The ERA is a Trojan Horse

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to the
U.S. Senate Committee on the Judiciary

Tuesday, February 28, 2023

Chairman Durbin, Ranking Member Graham, and distinguished members of the Committee on the Judiciary, thank you for inviting me to testify today.

As Director of Independent Women's Law Center, I come before you to oppose congressional attempts to shoehorn the *so-called* Equal Rights Amendment into our Constitution – more than four decades after that proposal expired.

I refer to the "so-called" Equal Rights Amendment because, in America today, men and women are legally equal. Adding the ERA to our Constitution now would not ratify women's equality. Rather, it would undermine it.

Sex Equality Renders the ERA Both Unnecessary and Void

When Rep. Martha Griffiths introduced this version of the ERA in 1971, it was still lawful to discriminate against pregnant employees, to discriminate against women in the granting of credit, to refuse to sell or rent housing to women, and to refuse to provide women equal educational opportunities. Women could be struck from serving on juries and banned from working in certain professions.

But all that has changed.

In 2023, there is not a single constitutional right that belongs to my son but not to my three daughters. Not one. The Equal Protection Clause of the 14th Amendment prohibits unfair sex discrimination. And numerous, long-standing federal and state laws outlaw sex discrimination in education,

athletics, housing, the granting of credit, and employment – including prohibiting sexual harassment and unequal pay.[1]

As a result, no less an authority than the late Justice Ruth Bader Ginsburg, an early supporter of the amendment, observed that "[t]here is no practical difference between what has evolved and the ERA."[2]

In addition to significant changes in law (or some might argue because of them), women have achieved enormous social, economic, and political success in the past half century.[3] What's more, American society now fully embraces the principle that women and men deserve equal access and equal opportunity.

These seismic changes in American law and culture render the ERA unnecessary in 2023. As such, it's likely that many of the states that voted to ratify the ERA in the 1970s would not do so again under current circumstances. Unless we begin this process again, we cannot be assured that the amendment has the contemporaneous support of ¾ of the states as required by Article V of the Constitution.

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None of this is to say that adding the ERA to the Constitution now would be harmless or merely symbolic.[4] To the contrary, the ERA is a Trojan horse, the negative consequences of which are hidden behind empty equality rhetoric.[5]

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[1] *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d); Title VII, 42 U.S.C. § 2000e (prohibiting sex-based discrimination in employment); Title IX, 20 U.S.C. §1681 (Title IX) (prohibiting sex-based discrimination in educational programs that receive federal financial assistance); Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (prohibiting sex discrimination against credit applicants); Fair Housing Act, 42 U.S.C. § 3604 (prohibiting sex discrimination in the sale, rental, and financing of housing); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (requiring employers to treat pregnant women the same as other similarly capable employees).

[2] *See* Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. Times Mag. (Oct. 5, 1997).

[3] Today, women earn the majority of bachelor's degrees (57.7 percent), the majority of master's degrees (61.4 percent), and the majority of doctorates (55.2 percent). Women outnumber men in both law school and medical school. *See Digest of Education Statistics*, National Center for Education Statistics (Oct. 2021), http://bit.ly/3KFvVUC; *Women in the Legal Profession*, American Bar Association, https://bit.ly/3IVN6jh; *Women in medical schools: Dig into latest record-breaking numbers*, American Medical Association, https://bit.ly/3u4f8BY. Women also outnumber men in the college-educated labor force. *See* Richard Fry, *Women now outnumber men in the U.S. college-educated labor force*, Pew Research (Sept. 26, 2022), http://bit.ly/3KEDY3Z. The political power of American women also has increased exponentially since the 1970s. In 21st century America, American women are both more likely than men to be registered to vote and more likely than men actually to vote. *See* 2020 Presidential Election Voting and Registration Tables, Census (Apr. 29, 2021), https://bit.ly/3KHtwpW.

[4] Our Constitution is not a symbolic or aspirational document, it is a governing charter. There is simply no compelling reason to start adding groups to the text of our governing charter simply so people feel acknowledged or "seen." Were that the goal, a country as diverse as ours would be amending our constitution every year.

[5] Kate Kelly, speaking to the California Women's Law Center on March 31, 2021, *available at* https://bit.ly/3EEWJAn ("I don't know what the positive word for a Trojan Horse is? Like, this is a positive pinata, let's say, of potential legislation. We get this Equal Rights Amendment, and then there's all this great candy that we can get inside.").

1. Definition of Sex

To begin with, the ERA does not define the word "sex." In 1971, it may have seemed unnecessary to do so.

Today, the current administration is actively trying to redefine sex-based protections under Title IX and other federal laws to include "gender identity." And a 2020 report of the Democratic-controlled House Judiciary Committee explicitly observes that "the ERA's prohibition against discrimination 'on account of sex' could be interpreted to prohibit discrimination on the basis of sexual orientation or gender identity."[6] Can there be any doubt, then, that activists will try to use the ERA to constitutionally *require* all sorts of unpopular policies that state and federal legislatures will not or cannot pass? Unpopular policies, including those pushed by transgender activists, such as:

- Forcing schools to include biological males on women's sports teams;[7]
- Requiring prisons to allow male offenders who claim to identify as women transfer to women's facilities;[8]
- Requiring federal funding of puberty blockers for teenagers; and
- Opening domestic violence shelters to men who identify as women.[9]

2. Strict Scrutiny

Even if the ERA did clearly define the phrase "on account of sex," which it does not, its adoption today would jeopardize many single-sex spaces upon which women rely. That is because adopting it on top of our robust Equal Protection Clause could be interpreted to mean that the ERA requires something *more* than the equal treatment of similarly-situated individuals.

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[6] Removing the Deadline for the Ratification of the Equal Rights Amendment, House Committee on the Judiciary, H. Rep. No. 116-378, at 6 (2020) (hereinafter, "2020 House ERA Report").

[7] *See* Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021) (establishing federal policy to permit access to school sports based on gender identity).

[8] *See* Transgender Offender Manual, U.S. Department of Justice (Jan. 13, 2022) (rescinding biological-sex based placement of prisoners).

[9] *See Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory Review*, 86 Fed. Reg. 22125 (Apr. 27, 2021) (revoking proposed rule that would have permitted biological sex-specific emergency shelters).

In other words, courts might rule that the ERA requires strict scrutiny[10] of sex-specific policies. This would limit, if not eliminate, flexibility to take sex into account where biology is relevant. It would raise constitutional doubts about everything from single-sex prisons and government funded domestic violence shelters to public school athletic teams and sororities and fraternities at state schools.[11] Strict scrutiny would call into question programs designed to support women and girls, such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), federal grants that attempt to increase the participation of women and girls in STEM programs, and grants administered pursuant to the Violence Against Women Act.

3. Disparate Impact

Likewise, the ERA could legally mandate, as ERA advocates intend, equal societal *outcomes* for males and females *as groups*.[12] In practice, this could require not only that women register for the selective service but that the military actually draft and send to the front lines equal numbers of women and men. Colleges and graduate schools could be forced to discriminate against women in order to balance the number of women and men in each program.[13] And girls could face increased discipline in school, again to equalize outcomes with boys.[14]

4. Abortion

In the post *Dobbs*-era, ERA proponents have been quite vocal that they hope the amendment will be interpreted as creating a constitutional right to abortion on demand, without restriction, and fully funded by the

[10] Strict scrutiny is exactly what ERA proponents hope for. *See* Martha F. Davis, *The Equal Rights Amendment: Then & Now*, 17 Colum. J. Gender & L. 419, 422 (2008).

[11] *Compare Johnson v California,* 543 U.S. 499 (2005) (applying strict scrutiny to race-based inmate double-occupancy) *with Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (citing *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989)) (segregating inmates by sex is "unquestionably constitutional").

[12] *See* 2020 House ERA Report, *supra* note 6 at 6 (noting that "under some theories, the ERA could provide a basis for plaintiffs to challenge laws or policies that have a disparate impact on women, or to support efforts to create gender balance in certain contexts."); *see also* Brief for Amici Curiae Generation Ratify, *Virginia v. Ferriero*, No. 21-5096 (D.C. Cir. Jan. 10, 2022) (suggesting the ERA will flatten a range of societal differences, from the unequal participation of women in certain careers to menstrual needs).

[13] *See supra* note 3.

[14] Christopher Brueningsen, *Boys in crisis: Schools are failing young males. Here's what needs to change in classrooms*, USA Today (Oct. 9, 2021), http://bit.ly/3m7WiYZ; Mark J. Perry, *For Every 100 Girls...*, American Enterprise Institute (Nov. 1, 2021), http://bit.ly/3xTlapV.

government.[15] Although IWLC takes no institutional position on abortion policy, I would be remiss if I didn't point out that, while Americans could certainly choose to amend the Constitution to make abortion a constitutional right, at no point have 38 states debated such an amendment and agreed to do so. Congress cannot simply dissolve the ERA's ratification deadline and claim that they have.

5. Religious Liberty

The push for abortion by ERA proponents includes invalidating the Hyde Amendment,[16] the compromise at the federal level in which the federal government permits widespread access to abortion in the states, but protects taxpayers—tens of millions of whom hold religious and moral objections to abortion—from funding it. In this respect, an ERA would be devastating to religious liberty.[17]

The ERA could also threaten the tax exempt status of and federal financial assistance to[18] religious organizations that ordain only men as clergy or counsel young people about biological sex differences.

Conclusion

In conclusion, the version of the ERA that is before you today expired in 1979, during the era of Charlie's Angels, disco, and the Iran Hostage Crisis, when fully 62% of today's voters either weren't alive or were too young to vote. To declare now that the 1972 ERA is part of the Constitution would be to force a trojan horse upon the American people by hijacking the votes of the members of Congress and thousands of state legislators who consented to a very different proposition back in the early 1970s (and to a specific resolution that contained a definitive deadline).

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[15] *ERA Coalition Statement Marking the 50th Anniversary of Roe v. Wade*, ERA Coalition (Jan. 20, 2023), http://bit.ly/3EF3fXH ("The Supreme Court's disturbing [*Dobbs*] decision reflected a stunningly limited view of the rights conferred by our Constitution, and only reaffirms why we need the Equal Rights Amendment.")

[16] State-level ERAs have already been used, successfully, to challenge restrictions on public funding for abortion. *See, e.g.*, *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 845 (N.M. 1998).

[17] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022) (respect for the free exercise of religion is "indispensable to life in a free and diverse Republic.").

[18] Professor Jeremy Rabkin, Cornell University, U. S. Senate Hearing, The Impact of the Equal Rights Amendment, Senate Judiciary Subcommittee on the Constitution, on S. J. Res. 9/13/83, pp 99, 100.