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A Road Less Traveled to a Federal ERA

John Paul Jones
University of Richmond, jjones@richmond.edu

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by John Paul Jones

When Congress's deadline expired in 1982, the Federal Equal Rights Amendment was still three states short of the Constitutionally required number for ratification. If that deadline had any meaning, it had to be that those favoring a Federal ERA would have to begin again the process set forth in Article V, either by reintroducing the amendment in Congress, or by obtaining support by enough states for a constitutional convention.

An equal rights amendment was first introduced in Congress in 1923, shortly after ratification of the Nineteenth Amendment afforded women a Constitutional guarantee of suffrage. It was reintroduced in every Congress from 1924 to 1970. A subcommittee of the House Judiciary Committee first reported favorably on the amendment in 1936, and subcommittees in both houses reported favorably the following year. In its present form, the ERA passed the Senate in 1946 by three votes. With the so-called Hayden rider (preserving laws benefitting or exempting women) attached, the amendment passed the Senate again in both 1950 and 1953. The amendment failed to secure the requisite two-thirds necessary for submission to the states until 1972.

ERA's Route Through Congress

The Congressional route, which brought ratification so near in 1982, seems still the favored one. On January 14, 1991, forty-eight Senators co-sponsored a Senate Joint Resolution proposing to the states a constitutional amendment phrased exactly like that which failed ratification in 1982. On the same day, 129 Members of the House did likewise. So, the campaign begins again. The question remains where is and should it be going?

Were the question put in 1982, a ratificationist would have answered by saying that we still need an ERA and should prepare to go the distance to see it ratified. As a ratificationist, I would have urged the struggle forward in 1982 on the basis of the following legal argument.

Ratificationist Says Need for ERA Unchanged

America needs an ERA as much now as ever. Neither safeguards in the United States Constitution's Fifth and Fourteenth amendments nor guarantees in federal civil rights statutes like Title VII and Title IX are enough to guarantee that the past won't repeat itself. Only a generation ago, the United States Supreme Court could resort to blatant sexual stereotypes in upholding a law excluding women from licensing as bartenders. Only a generation ago, Congress could complacently turn a blind eye to the systematic exclusion of women from education and commerce.

Just as history entitles Jews to fear a future pogrom, history also entitles women to fear re-imprisonment in the seraglio. All that women really have today in America is a promise by a predominantly male government that federal law will ensure their rights. But, in the long run, who will

John Paul Jones is a professor of law at T. C. Williams School of Law.

ensure those rights against the very men who make such a promise? Only the Constitution can legally inhibit our national legislature. So, unless the ERA is passed, women's rights remain vulnerable to the first misogynic Congress that comes along.

An anti-ratificationist, on the other hand, would have answered in 1982 that another battle for the ERA would not be worth the candle. As an anti-ratificationist twenty years ago, I would have based my resistance to reviving the ERA on the following legal argument.

Anti-Ratificationist says ERA Moot

An ERA in the eighties would add little, if anything, to the status afforded women by existing law. As several post-mortems on the ratification campaign of the seventies have demonstrated, the United States Supreme Court had become decidedly hostile to sex discrimination by 1982. In a series of decisions beginning with *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating an Idaho law which preferred men for court appointments as estate administrators) which continued at least through *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (invalidating Missouri law which provided death benefits to all workers' widows but only to worker's widowers who could prove dependency), the Supreme Court used the Fifth and Fourteenth amendments to strike down a variety of laws discriminating against women.

By *Wengler*, the Court had made clear its intent to afford women *almost* the same judicial protection from discrimination that, in keeping with the evident purpose of the Fourteenth amendment, it afforded the descendants of former slaves. Indeed, if the Court's statements in *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding Florida property tax exemption for widows but not widowers because of the financial straits in which widows commonly were found) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding Navy regulations which allowed women officers who had been passed over for promotion to remain in the service longer than men in light of the barriers to assignment of women to career enhancing sea or combat duties) were compared with the several opinions in *Regents of the University v. Bakke*, 438 U.S. 265 (1978), such a comparison would readily lead to the conclusion that the Court would be more likely to find women entitled to affirmative action than black Americans. If, in the eighties, women already enjoy at least the equal protection of laws, what marginal advantage could justify another bitter ERA struggle? Let well enough alone.

Climate Change for 1990's

But here we are in the 1990's, and what, if anything, has changed? Someone else might speak competently to the political arguments by both ratificationist and anti-ratificationist. I will speak to their legal arguments.

The legal argument of the ratificationist remains the same in the continued absence of a Constitutional amendment. Nothing much has changed: the rights of women to equality in various settings continue to exist by legislative grace. Indeed, the new Civil Rights Act of 1991 enhances such rights in important ways, and seems to renew the pledge that women's equality is safe in the hands of Congress.

On the other hand, the assurances of the anti-ratificationist that the Supreme Court does not need an explicit amendment to enforce sexual equality ring less true with each succeeding Supreme Court term. *Rust v. Sullivan*, 111 S.Ct. 1759 (1991) (upholding U.S. Department of Health and Human Services regulations which severely restricted, in non-profit family planning clinics accepting federal funds, a physician's discretion to furnish a patient with abortion-related advice) was a stupendous decision, not only because of its implications for *Roe v. Wade*, 410 U.S. 113 (1973), and the right to abortion freedom, but also because of what the Court said about free speech and judicial control of lawmaking. The *Rust* decision is no freak. From one end of the Bill of Rights to the other, the Rehnquist Court has, especially in the last two terms, been riding rough-shod. After cases like *Rust, Employment Div. v. Smith*, 110 S.Ct. 1595 (1990) (holding against religious discrimination claim Oregon's refusal of unemployment compensation to two members of the Native American Church fired for sacramental consumption of peyote), *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991) (holding against First Amendment free expression claim Indiana's public indecency law as applied to non-obscene live nude dancing) and *California v. Hodari D*, 111 S. Ct. 1547 (1991) (Fourth Amendment protection from unreasonable arrest does not apply to police chase beforehand), I am no longer at ease entrusting my own—or anybody else's—rights to an inference drawn by the United States Supreme Court.

Addition of Clarence Thomas

Justice Thomas's presence seems to bode especially ill for the rights of women, as his recent opinion for the D.C. Circuit Court in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), clearly evidences. So, if you can't trust the Congress to ensure women's equality under the law, you can't trust today's Supreme Court either. Neither civil rights laws in the hands of Congress nor the constitutional amendment in the hands of the Supreme Court can offer complete security, but, like a belt with suspenders, having both can make very unlikely their simultaneous failure. An ERA would present both Congress and the Court with an explicit statement of Constitutional guarantee, not simply a permissible inference of one.

Bleak Future for ERA

So what future do I see for a revived ERA campaign? Frankly, I see little chance of success. Over ten thousand amendments have been proposed in just over 200 years. Only twenty-seven have been added to our Constitution. Considering that two thirds of both houses must endorse any amendment Congress proposes to the states, the process for amendment is arguably biased against amendment. Then, three fourths of the states, acting either through their legislatures or through conventions called for the exclusive purpose, must vote to ratify.

For an amendment like the ERA that restricts government, that's a lot of legislators selflessly agreeing to limit their own lawmaking prerogatives. As few as thirteen state representatives could frustrate ratification, were each to cast a single nay vote in a different state. Small wonder that the subject of four of the sixteen amendments since the Bill of Rights has been the presidency, a lawmaking institution that has no role in the amending process. Small wonder that another amendment, the Eleventh, restricts the federal courts, another lawmaking institution with no role in the amending process.

Grassroots Reform has Poor Track Record

The only successful grassroots effort to take power from those with Article V power was the Eighteenth (Prohibition) amendment. That amendment in effect said that courts would make sure neither Congress nor the states permitted liquor sales. Arguably, such an amendment could only have succeeded in an era before Congress and the state legislatures had experienced significant judicial encroachments on their authority.

Today, legislators, particularly state legislators, can look back in frustration at numerous instances of judicial meddling in cases involving bussing, school prayer, pornography, and, of course, abortion. One might point to the Reconstruction amendments as other examples of successful curtailments of state legislatures. But, to do so is to substantially underestimate the intimidation by occupying Federal troops on the amendment decisions of former Confederate states. We are not likely to see Federal troops lining the chambers when state legislatures debate the ERA.

Legislators Wary of Yielding Power

These days, I think state legislators are considerably more wary of granting, by federal constitutional amendment, a judicial license to nullify their lawmaking. I can hear state lawmakers asking ratificationists why they trust judges more than the very elected representatives whose ratification votes they are courting. Of course, recent decisions by the Rehnquist Court can be cited to attenuate the shibboleth of judicial interference, but it will surely take a decade or more for the new jurisprudence to permeate the psyches of local lawmakers. By that time, the new amendment would be likely to receive no warmer a Supreme Court reception than the equal protection clause received initially in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana law requiring racially segregated accommodations in railroad trains).

I don't take much comfort from senators and representatives lining up in Congress to sponsor the joint resolution proposing the ERA again. In the first place, theirs is a no-lose position; after all, if they secretly oppose ratification, they can always rely on their brothers in the state houses to withhold the necessary assents. In the second place, Congress has little to lose even if the amendment is ratified. The United States Supreme Court has exhibited the greatest reluctance when called upon to review a legislative act of Congress, much more reluctance than it has shown when invited to discipline states. Every indication is that the Supreme Court of the near future will be even more deferential to the lawmakers across First Street.

In short, while the need for the amendment is greater now than when it failed ratification in 1982, the opposing odds seem just as great. What remains are two variables: first, how important is it to carry on courageously a political campaign, which even if it must fail, is surely the right thing to do; and second, to what extent must we always expect legislators to act selfishly? In 1919, I would never have predicted that men could be induced into sharing with women the power of the franchise, and yet they—we—did, by ratifying the Nineteenth Amendment.

International Lawmaking Provides An Alternative

There is an interesting third option. In 1979, the United Nations General Assembly adopted and opened for signature the Convention on the Elimination of All Forms of Discrimination against Women (1249 U.N.T.S. 14). It went into force on September 3, 1981.

The Convention is comprehensive in scope, prohibiting:

> [A]ny distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Convention obligates signatory states to pursue "without delay" a policy of eliminating discrimination against women "by any person, organization, or enterprise," by taking "all appropriate measures including legislation." At the same time, the Convention authorizes what we domestically know as affirmative action by permitting "temporary special measures" to accelerate *de facto* equality between men and women that would otherwise constitute sex discrimination. Moreover, the Convention obligates each signatory state to "take appropriate measures" to alter social and cultural norms to eliminate stereotypes and sex prejudice.

The Convention imposes in international law specific duties to combat discrimination in many areas already covered by federal civil rights law such as politics and suffrage, citizenship, education, employment, and social benefits. While the Convention calls specifically for an end to discrimination against women in health care, it also requires signatory states to provide all women with adequate nutrition and services during pregnancy and the post-natal period.

Across-the-Board Equality

Silent on abortion *per se*, the Convention calls for women's equality in all matters relating to family and marriage. It creates for women a right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to

exercise these rights." Signatory states must report regularly to the United Nations on their progress toward fulfilling the many specific obligations set forth in the Convention. A separate international committee of experts will scrutinize these reports and comment on them to the United Nations Commission on the Status of Women. In short, the Convention is an omnibus effort to end discrimination against women around the world.

Americans Active at Drafting

Representatives of the United States participated actively in the drafting of this Convention, and President Carter signed it on behalf of the United States on July 17, 1980. He transmitted it (along with a State Department report on its potential consequences for American law) to the Senate for advice and consent four months later, but the 96th Senate took no action, and no Senate has acted since. No hearings were conducted for eight years after the Senate received the Convention. The first hearings were held in 1988, and more were held by the 101st Congress in 1990.

Senate Consent Not Yet Forthcoming

Internationally, the Convention went into force in 1981, (Multilateral Treaties Deposited with the Secretary-General at 151, U.N. Doc. ST/LEG/SER. E/3, art. 27(1) (Dec. 31, 1984)). One hundred and ten countries had ratified the Convention by March 18, 1992 but, without Senate consent and Presidential ratification, it has not yet become the law of the United States.

The 102th Senate is blaming the delay on the White House, because neither President Reagan nor President Bush has ever offered the Senate their administration's reservations, understandings, and declarations (as President Carter did in Secretary of State Muskie's Memorandum). The Senate apparently deems the views of the White House essential to Senate consent.

Preemptive Effect on State Law

By the Federal Constitution's Supremacy Clause, the Convention, once ratified, would, like any treaty, override any conflicting state law. It would thereby establish, at least as well as the ERA, sex equality in every state. The Convention would also hold the Congress to its civil rights promises, more than would an ordinary federal law, albeit less than a constitutional amendment. Theoretically, Congress could act to abrogate the treaty, but resistance, both institutional and public, to reneging on formal promises made in the community of nations ought to be much greater than resistance to the repeal of a domestic civil rights act.

Shortcut to Approval

What attracts me about the Convention is that it needs only federal action, that is consent by the Senate and signature by the President. Neither the House of Representatives nor the state legislatures act on treaties or international agreements. The Convention could therefore become the law of the land without lobbying state legislators, the lawmakers most likely to suffer its consequences and most resistant to an ERA.

Persuading one President and sixty seven members of the national upper house that a single law ought to apply nationwide is a much more manageable lobbying effort, not only because of the limited numbers and single location, but also because of the nature of the offices.

Both the Presidency and the Senate are national offices whose occupants should be unintimidated by new bans on sex discrimination. Federal civil rights laws have already established equality as a legal norm in the major areas of federal lawmaking. The Government Employment Acts of 1991 (Pub. L. No. 102, 106 Stat. 3 (1991)) extended to employees of the Senate protection from gender discrimination similar to that afforded other employees by Title VII. In *Davis v. Passman*, 442 U.S. 228 (1979), for example, the Supreme Court held a Congressman liable under the Fifth Amendment for gender discrimination in staff promotion and hiring.

Nor are the President and Senators likely to be sympathetic enough to state autonomy to resist ratification lobbying like state legislators would. While Presidents are formally chosen by an electoral college assembled according to procedures dictated by state legislatures, the Presidential two-term limitation and the electoral college's deep-seated tradition of following the popular vote prevent state legislators from commanding any loyalty from the oval office.

Once the Federal Constitution provided for the selection of Senators by state legislatures, and those selected were therefore naturally responsive to the preferences of those in the state houses who held the power of reappointment. Passage of the Seventeenth Amendment in 1913, however, providing for popular election of the Senate, emancipated the members of the national upper house from servitude to the controlling factions in state legislatures. This change surely left Senators less sensitive to concerns about subordinating state autonomy to their views of the national interest. Thus, neither the President nor thirty-four senators ought to oppose the Convention as much as some state legislators opposed the ERA. They lack the stake and they risk much greater exposure.

Some Critical Drawbacks

As a way of outlawing discrimination against women in this country, ratification of an international convention is not without its drawbacks. There is, first, the problem of White House procrastination. Some senators feel constrained, or at least claim to feel constrained, to withhold consent in the absence of formal interpretation by the current administration. No such constraint appears on the face of the Constitution, but Presidential practice of late has conditioned the Senate to demand some sort of statement by the White House as to how the Executive Branch plans to interpret that to which the Senate consents. For example, President Reagan's 1985 reintrepretation of the ABM Treaty to permit certain research in conjunction with the Strategic Defense Initiative ("Star Wars") took many in the Senate by surprise. This understanding of the scope of the treaty clearly differed from the Senate's interpre-

tation a decade earlier, as evidenced by Senate debates at the time of its consent. It brought to a head Constitutional issues of whether the Senate's interpretation, at the time it gives consent to a treaty, binds the executive branch then or thereafter, and whether an interpretation, offered the Senate by the Executive branch, binds either the administration which offers it or any which follow.

These two, as yet unresolved, issues obviously prompt the Senate to pry out of the White House as definitive a statement of what the White House thinks the agreement means as the Senate can get. While the Senate rightfully evinces concern for harmony between the branches as to the interpretation of an international agreement, inaction in Congress is only one of several responses to silence in the White House. When more than a decade passes without Senate consent, Senate inaction begins to suggest inter-branch concert rather than conflict. Once the Senate gives its consent, the President becomes the exclusive object of lobbying efforts, for only his signature is then lacking to achieve ratification.

No Interpretive Conflict

If the Senate's concern is that a present or future administration will eventually interpret the Convention in some important way different from the interpretation offered by the Carter administration, nothing is gained by waiting around for a memorandum that seems unlikely to issue from the Bush administration.

No interpretive conflict now exists, so a ratified Convention should appear a better alternative than a non-ratified Convention to a Senate already on record as enthusiastically in favor of ending sex discrimination by Constitutional amendment. More than most subjects of international agreements, a human rights convention virtually guarantees a continuing interpretative role for the domestic lawmaking body, so the Senate need not fear corruption of the Convention by subsequent conflicting interpretation in the White House.

A second problem for those backing the UN Convention is limiting reservations and conditions. Although the Constitution is silent on the matter, the Senate has the power to impose conditions on its consent to a treaty or other international agreement. Such conditions have come to be expressed in either of two ways: by insisting in the ratification resolution that the President amend the text of the treaty upon ratification, or else by inserting additional material in the ratification resolution itself.

Conditions imposed by the Senate cannot be incompatible with the object and purpose of the agreement. The widespread practice of reservation among signatory states has particularly plagued the Convention to End All Forms of Discrimination Against Women. By last summer, one commentator could report that at least twenty-three states had made a total of eighty-eight reservations to the rights guaranteed by the Convention and another twenty-five states had opted out of procedure for dispute resolution. The Senate needs to be convinced of the rectitude of consent without much—if any—reservation.

State Department Review

In the Memorandum attached by President Carter to the Convention for transmittal to the Senate, the State Department reviewed the Convention and its impact on U.S. law. Where a likely conflict could be discerned, the Department suggested alternative resolutions: either legislation bringing domestic law into compliance with international obligations under the Convention or else Senate reservation to limit the Convention's U.S. impact short of its intended global reach.

One issue for which reservation is a suggested solution is whether the Convention has force in areas of law traditionally left to the individual states. Those opposed to the principles underlying both the ERA and the Convention are very likely to raise states' rights objections to an international agreement capable of nullifying state laws which discriminate in areas like marriage, family, and private associations.

Such objections have been persuasively criticized as specious, but they nevertheless have a potential for distracting some Senators or furnishing others an apparently principled excuse for a reservation. The more such reservations are fashioned, the less the Convention will do in the United States, so it obviously behooves the advocates of ratification to insist the fewest conditions.

While the threat to the Convention of enervating reservations is a real one, as both international practice and the State Department memorandum make clear, it does not change the underlying assessment that makes the Convention an appropriate goal for supporters of a national ERA. The advantage offered by Convention ratification over amendment ratification is still there — only the Senate and President, and not thirty-eight state legislatures, must be persuaded right now.

While endorsement by states and the House of Representatives would make the task of persuading first the Senate, and then the President easier, the absence of such endorsements is no real impediment to action by either. The Senate is already on record as favoring a Federal ERA, and its underlying principles.

Art of the Possible

Nothing suggests that a state-by-state ERA campaign could secure ratification in the near future when it could not in the decade before 1982. It is therefore even riskier for those dedicated to women's rights to embark on such a campaign a second time. Instead of proceeding directly toward Constitutional amendment, I propose a crooked road that begins with ratification of the United Nations Convention to End All Forms of Discrimination Against Women. One hundred and ten nations have already made the Convention part of their domestic law, and it has been international law among the signatory nations since 1981. Ratification of the Convention does not require the assent of the several states, only the consent of the Senate and the signature of the President.

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Birth

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time came, after fourteen sleepless nights, the two hours that we set aside grew to five.

It was a nightmare; Bill was doing a Westlaw search on all the cases that we cited; Esther was "bleeding all over the pages" as she edited with a red pen. I was frantically trying to type in her corrections, and Stuart was running all over the library to locate the correct cites that were incomplete in our drafts. However, at 5:30 p.m. on a Friday afternoon, the (somewhat) complete document was turned over to both Eileen and Professor Jones. None of the rest of us ever wanted to see it again for quite some time.

Unfortunately, our wish was not quite granted. Several days later, the four of us sat with Professor Jones and spent four quality hours editing the final text. Eileen had transposed what we had written with a brief that she had done. (She somehow managed to put the whole paper together over the weekend.)

The end result was a small book that we felt was quite well written. Now that the project is over, I feel that I must admit that each time VMI objected to some part of our brief and especially when the Fourth Circuit Court of Appeals heard the case, the four of us experienced a bit of pure delight. We will always be thankful to Eileen Wagner and Professor Jones for giving us the opportunity to work on the brief and the chance to work with them. ❑

Road

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Unlike an ERA ratification campaign, a campaign to secure ratification of the Convention can therefore be concentrated in Washington. The Senate is already on record as supporting the ERA, and should therefore be especially susceptible to arguments that the Convention accomplishes much of what the Senate endorsed in proposing an ERA to the states in every year since 1984.

Once the Convention is ratified, it becomes a powerful lever for both expansion of Federal Civil Rights proscriptions into areas of sex discrimination previously deemed the business of the several states, and for explicit recognition of women's rights in a Federal Constitutional amendment. ❑

Freedom of Speech

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distinguished between "mere advocacy" of illegal activity and remarks which are "likely to incite or produce such actions." Language that is merely offensive or derogatory arguably does not even reach the level of the former.

Limitation on freedom of expression in the university setting has been viewed by such scholars as law professor Gerald Gunther of Stanford as being "...not only incompatible with the mission and meaning of a university...(but) also send(ing) exactly the wrong message from academia to society as a whole."

Former Yale President Benno C. Schmidt, Jr. has warned against the unleashing of a "vague and unpredictable empire of suppression" by unjustifiably stretching the line of true threats and fighting words" to include offensive speech in general. And the restructuring of traditional curricula (on the issue of race, gender, and ethnicity) to accommodate those faculty who have their own agenda of what is the "greater good" of those who exercise political clout with respect to university policy, and the promulgation of anti-harassment codes has been labeled as "cross(ing) the line that separates the legal from the illegal" by a distinguished professor of law at one non-Virginia public university.

The public university in particular has been somewhat set aside for special First Amendment treatment, regarded as a "haven of free speech."

These remarks are not to infer that racist, sexist, or ethnically abusive language is to be condoned or encouraged in the academic community or elsewhere, or to disparage the well-directed efforts of those persons endeavoring to eliminate such language. These efforts, however, must be tempered with the recognition that free and unfettered expression is a right constitutionally insured and that demeaning and derogatory language often must be tolerated when uttered in the public domain.

The decisions invalidating the G.M.U. activity and the speech codes at the Universities of Wisconsin and Michigan did not implicitly or explicitly indicate the courts' approvals, but rather their acknowledgment of the constitutional protection which extends to such acts and/or remarks.

Professor Gunther's conclusion best explicates the purpose for the premise that university campuses should assure greater, rather than less, freedom of speech than is acceptable by society in general: "I believe—in my heart as well as my mind—that these principles and ideals (i.e., the assurance of free expression in the academic setting) are not only established but right. I hope that the entire academic community will seriously reflect upon the risks to free expression, lest we weaken hard-won liberties at our universities and, by example, in this nation." ❑