The Equal Rights Amendment: Back for an Encore Performance?

By Gail Heriot

The ERA is back—or, at least, so we are told. On March 27, 2007, a group of Congressional Democrats—including Senators Edward Kennedy and Barbara Boxer and Representatives Carolyn Maloney and James Leach—announced with great fanfare a renewed effort to pass the formerly-defunct proposal.[1] "Elections have consequences, and isn't it true those consequences are good right now?" Senator Boxer asked a cheering audience of ERA supporters at the Capitol Hill press conference.[2]

Nothing has changed about the proposal except its name, which, for reasons I can only speculate upon, the revivalists have re-dubbed the "Women's Equality Amendment." Its core clause would still amend the Constitution to read, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[3] All the original proposal's merits and demerits have been lovingly preserved.

It had been a long time since I had given any serious thought to the ERA. When the twice-extended deadline for ratification finally expired on June 30, 1982, I had wrongly assumed the country was closing the book on the proposal. Hearing of its revival made me feel a bit nostalgic (much the way my old eight-track tapes of Cat Stevens make me feel), but it has not caused me to change my mind about the measure.[4]

There was a time, shortly after its initial passage by Congress in 1972 when the ERA's ratification seemed inevitable. President Nixon supported it, and so did his successors, Gerald Ford and Jimmy Carter. The vote in the House of Representatives was 354 to 24; in the Senate it was 84 to 8. By the end of 1973, 30 of the 38 states necessary for ratification had approved the measure. Even your humble author was an enthusiastic supporter. (This was long before anyone ever thought to call me a "conservative," much less a "conservative law professor." I was just a school girl, and my politics were somewhat left-of-center.)

But by the time the extended deadline had expired, I and many other Americans had cooled to the idea. Five states that had initially approved the measure voted to rescind their approval.[5] Something had changed our way of thinking. And, for me at least, it had little to do with becoming a conservative—since, in 1982, I still regarded myself as liberal, if not always happily so. For me the real change was that I had become a lawyer and learned something about the lawyer's craft, especially the art of drafting legal language that will best accomplish the goals one has in mind and not those one does not.

Phyllis Schlafly, leader of the anti-ERA movement, warned that those words, "[e]quality of rights under the law shall not be denied or abridged ... on account of sex," might have consequences not intended by its rank-and-file supporters. And she was not shy about coming up with examples. Among the questions she asked: What effect will it have on the military draft and on the military's authority to assign men, but not women, to combat duty? How will it affect the authority of federal and state governments to maintain separate bathrooms for men and woman in public buildings and similar, separate and otherwise-uncontroversial facilities? Will states have the authority to provide for marriage between a man and a woman without also providing for marriage between two men or two women? When leaders of the ratification movement failed to provide satisfactory answers, Mrs. Schlafly's questions cut seriously into support of the ERA. Whatever political support ideas like gay marriage and women in combat might have today, they had practically none a generation ago. No state legislature would have voted to ratify the ERA if voters had thought that her warnings had substance. It would have been difficult to find more than a handful of legislators willing to endorse the measure.

Mrs. Schlafly was accused of fomenting hysteria.[6] Leaders of the ratification movement argued that the amendment would be interpreted by the courts to impose a strict scrutiny standard on all laws that discriminate on the basis of sex like that already imposed on racially discriminatory laws. Mrs. Schlafly's parade of horribles, they said, would never come to pass. But the actual text of the ERA imposed an unqualified call for "equality of rights," not a strict scrutiny standard. Their argument therefore seemed largely grounded in faith.

Meanwhile, the Supreme Court had been busy fashioning tough protections against sex discrimination as part of its equal protection jurisprudence, in cases like *Reed v. Reed* (1971),[7] *Frontiero v. Richardson* (1973),[8] and *Craig v. Boren* (1976).[9] Even those who heavily discounted Mrs. Schlafly's warnings had to wonder if ERA would add any value. After *Craig*, the Court was already committed to an intermediate scrutiny standard in matters of sex discrimination. Many state legislators concluded that little could be gained by rocking the boat, and allowed the measure to die.

Fast forward to the 21st Century. Is there anything we have learned that might help us evaluate the ERA revival? You bet. With the clarity of hindsight, we now know that Mrs. Schlafly's most explosive warnings were entirely on-target. State constitutions with ERA-like clauses have indeed formed the basis for arguments that a state that recognizes marriage between a man and a woman must also recognize same-sex marriage. More significantly, several courts have agreed.[10] It is hard to argue with Mrs. Schlafly's legal analysis now. Her prediction on this point did indeed come to pass.[11]

I cannot help but wonder, however, if revivalists could not re-draft their proposal in a way that would be perfectly consistent with the way the ERA was understood by its original rank-and-file supporters, while avoiding the pitfalls about which Mrs. Schlafly warned. And I cannot help but wonder if such a newly drafted ERA would not easily win ratification. Allow me to lay out a few possibilities for the sake of intellectual stimulation:

(1) The ERA could be amended to make clear the authority of federal and state governments to maintain separate public

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bathrooms and make similarly uncontroversial distinctions based on sex. Given that ratification leaders agreed that the measure was not intended to interfere with that authority, presumably no one will object to this.

Part of the problem with the ERA was that it had been drafted into its present form in the 1940s—decades before it was actually adopted by Congress in 1972. A lot happened after the final language was hammered out. Before *Brown v. Board of Education*, one could imagine that "separate but equal" facilities would not violate the proposed amendment; after that decision, however, such an assumption was unwarranted.[12] When Title VII of the Civil Rights Act of 1964 was being considered, its supporters recognized that sex discrimination really is different from race discrimination, and that some of the everyday distinctions based on sex, like separate bathrooms and separate prisons, are in fact sound public policy. Consequently, Congress added a little flexibility to the ban on sex discrimination in employment, providing an exception for "bona fide occupational qualifications based on sex."[13] It was meant to be, and is, an exception of limited scope that applies mainly to issues of sexual privacy and theatrical authenticity. It has caused little serious controversy over the years. Evidently, no one thought to re-draft the proposed language of the ERA to include such an exception. They could now.

(2) The ERA could be amended to recognize that certain issues are too controversial even today to be governed by a constitutional amendment upsetting the status quo. Maybe gay marriage is a good idea, maybe it is not. Maybe placing women in combat on the same basis as men makes sense, maybe it does not. But no proposal that would constitutionally mandate either has a chance of passing Congress by a two-thirds majority or being ratified by three quarters of the states. Leave these issues to the political process. Those who favor women in combat or gay marriage will have an opportunity to persuade legislators (or to argue in the courts based on already-existing law). The ERA should be limited to issues where there is the kind of public consensus necessary for ratification. Presumably this would cause no problem for the ERA revivalists who scoffed when Mrs. Schlafly raised these issues a generation ago. If they really thought her warnings were hysterical, they should be willing to agree to such a limitation. I would suggest limiting the ERA's application to public employment, public education, and public contracting, areas that together account for nearly all of the cases ERA's original rank-and-file supporters had in mind. That is enough for any constitutional amendment to bite off.

(3) In keeping with the original spirit and understanding of the ERA, supporters could make clear that the measure is about equality of treatment and not equality of results. It is a two-way street, permitting neither "negative discrimination" nor preferential treatment. One way to do this is to drop the "[e]quality of rights" language and replace it with more active language, such as: "Neither the United States nor any State shall discriminate against, or grant preferential treatment to, any individual or group on the basis of sex." Such language makes it clear, for example, that a state need not set aside half of its jobs for women just because half of its citizens are women, and need not fund abortions for women just because men do not get pregnant. As with my other proposals, this one should be accepted readily by those who argued that Mrs. Schlafly's warnings were off-base.

Would conservatives like me support an ERA with these changes? The answer to that question is very clear: *I already have*. Indeed, I have spent much of the last twelve years helping to pass popular initiatives that would amend state constitutions to include exactly such language.

Proposition 209, adopted by California voters in 1996, states that "the State shall not discriminate against, or grant preferential treatment to, any individual or group on the ground of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."[14] It contains an exception modeled after Title VII that states, "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting."[15] More recently, in 2006, Michigan voters adopted Proposal 2, which contains essentially identical language.[16]

Perhaps a more revealing question is whether ERA revivalists would support these friendly amendments. Unfortunately, the answer seems too clear: *There isn't a chance.* Many of the same organizations that are pressing for the ERA revival led the opposition to Proposition 209 and Proposal 2. In the final days of the Proposition 209 campaign, California's television airwaves were blanketed with a spot featuring a woman being stripped by male hands of her stethoscope, medical lab coat, hard hat, police cap and finally her business suit until she was left in torn clothes and underwear, while men chanted "take it off, take it all off." The voice over asked, "Want to be a doctor? Police Officer? Hard Hat? Forget it!" At the end, a final male hand reaches in to stroke her face suggestively. Katherine Spillar, Executive Vice President of Feminist Majority—who headed the coalition that produced the spot—was only too happy to confirm what that final flourish was intended to convey. "The suggestion is that a woman can always sell her body," she told the press.[17]

ERA revivalists are in a bind. They opposed Proposition 209 and Proposal 2 because those measures required equal treatment, and they believed women needed preferential treatment. Without it, some could be forced into prostitution—or so their television spot implied. Yet they claimed to support a revival of the ERA, which calls for "[e]quality of rights" and not for special rights. Surely, they are playing a dangerous game here. Even without clarifying changes, the ERA would very likely be interpreted to invalidate the many state-sponsored "affirmative action" programs that currently give preferential treatment to women and women-owned businesses. Equal rights means equal rights.[18] Given these circumstances, it is difficult to take the plan to revive the ERA seriously.

My views on the ERA changed between 1972 an 1982, but my views on sex discrimination have changed remarkably little over the years. As a school girl, I opposed sex discrimination in medical school admissions, in the employment of park rangers, and in the awarding of highway contracts. But I still preferred

to apply my mother's lipstick in a women's bathroom, and I was not keen on co-ed prisons. (The possibility of same-sex marriage never crossed my mind.) Decades later, I buy my own lip gloss but have not changed my mind about sex discrimination. And I still do not have my mind wrapped around the same-sex marriage issue. In 1972, my views made me a liberal; now they make me a conservative. But they are consistent.

It may be hard to persuade ERA revivalists to abandon preferences and approach the issue as I do. But there is one angle they (indeed all of us) might want to consider. Back in 1996, when Proposition 209 passed, there were not a lot of affirmative action programs that overtly discriminated against women. But I do remember one—a California state university nursing program that, in the name of diversity, gave preference to men interested in nursing. Proposition 209 outlawed it. Today, more than a decade later, 56% of all undergraduates are women.[19] That makes them not just a majority, but a significant majority, particularly at the community college level. Consequently, some admissions offices at moderately selective schools are starting to give preferential treatment to men.[20] Yes, we have come a long way.

Harmless? I, at least, am not inclined to think so. This preferential treatment presents a serious problem that could become even more serious as time goes by. Once a few schools indulge in it, others may feel pressure to follow the suit as they vie to achieve what they regard as a desirable gender balance. The competition for scarce men may become fierce in a way that is analogous to the competition for minority students on selective college campuses. Schools that resist engaging in such preferential treatment may find it extremely hard to recruit men and eventually relent. The tiny thumb on the scale could become not-so-tiny.

In the end, the competition will be all for naught, since it only rearranges the men at undergraduate institutions, pairing them with better qualified women. It is not likely to increase their overall numbers in higher education, and hence would have little or no effect on the problem of overall gender imbalance. But after *Grutter v. Bollinger*[21]—which upheld the right of the University of Michigan to give racial preferences for diversity's sake—it is not clear that sex discrimination of this kind is illegal outside California and Michigan.

This raises some interesting questions: Is it possible that feminist organizations will one day regret their support for the University of Michigan in *Grutter*? Is it possible that they will decide to support initiatives like Proposition 209 and Proposal 2? If so, maybe we will see a real ERA.

Endnotes

1 *See* S.J. Res. 10 (introduced Mar. 27, 2007); H.J. Res. 40 (introduced March 27, 2007).

Not everyone agrees that the ERA was "formerly defunct." Those who subscribe to the "Three-State Strategy" take the position that the measure was not dead, but only sleeping. Developed by three University of Richmond law students, this approach requires neither that Congress re-pass the ERA nor that the 35 states that have already ratified the measure re-ratify it. Instead, it holds that Congress may declare the ERA ratified if only three additional states vote to approve it. *See* Allison L. Held, Sharyn L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & Law 113 (1997).

The logic of the Three-State Strategy depends upon the following propositions being accepted:

(a) Congress's original deadline of March 22, 1979 and its subsequent extensions are all null and void, because, for reasons that are never entirely explained in the article, Congress can only impose a ratification deadline if it inserts it into the actual text of the Constitutional language to be ratified. Putting the deadline into the proposing language has no effect and should be ignored.

(b) Any state that ratified the proposal in part in reliance on the deadline (i.e. the belief the provision would not go into effect without the substantially contemporaneous consensus of 38 states) can nevertheless be held to its ratification.

(c) States may not rescind their ratification, as five states at least purported to do while the ratification process was still underway.

But see Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982) (holding that Congress's original deadline was binding, that subsequent efforts to extend the deadline were unconstitutional, and that a state may rescind its ratification prior to the measure's final approval).

The current effort to pass the ERA by beginning the process from scratch is not entirely a repudiation of the Three-State Strategy. Currently pending in Congress is H.R. 757 (introduced October 18, 2007), which would require the House Representatives to take any action necessary to verify that the ERA is part of the Constitution if three more states ratify it. Representative Carolyn Maloney, the lead House sponsor of the move to re-pass the ERA, is also a co-sponsor of H.R. 757.

2 *New Drive Afoot to Pass Equal Rights Amendment*, Washington Post at A01, March 28, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702357.html.

3 The full text of the amendment would read:

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.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This article shall take effect 2 years after the date of ratification.

4 This is, in fact, the second significant effort to re-pass the ERA in Congress. The first, in 1983, failed to muster the necessary two-thirds vote in the House of Representatives. Interestingly, on this occasion, proposals to amend the measure to exempt women both from the draft and from combat were defeated in the House Committee on the Judiciary based at least in part on arguments that women should be not so exempt.

5 Nebraska, Tennessee, Idaho, Kentucky and South Dakota. The states that never ratified the ERA were Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia.

6 *See* Judy Mann, *Obstruction*, Washington Post at B1 (Feb. 19, 1982)("The vote in Virginia [against ratification of the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the old canards about homosexual marriages and unisex restrooms ...."); Betty Friedan, *Feminism's Next Step*, New York Times, sec. 6 at 14 (July 5, 1981)("Discussion of [the ERA] bogged down in hysterical claims that the amendment would eliminate privacy in bathrooms, encourage homosexual marriage, put women in the trenches and deprive housewives of their husbands' support."); Patricia Avery & Patrick Oster, *Equal Rights for Women–Doomed?*, U.S. News & World Report at 45 (Apr. 28, 1975) ("What foes of ERA contend were valid arguments and what advocates claim were emotional scare tactics also seemed to sway sentiment among the women against the amendment [in North Carolina]. Opponents, for example, suggested passage of ERA would mean abortion on demand, legalization of homosexual marriages, sex-integrated prisons and reform schools–all claims that were hotly denied by ERA supporters."). *See* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1162 n.23 (2005)(citing above articles); *see also* Betty Friedan, The Second Stage (1981).

7 404 U.S. 71 (1971).

8 411 U.S. 677 (1973).

9 429 U.S. 190 (1976).

10 *See* Goodridge v. Department of Public Health, 798 N.E.2d 941, 970 (Mass. 2003)(Greaney, J., concurring in a 4-3 decision in which Greaney's concurrence was necesssary to achieve a majority). *Also see* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998) (superseded by constitutional amendment Alaska Const. art. I, § 25); *In re Marriage Cases*, No. 4365-JCCP (Cal. Super. March 14, 2005), *rev'd* 49 Cal. Rptr. 3d 675 (Cal. App. 2006), review granted 53 Cal. Rptr. 3d 317 (Cal. 2006); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (superseded by constitutional amendment Haw. Const. art. I, § 23).

11 'Mrs. Schlafly's warnings about the military draft and combat have had no opportunity to be tested, but it is worth pointing out that in the absence of an ERA, the power of Congress to require men, but not women, to register for the draft has been challenged. The Supreme Court upheld that power in *Rosker v. Goldberg*, 453 U.S. 57 (1981). Whether the Court would have done so had the ERA been part of the Constitution is, of course, unknown.

12 Brown v. Board of Education, 347 U.S. 483 (1954).

13 42 U.S.C. sec. 2000e-(2)(e)(I) (1981).

14 Cal. Const., art. I, § 31. Washington State's Initiative 200 amended the Revised Code of Washington State in a similar manner in 1998. Rev. Code Wash. Sec. 49.60.400.

15 *Id*. at sec. 31(c).

16 Mich. Const., art. I, § 26.

17 Burt Herman, *Ads Target Women*, AP (Nov. 1, 1996).

18 Perhaps changing the name of the proposal from the "Equal Rights Amendment" to the "Women's Rights Amendment" is intended to convey an intent to invalidate only laws that disadvantage women and not laws that disadvantage men. But such a result will require the courts to ignore both the proposal's text and the way in which it was represented to the public in the 1970s.

19 U.S. Census Bureau Press Release (Dec. 19, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/007909.html

20 *See* Richard Whitmire, *The Latest Way to Discriminate Against Women*, Chron. Higher Ed. (July 20, 2007), *available at* http://chronicle.com/cgi-bin/printable.cgi?article=http://chronicle.com/weekly/v53/i46/46b01601.htm. *See also* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001).

21 539 U.S. 306 (2003).