be modified."

12. Deferment policy "could provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female would be deferred."

13. "If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged . . . The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignments in noncombat zones, as men are now permitted to do."

14. "Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children."

15. "Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wed-

lock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact."

16. "Under the Equal Rights Amendment the WAC would be abolished."

17. "Women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations . . . there is no reason to prevent women from doing these jobs in combat zones."

18. "No one would suggest that . . . women who serve can avoid the possibility of physical harm and assault. But it is important to remember that all combat is dangerous, degrading and dehumanizing."

19. "Male officers are provided a dependents' allowance based on their grade and the number of dependents . . ." The Equal Rights amendment will recognize "the husband of a female officer . . . as a dependent."

20. "Athletic facilities will also have to be made available to women personnel."

CRIMINAL LAW

Because of different physical characteristics, and health considerations, and other reasons, legislatures have adopted some criminal laws which apply to only one sex or the other or treat men and women differently in some degree. Because the Equal Rights Amendment will forbid any legal distinctions between men and women, all existing and future criminal laws of this nature would be nullified.

As in several areas, a good review of the types of laws that will be changed by the ERA was discussed in the April 1971 issue of the *Yale Law Journal*. This article has been cited with approval by the proponents of the ERA and the statements which I have excerpted should constitute a good example of what we could expect after passage of the act in the area of criminal law. The excerpts from the *Yale Law Journal* are as follows:

1. "Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike."

2. "Courts will most likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike."

3. "Seduction laws, statutory rape laws, laws prohibiting obscene language in the presence of women, prostitution and 'manifest danger' laws . . . Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social sterotypes."

4. "The statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law . . . suffer from a double defect under the Equal Rights Amendment."

5. "To be sure, the singling out of women probably reflects sociological reality . . . Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young mans. *But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard . . .*"

6. "Adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment."

7. "Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment."

8. "Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so the ERA would require invalidation of laws specially designed to protect women from being forced into prostitution."

9. "A court would probably resolve doubts about congressional intent by striking down the . . . (Federal White Slave Traffic–Mann Act)."

DOMESTIC RELATIONS LAWS

The common law and statutory law of the various states recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. to enable women to do these things and thereby make the existence and development of the race possible, these state laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these state laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the Equal Rights Amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

As with the military, a good analysis of what the amendment will accomplish in the area of domestic relations was set out in the *Yale Law Journal* which has been fully endorsed by Congresswoman Martha Griffiths and other proponents of the ERA. As I have stated earlier, no clearer legislative intent can be presented because I agree with the amendment's proponents that the ERA will have the following effects.

Significant excerpts from the *Yale Law Journal* which is supported by the proponents of the ERA in the area of domestic relations are as follows:

1. "The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex."

2. "Thus, common law and statutory rules requiring name change for the married women would become legal nullities."

3. "These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both."

4. "The Amendment would also prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's."

5. "In ninety percent of custody cases the mother is awarded the custody. The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent."

6. "Physical capacity to bear children can no longer justify a different statutory marriage age for men and women."

7. "Mere estimates of emotional preparedness founded on impressions about the 'normal' adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids."

8. "The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage."

9. "A court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment."

10. "A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home."

11. "The traditional rule is that the domicile of legitimate children is the same as their father's . . . The Equal Rights Amendment would not permit this result."

12. "In all states husbands are primarily liable for the support of their wives and children . . . the child support sections of the criminal nonsupport laws . . . could not be sustained where only the male is liable for support."

13. "The Equal Rights Amendement would bar a state from imposing greater liability for support on a husabnd than on a wife merely because of his sex."

14. "Two different systems have been adopted in the United States for distributing property rights within a family–the community property system and the common law system . . . As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment."

15. "Under the Equal Rights Amendment, laws which . . . favor the husband as manager (of community property) in any way, would not be valid."

16. "All states except North Dakota and South Dakota give women a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate . . . the discriminatory laws would either be invalidated or extended."

17. "A court could invalidate (many grounds for divorce) without doing any serious harm to the overall structure of the states' divorce laws . . . These are pregnancy by a man other than husband at time of marriage, nonsupport, alcoholism of husband, wife's unchaste behavior, husband's vagrancy, wife's refusal to move with husband without reasonable cause, wife a prostitute before marriage, indignities by husband to wife's person, and willful neglect by husband."

18. "Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only . . ."

19. "The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests."

20: "The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives."

21. "The laws could provide support payments for a parent with custody of a young child who stays at home to care for that child so long as there was no legal presumption that the parent granted custody should be the mother."

22. The ERA could require "for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for *his* reasonable needs and is unable to support *himself* through appropriate employment." . . .

RIGHT TO PRIVACY

I believe that the absolute nature of the Equal Rights Amendement will, without a doubt, cause all laws and state-sanctioned practices which in any way differentiate between men and women to be held unconstitutional. Thus, all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. Also, men and women will be thrown together with no separation on the grounds of sex in the military.

The proponents of the ERA mention that the Constitutional right to privacy will protect and keep separate items such as public restrooms; however, this assertion overlooks the basic fact of constitutional law construction: The most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exception for elements of publically imposed sexual segregation on the basis of privacy between men and women.

Even assuming the *very unlikely* result that privacy will allow segregation of the sexes in places like the military, Fred Buzhardt, General Counsel of the Defense Department, mentioned the physical impossibility of providing this always in the military. Mr. Buzhardt said:

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

Professor Paul Freund of the Harvard Law School testified about this matter before the Senate Judiciary Committee in 1970. After stating that the amendment would be absolute, Professor Freund said that it would follow that the ERA "would require that there be no segregation of the sexes in prison, reform schools, public restrooms, and other public facilities."

Professor Phil Kurland, Editor of the *Supreme Court Review* and a Professor of Law at the University of Chicago Law School stated before the Judiciary Committee:

Senator Ervin. The law which exists in North Carolina and in virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor Kurland. That is right, unless the separate but equal doctrine is revived.

Senator Ervin. And the laws of the states and the regulations of the Federal government which require separate rest-

rooms for men and women in public buildings would also be nullified, would it not?

Professor Kurland. My answer would be the same.

As Professors Freund and Kurland indicate there is no qualification of the ERA for the privacy of women just as there will be none for the draft or protective labor laws.

A few examples in our society where the privacy aspect of the relationship between men and women would be changed are:

1. Police practices by which a search involving the removal of clothing will be able to be performed by members of either sex without regard to the sex of the one to be searched.

2. Segregation by sex in sleeping quarters of prisons or similar public institutions would be outlawed.

3. Segregation by sex of living conditions in the armed forces would be outlawed. This includes close quarter living in combat zones and foxholes.

4. Segregation by sex in hospitals would be outlawed.

5. Physical exams in the armed forces will have to be carried out on a sex neutral basis.

There are, of course, numerous other examples which flow from the absolute nature of the Equal Rights for Women amendment.

THE RADICAL EFFECT OF THE EQUAL RIGHTS AMENDMENT ON THE AMERICAN SOCIAL STRUCTURE

. . . Professor of Neurology at the Yale Medical School, Dr. Jonathan H. Pincus, has asked the following question: "Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?" In a statement in opposition to the ERA, Dr. Pincus goes on to answer his question in the affirmative, and in his discussion he sheds some real light on the radical changes which will be made in our social structure.

At the present time in all states husbands are primarily liable for the support of their wives and children but, as Representative Griffiths' approved article in the *Yale Law Journal* states, "The ERA would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." Dr. Pincus is very concerned about the effects of this removal of a husband's responsibility. Dr. Pincus said:

"It seems to me that the removal of legal responsibility from a man for supporting a family, giving the family a name and protecting his daughters from the sort of influences the U.S. Army might have in store for them before marriage is likely to have some effect on the manner in which men relate to their wives and children and vice versa; those traditional ties will be weakened."

Dr. Pincus feels that "a solid happy family life is the foundation of mental health and happiness," and as to the effects of the ERA on this family life, he goes on to state:

"I would predict that the Equal Rights amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and, possibly, sexual deviation."

Whether or not one agrees with the predictions of Dr. Pincus, I believe he is asking very genuine questions which should be discussed before the Constitution is amended. Before we begin tinkering with the very subtle mechanisms of family relationships and social responsibilities, should we not consider that we might in fact be passing a Tonkin Gulf Resolution of the American social structure?

While I believe that any unfair discriminations which the law has created against women should be abolished by law, I have the abiding conviction that the law should make such distinctions between them as are reasonably necessary for the protection of women and the existence and development of the race.

I share completely this recent observation by Mr. Bernard Swartz: "Use of the law in an attempt to conjure away all the differences which do exist between the sexes is both an insult to the law itself and a complete disregard of fact."

The late Justice Felix Frankfurter, in an eloquent statement in the *New Republic* magazine many years ago put it a different way. Justice Frankfurter said:

"Only those who are ignorant of the nature of law and of its enforcement and regardless of the intricacies of American constitutional law, or indifferent to the exacting aspects of woman's industrial life, will have the naivete or the recklessness to sum up woman's whole position in a meaningless and mischievous phrase about 'equal rights'."

Let us consider for a moment whether there be a rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women.

To say these things is not to imply that either sex is superior to the other. It is simply to state the all important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and make its laws is woefully lacking in rationality.

Our country has not thus far committed this grievous error. As a consequence, it has established by law the institutions of

marriage, the home, and the family, and has adopted some laws making some rational distinctions between the respective rights and responsibilities of men and women to make these institutions contribute to the existence and advancement of the race.

It may be that times are changing and more and more women will leave the home to compete in the business and professional community. However, I would like to call the Senate's attention to the remarks of Professor Phil Kurland of the University of Chicago Law School on this point. He said:

"Times have changed in such a way that it may well be possible for the generation of women now coming to maturity, who had all the opportunities for education afforded to their male peers and who had an expectation of opportunities to put education to the same use as their male peers, to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains a very large part of the female population on whom the imposition of such a constitutional standard would be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. In the eyes of some, this may be unfortunate, but it is true. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Certainly the desire to open opportunities to some need not be bought at the price of removal of legal protections from others." . . .

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