1978

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Recommended Citation
Philip B. Kurland, "Is the ERA Constitutionally Necessary?," 2 Update on Law-Related Education 16 (1978).

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OPPOSING VIEWS

No, it is an irrelevancy that diverts energy from securing effective legislation

Is the ERA Constitutionally Necessary?

Philip B. Kurland

Philip B. Kurland is a professor of law at the University of Chicago Law School. His most recent book is Watergate and the Constitution.

Yes, it will impel long overdue reform and insure that women are equal under the law

Ruth Bader Ginsburg

Ruth Bader Ginsburg is a professor of law at Columbia University’s School of Law and general counsel to the American Civil Liberties Union.
I do not oppose the ERA, nor do I support it. I regret it. It is substantively an irrelevancy. It is symbolically a divisive instrument diverting energies that might better have been spent on securing effective legislation.

**Why an Amendment?**

A constitutional amendment is appropriate for any of four reasons, none of which applies to the ERA. It may be necessary to change governmental structure. There is no other appropriate way to accomplish such an end. It may be necessary to reverse a Supreme Court decision without awaiting self-correction by that body, as was done by the income tax amendment. It may be necessary to secure enfranchisement for the disenfranchised, so that their voices may be heard through their representatives, as was the case with the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. It might be necessary to remove an earlier amendment promulgated in an excess of piety and in the absence of judgment, as with the Twenty-First. It is hardly appropriate merely to erect a symbol of changed times, as evidence of the power of the franchise.

**The ERA Does Not Affect Nongovernmental Behavior**

The ERA, like most provisions of the Constitution—the most noteworthy exception being the Thirteenth Amendment that prohibits slavery—is directed to governmental behavior, not individual behavior. It would not create equality of treatment by nongovernmental agencies. It would not create authority in governmental agencies to inhibit unequal treatment by individuals. That authority the government already has, whether it is deemed to derive from the Commerce Clause or the Fourteenth Amendment. Contrary to the expressions of both the proponents and opponents of ERA, it should have no effect on the legality of abortions; it would not assure equal pay for equal work by individual employers; it would not command proportionate representation either in public or private employment or in education.

A look at federal legislation tells the story. Some 800 provisions of the United States Code contain gender-based references. A few samples: The aid to dependent children program provides support for the two-parent family with an unemployed father, but not for the family with an unemployed mother. Men have priority over women in job training and placement under the work incentive program. The Social Security Act authorizes benefits for the spouse of a male worker which are not accorded to a similarly situated spouse of a female worker.

Part of the picture, too, are civil rights laws that prohibit discrimination on the basis of race, national origin and religion, but not on the basis of sex. For example, gender isn’t listed in the public accommodations title of the Civil Rights Act of 1964. A Congress prepared to close down the White Cafe was not yet ready to close down the Men’s Grill.

Some samples from the thousands of outmoded state laws: Alabama permits a father, but not a mother, to recover for the wrongful death of a child. Until very recently, Louisiana allowed a husband to sell or mortgage the family home without even telling his wife, regardless of all the work she did to help purchase and maintain the home. Both laws were upheld as constitutional in 1977.

The equal rights amendment gives our legislators a two-year period to update laws now lagging behind social change. In theory, the job could be done without an equal rights amendment. But history strongly suggests that the task will continue to be relegated to a legislative backburner without the propelling force supplied by the ERA.

**The ERA Is Ambiguous**

There are two possible interpretations of the language of the ERA. Both are put forth at different times by its proponents and opponents. The first, the so-called "unisex" interpretation, would have the amendment read so that men and women must be treated the same whatever the differences between them and whatever the rationality of the different treatment proposed by governmental action. That there are biological differences between males and females cannot be denied. That these biological differences may call for differences in governmental treatment is acknowledged by most. A unisex reading would preclude such disparate treatment. It has largely been abandoned by proponents but harbored by opponents.

The alternative reading, that government may distinguish between the sexes only when it has a rational basis for doing so, would make the amendment redundant. That requirement already exists in the Equal Protection Clause of the Fourteenth Amendment. Whatever discretion is vested in the Supreme
Court by the Fourteenth Amendment, which is lamented from time to time by ERA proponents, would also be vested in the Supreme Court by the ERA. No change would likely be brought about by this amendment with this construction.

**Conclusion**

The primary effect of the ERA is to provide a diversion of energies from the legislative arena, where substantive laws for the effectuation of women's interests might be accomplished. The secondary effect of the ERA is to provide a battle-ground, primarily for women who view its symbolic significance differently. For the one it symbolizes equal status with men, for better, for worse, for richer, for poorer, forever. For the other it symbolizes the destruction of the institution of the family and all the values that pertain to that institution, including divorce and the right to alimony. For me, it is not a symbol, but a shadow, "full of sound and fury and signifying nothing." The sooner the decision as to ratification is made, one way or the other, the better off we shall all be.

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**Ginsburg**

Line of gender discrimination] cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea."

In light of its once solid, predictable response, the Supreme Court has taken some remarkable steps in a new direction. But the Court shies away from doctrinal development. The tendency has been to deal with each case as an isolated instance. No majority opinion acknowledges without qualification what computer-runs on federal and state statutes reveal: that the particular laws the Court deals with are part of a general design, a law-making proclivity reflecting distinctly non-neutral notions about "the way women (or men) are."

Why is the Supreme Court reluctant to provide the guidance lower courts seek in this area? Mr. Justice Powell addressed the problem in his concurring opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court must tread lightly, he said, in the border ground between constitutional interpretation, a proper judicial task, and constitutional amendment, a job for federal and state legislatures.

But the equal protection guarantee of the Fourteenth Amendment applies to all persons, and the Supreme Court has indeed acknowledged that women are persons. Why, then, the reluctance to interpret the equal protection principle dynamically?

Because it is historic fact that neither the founding fathers nor the Reconstruction Congress that passed the Fourteenth Amendment had women's emancipation on the agenda. Recall that when the post-Civil War amendments were added to the Constitution, women were denied the vote, now recognized by the High Court as the most basic right of adult citizens. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings.

The Fourteenth Amendment left all of that untouched. Courts are sensitive to this history, a history that serves as a counterweight to judicial recognition of the need for constitutional principle to accommodate to a changed social climate.

The equal rights amendment would remove the historical impediment—the absence of any intention by 18th and 19th century Constitution-makers to heed Abigail Adams' plea to "remember the ladies." Our Constitutional Fathers, after all, were saddled with and never questioned the common law legacy—that women and children were properly subordinated to men.

In sum, without the equal rights amendment, the judiciary will continue to be plagued with a succession of cases challenging laws and official practices that belong on history's scrap heap. And the Supreme Court will continue to confront the need for doctrinal development to guide the lower courts, and the difficulty of anchoring that development to the text of 18th and 19th century draftsmen.

With the equal rights amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and women are created equal.

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**The Numerical Majority Argument**

Women outnumber men, some point out, and therefore are well situated to push for legislation to end discrimination. Skipped over in this appraisal is the fact that during most of our nation's history total political silence was imposed on the numerical majority. Moreover, a count of women at the center of government is revealing. Only eighteen women serve in the House of Representatives, one in the Senate, none on the Supreme Court. Worse than being "discrete and insular," which for minority groups at least has the advantage of fostering political organizing, women are separated from each other and therefore remain far distant from the political potential ascribed to them.

**Not a "Unisex" Amendment**

Finally, I turn to the argument that the amendment ignores the biological differences between men and women. The Senate Judiciary Committee's majority report clearly states that the ERA is not a "unisex" provision. The amendment does not stamp man and woman as one (the old common law did that); it does not label them the same; it does not require similarity in result, parity, or proportional representation. It simply prohibits government from allocating rights, responsibilities or opportunities among individuals solely on the basis of sex.

Would it be wiser to attend to the bathroom exception, and the one directed to "unique physical characteristics," by expressly including these two qualifications in the text of the amendment? Should we send the equal rights
amendment back to the drawing boards for this purpose? Other human rights guarantees may be instructive on this point.

"Congress shall make no law abridging the freedom of speech, or of the press." Is the first amendment formulation seriously defective because the text does not say "except for language defamatory or obscene, words threatening to precipitate an immediate breach of the peace, or generating a grave and irreparable danger to national security?" The same question might be asked with respect to virtually all the grand principles safeguarding individual freedom and dignity in our fundamental instrument of government.

The equal rights amendment's generality seems to me necessary and appropriate for a Constitution meant to govern generations we will not see. Yes, there will be some work in this for the judges, but most of them seem reliable enough to interpret the amendment in the spirit of its legislative history. At least judges will find in the Senate Judiciary Committee's majority report on the equal rights amendment considerably more guidance than they now have from the legislative branch in measuring gender discrimination claims against an equal protection standard.

And, of course, students of history know that any qualification written into the equal rights amendment purporting to protect or benefit women is fraught with danger for them. For sex classification was never perceived as "back of the bus" regulation. Rather, almost every gender line drawn by the law keeping women from working at the bar as lawyers or behind one as bartenders, or from serving on juries, for example—was rationalized as a favor to females. Nor does the ERA open opportunity to any woman by derogating from protections enjoyed by another. As the Bar Association of the City of New York explained in its report on the ERA:

The amendment would eliminate patent discrimination, including all laws which prohibit or discourage women from making full use of their political and economic capabilities on the strength of notions about the proper "role" for women in society. Any special exemptions or other favorable treatment required by some women because of their physical stature or family roles would be preserved by statutes which utilize those factors—rather than sex—as the basis for distinction.

Conclusion

At the nation's first centenary, Susan B. Anthony urged our lawmakers to complete the promise of the American Revolution and of the post-Civil War constitutional changes. Her words are worth noting in the months ahead when the fate of the equal rights amendment will be decided. She said:

Now, at the close of a hundred years, we declare our faith in the principles of self-government. We ask no special favors. We ask justice, we ask equality, we ask that all of the civil and political rights (and responsibilities) that belong to the citizens of the United States be guaranteed to us and our daughters forever.

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