

Be Careful What You Wish For

The revived Equal Rights Amendment may surprise its supporters.

BY ILYA SOMIN

In March, congressional Democrats resuscitated the Equal Rights Amendment, which fell just short of ratification in 1982. Renamed the Women's Equality Amendment, the ERA is now up for consideration again after a 25-year hiatus. Supporters hope to secure the two-thirds majority in each house of Congress necessary to send the ERA out for ratification by the states.

If enacted, the ERA is likely to have a greater impact than many expect.

The conventional wisdom among jurists and legal scholars is that the ERA will make little difference. In the 35 years since Congress first approved the amendment, federal and state courts have struck down numerous laws that discriminate on the basis of sex. Courts have relied on the equal protection clause of the 14th Amendment to do most of the work that the ERA was intended to accomplish. Many other discriminatory laws have been repealed by Congress and state legislatures acting on their own.

In reality, the ERA may well have a considerably greater impact than many imagine. Perhaps predictably, some effects will be welcomed by supporters and will upset social conservatives.

What is surprising, however, is how many of the ERA's possible effects will come as an unpleasant surprise to the amendment's predominantly liberal supporters. If enacted, the ERA will likely curtail governmental affirmative action for women and invalidate public school programs that provide targeted assistance to African-American boys, results that many liberals are likely to deplore.

STRICT SCRUTINY

The ERA states: "Equality of rights under the law shall not be

denied or abridged by the United States or by any State on account of sex." This language seems to ban any law that assigns rights or obligations on the basis of gender.

Under the Supreme Court's current 14th Amendment equal protection clause precedent, laws that classify on the basis of gender are subject to "intermediate scrutiny." They must be "substantially related" to the advancement of an "important" governmental interest.

By contrast, racial classifications are subject to "strict scrutiny," meaning that they must be "narrowly tailored" to the achievement of a "compelling" interest. To avoid invalidation, a law subject to strict scrutiny must have both an extremely important objective and a high degree of proof that it is actually needed to achieve that goal.

If the ERA passes, courts will almost certainly subject all laws with gender classifications to at least the strict-scrutiny standard. That is what has happened in most states that have added equal rights amendments to their state constitutions. Eighteen state constitutions have provisions similar to the ERA. Courts in eight of these states now subject gender classifications to strict scrutiny. Two others have interpreted their state ERAs to ban virtually all gender-based laws, and one (Alaska) uses a sliding scale that subjects most gender classifications to a strict scrutiny-like standard. Only three ERA states have adopted the intermediate scrutiny standard currently used by the U.S. Supreme Court under the equal protection clause. Four have left the standard of review undefined.

The most likely "conservative" effect of the ERA will be the curtailment and potential abolition of government affirmative action for women.

Numerous state and federal programs offer women preferences in public contracting and government jobs. Such programs would be subject to strict scrutiny under the ERA, and many probably would not survive. Many ERA supporters will not wel-

come this outcome, but it is a natural implication of the ERA's text, which condemns all gender classifications unequivocally, regardless of their purpose. This outcome is likely to discomfit liberals more than any other aspect of the ERA.

Some liberals will also deplore the ERA's impact on public single-sex education. Public schools in several cities have instituted single-sex educational programs to help troubled, low-income boys. Advocates claim that these programs are needed to address the distinctive needs of poor, African-American, male students. These programs would be an obvious target for suits under the ERA, and it is unlikely that they would survive.

The politics of this issue are, of course, complicated. Liberals are divided among themselves on the question of whether single-sex education is a good policy or not. Nonetheless, most current public single-sex education programs are intended to advance liberal causes.

THE ERA IN COURT

Such educational programs have already been subjected to lawsuits under the 14th Amendment. In *United States v. Virginia* (1996), the Supreme Court did not categorically forbid state-sponsored single-sex education, but it did hold that any such program would have to be offset by the provision of comparable opportunities to the other gender. Any single-sex education programs that could survive scrutiny under *Virginia* would almost certainly be struck down if the ERA were enacted.

Some claim that the ERA would never be used to strike down liberal policies such as affirmative action because liberal judges would interpret it to avoid this result. As support, they cite the Supreme Court's interpretation of the Civil Rights Act of 1964 in *United Steelworkers of America v. Weber* (1979) to permit affirmative action, despite the fact that racial preferences seem inconsistent with the text of the law.

This argument ignores the massive changes in the federal judiciary over the last 25 years. In the 1960s and '70s, most federal judges were politically liberal and skeptical of textualism. As a result, they were sometimes willing to deviate from the text of the law to reach liberal results.

Today, the judiciary is largely made up of judges appointed by conservative Republican presidents who tried hard to pick judges with strong conservative credentials and (to a lesser extent) textualist approaches to legal interpretation. Almost 60 percent of today's federal courts of appeals judges were appointed by conservative Republican presidents. With the replacement of Justice Sandra Day O'Connor by Justice Samuel Alito Jr., the Supreme Court now has a majority that is generally hostile to affirmative action.

Unlike their predecessors several decades ago, today's judges are likely to enforce the conservative implications of the ERA as strongly as the liberal ones, if not more so.

MILITARY AND MARRIAGE

Some liberal causes will benefit from the enactment of the ERA. Among the most likely to advance are the abolition of restrictions on women in the military and the promotion of same-sex marriage. On the other hand, the ERA will almost cer-

tainly have virtually no impact on economic inequality between the sexes—the alleviation of which is routinely cited by proponents as a key reason to support enactment.

Women in the military have made great strides over the last 30 years. But a number of military jobs remained closed to them by Department of Defense policies. Most are in combat units, such as armor and infantry. Such gender-based restrictions in the military are highly unlikely to survive judicial scrutiny if the ERA passes.

And this includes any draft. The Supreme Court upheld male-only draft registration under the equal protection clause of the 14th Amendment in *Rostker v. Goldberg* (1981). This precedent is unlikely to survive the enactment of the ERA. This may not matter much as long as there is no draft. But it will matter a great deal if the draft is ever reinstated.

As for marriage, the results of the ERA will also advance liberal causes. In Hawaii and Massachusetts, for example, state supreme court decisions striking down laws that forbid gay marriage have relied in part on state ERAs. There is a compelling argument that a law permitting opposite-sex marriage but not same-sex marriage is a gender classification and therefore a violation of the ERA. Under such a law, Adam can marry Eve but could not do the exact same thing with Steve—even if Eve and Steve are identical in every way other than gender.

Nonetheless, it is unlikely that the ERA would quickly lead to the Supreme Court mandating legal recognition of gay marriage. The strong public opposition to gay marriage, combined with a conservative majority on the Court, makes such a result unlikely. But the enactment of the ERA could result in a pro-gay-marriage Court decision in the more distant future.

Moreover, civil-union laws enacted in several states limit such unions to same-sex couples (and exclude heterosexuals). This restriction is a gender classification, for the same reasons that a law restricting marriage to opposite-sex couples is one. And federal judges are more likely to use the ERA to strike down laws restricting heterosexual access to civil unions than laws restricting homosexual access to marriage. Civil unions for heterosexuals are a less politically charged issue than marriage rights for gays and less likely to generate a major political backlash against the federal judiciary.

But other things probably won't change. Many ERA advocates claim that the ERA will improve the economic status of women. For example, Rep. Carolyn Maloney (D-N.Y.) claimed that the ERA might help change the fact that "women still get only 77 cents for every dollar that men are paid."

In fact, studies by economists conclude that most of the pay gap between men and women is a result of differences in occupational choices, not discrimination.

But even if discrimination does play a major role, the ERA is unlikely to affect the pay gap. The amendment would ban discrimination only by government, not by private employers. Most sex discrimination in government employment is already forbidden by federal statutes and by the Supreme Court's interpretation of the equal protection clause.

IT REALLY MAY PASS

Does all this matter? Some discount the potential impact of

the ERA because they believe there is no chance it will actually be enacted. Since a constitutional amendment requires ratification by a two-thirds majority in both houses of Congress and by three-fourths of state legislatures, the obstacles are daunting. But they may be easier to overcome in this case than in others.

In the 1970s, 35 states ratified the ERA, just three fewer than necessary for enactment. A 1979 congressional mandate set 1982 as the deadline for ERA ratification, and that deadline has of course expired.

But many experts believe that if Congress were to resubmit the ERA to the states today, the 1970s state ratifications of the ERA would still be legally valid. They cite the precedent of the 27th Amendment, which was finally enacted in 1992—200 years after it was first submitted to the states by Congress.

If this view is correct, the ERA proponents need get only

three of the remaining 15 states to ratify—so long as they first obtain two-thirds majorities in both houses of Congress.

Such an outcome is far from impossible. The ERA is likely to be supported by nearly all Democrats, and some Republicans might be willing to support it to avoid being portrayed as opponents of gender equality.

The Supreme Court is reluctant to scrutinize the constitutional amendment process. If the ERA's legitimacy is accepted by public opinion and most political elites, the Court is unlikely to challenge it.

For this reason, the potential effects of the ERA deserve careful scrutiny. It has a real chance of becoming law.

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