

From: Patrick Butler
To: Six experts on ERA – law school professors
Subject: Meaning of ERA in 1983 and 2013
Date: Thursday, October 24, 2013
Attachment: Commentary by George Will on the 1983 U.S. Senate Hearing on the reintroduced ERA, annotated by Twiss Butler (see page 2 following)

Dear ERA experts,

For the sake of the ERA, please read critically the contents of this 1-page attachment: the 1983 Washington Post report “Praise the ERA and Pass the Buck” by George Will and the 2013 analysis of Will’s report by Twiss Butler. Both address important questions about ERA’s meaning that the 1983 sponsors and expert witnesses ducked. Twiss and I attended the hearings and remember their evasions as a disservice to a constitutional principle that merits straight answers.

To do justice to today’s ERA and before new Congressional hearings commence and a campaign is undertaken, the meaning intended by proponents must be settled and made public. For example, ratification of ERA will or will not nullify the Hyde Amendment?

In regard to such questions, the 2013 Roger Williams Law School conference on ERA seems to have had the cart before the horse. The program undertook to look at past and prospective *campaigns* with scant attention to the *meaning* of an ERA. The agenda included no panels or papers discussing the impact of the ERA on five critical sex discrimination issues—sex-based insurance, gay rights, sex segregation in education and the military, and abortion—all raised in 1983 by Senator Hatch. Although some of these issues have evolved since then, they remain sufficiently unresolved to invite continued “gotcha” tactics as long as ERA experts keep trying to avoid taking a strong, logical, and public position on them as women’s inequality issues.

Finally, did ERA *opponents* like Hatch and Will do a better job in 1983 than proponents did of defining what we want the ERA to mean? What are we going to do now to define its meaning in our own terms?

Thank you

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The Washington Post June 2, 1983

George F. Will

Praise The ERA And Pass The Buck

Persons who consider rigorousness inherently rude think Sen. Paul Tsongas (D-Mass.) was received rudely when he went before a Senate subcommittee to testify, as principal sponsor, for the resurrected Equal Rights Amendment, which says: "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." Chairman Orrin Hatch (R-Utah) simply asked Tsongas what the amendment means. This question caused Tsongas to show that he does not know and does not deeply care.

Hatch's point, which Tsongas unwillingly confirmed, is that ERA bestows a right without identifying it. Most debates about constitutional amendments (limiting abortion, permitting school prayer, abolishing the Electoral College, establishing a six-year presidential term) concern whether the amendment would be beneficial. Debate about ERA concerns what ERA means.

Tsongas began with the ritual announcement that it is "unseemly" for males to say what is good for women. Then he showed that although he says ERA would be good for women, he does not claim to know what it would do.

Hatch began by asking what standard of review ERA would establish for legislation involving sex classifications. Would the standard be as strict as standards applying to such "suspect classifications" as those involving race, religion or national origin? Virtually any law with such classifications is

nullified. Instead of answering, Tsongas imprudently asked for specific problems.

So Hatch asked whether, under ERA, the practice of giving some hiring preference in public jobs to veterans would be unconstitutional because most veterans are men. Tsongas answered: "We have what's called the Supreme Court, which is in a position to resolve those particular matters."

Hatch asked whether those ERA advocates are correct who say ERA would prohibit limits on federal funding for abortions. Tsongas said courts would answer that. Hatch asked whether, as many ERA advocates say, ERA would make it unconstitutional for single-sex colleges to receive federal aid, or federal assistance for students, or tax-exempt status. Tsongas said he had a "personal view" but that "these issues are going to be decided in the courts."

Hatch asked if ERA would require denial of tax exemption for, say, Catholic churches (because there are no women priests) and Orthodox synagogues (where the sexes are segregated). (The National Organization for Women demands that seminaries recruit men and women equally and tax exemptions be denied "any church actively opposed to abortion or ordaining women.") Tsongas conceded that "the issue of the ERA and the issue of freedom of religion are in some conflict," and he said courts would decide.

Hatch asked if, as some scholars say, ERA would prohibit sex-based distinctions in insurance, regardless of life expectancies and accident rates. Would, as some ERA supporters say, ERA require equal leave time for men and women during a pregnancy? Would, as many ERA supporters say, ERA ban discrimination in housing on the basis of marital status (because females head many single-parent families)? Would, as some scholars say, ERA prohibit segregation of sexes for sex-education classes? Would ERA end the right of Congress to enact male-only draft registration? Would ERA require women to be assigned to combat units on the same basis as men? Would WAC units be unconstitutional? Would, as some scholars think, the standard of review implied by ERA—a standard like that used on race classifications—overturn laws for-

Abortion (1) *

Education (2)

Insurance (3)

Military (4)

Gays (5) bidding homosexual marriages, just as anti-miscegenation laws have been overturned? Would, as the U.S. Civil Rights Commission implies, ERA conflict with seniority systems because women often have less seniority than men?

Repeatedly, Tsongas said he had certain "feelings" about what "adjustments" might be required, but that courts would decide. Losing his temper, Tsongas denounced Hatch for not giving him the questions in advance. Hatch noted that Tsongas was demanding a privilege not extended to persons who are not senators, and that Tsongas has been promoting ERA for a decade, so he has had time to think about these questions. Tsongas angrily vowed to submit written opinions. But why bother? He is content to have courts make policy.

Tsongas said all constitutional amend-

ments generate litigation. Yes, said Hatch, but other amendments are not intended to generate litigation; ERA is designed to pass hundreds of anticipatable controversies to the unaccountable branch of government. Tsongas said Hatch favors an amendment concerning abortion that would generate litigation. Hatch replied that it probably would. But it aims simply to restore to states the power they once had (before the 1973 Supreme Court rulings) to regulate abortions. So his amendment is the reverse of ERA; his amendment aims to restore policy-making to representative institutions.

Tsongas' testimony exemplified the complacent abdication of responsibility by legislators. It also shows how persons preening themselves on their love of "equality" play judicial roulette with sensitive social policies.

* Five issues that some leading proponents said ERA "would have nothing to do with" during the 1972-1982 ratification period. See Twiss Butler (1991) "Abortion Law: 'Unique Problem for Women' or Sex Discrimination?" 4 Yale J. Law and Feminism 133. (Available at www.equality4women.org.)

Today in 2013 some leading proponents of ERA are either silent on the five issues or argue that they will not be reached by a newly enacted ERA. But in legislative hearings and floor debate, the issues are sure to be raised again, abortion and ERA for example. In her 1987 review "Unthinking ERA Thinking" of Mansbridge's book "Why we lost the ERA," Catharine MacKinnon observed that "abortion IS a sex equality issue. Everybody knows it," and that denying this fact "may make not only bad law and lousy politics but also ineffective strategy."

The five ERA issues raised by Senator Hatch and reported on by George Will -- along with other sex inequality issues such as violence against women, pornography, and prostitution -- are controversial. But as I concluded in "How to Pass an ERA Worth Passing," the only way to advance great issues is to move them through the fire of controversy.

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