“WHY E.R.A. WON'T DIE”

by LeGrand Baker

1979

It is power, rather than "women's rights" which is at stake with the Equal Rights Amendment. If the proposed ERA amendment were to be incorporated into the Constitution as it is presently worded, it would shift most of the authority of state and local governments to Congress, giving the federal government almost unlimited power over the personal lives of individual Americans, effectually repealing the tenth amendment of the Bill of Rights, which guarantees, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or the people."

When the Founding Fathers met in Philadelphia, in 1787, to write the Constitution of the United States they were confronted with this impossible dilemma: How to create a government which would be strong enough to protect its citizens, but not strong enough to invade their private lives. Their experience had taught them that this could not be done until the government was rendered incapable of using its military power to coerce its own citizens. To achieve that end they divided the power of government between two systems, state and federal. Under this principle, "dual sovereignty", each government is sovereign in its own limited jurisdictions,with their respective power counterbalanced in such a way that the government with the greatest military power has almost no direct contact with its citizens, and the small governments which have almost no military authority have immediate jurisdiction over affairs which deal with private lives.

Thus the states, which have only limited ability to coerce their citizens, exercise the governmental powers which are potentially the greatest threat to individual liberty. This includes almost everything that has to do with the legal or contractual relationships of any two people, such as licensing businesses, determining school policies, defining the legal relationships and responsibilities of family members, regulating the uses of private property and every other matter where freedom of choice and initiative are most vulnerable to curtailment by unreasonable regulation. These powers were assigned to the state and local governments because, when the Constitution was written, Americans believed that laws which bear directly upon private lives should be made and enforced only by local and state government which are small enough, and geographically near enough to the people to be responsive to local situations and neighborhood pressures.

This fear of coercive power did not make the Founding Fathers naive. They realized that if freedom were to be preserved, government must be able to exert sufficient military force to defend it. This the states could not do, but their military weakness was compensated for by the federal government being given the responsibility to serve as a defensive umbrella over the states. It was given sweeping military powers with which to protect, but no authority over local affairs, so no legitimate excuses to use those powers against its own people.

In this carefully balanced system the state governments which have the jurisdiction to be

tyrannical, do not have the power; and the federal government, which has the power, does not have the jurisdiction. So the people are guaranteed freedom from tyranny, and will retain that guarantee until the states are given more military power or the federal government is given more jurisdiction.

In the meantime, the people are concurrently citizens of both governments and have different responsibilities to each. For example, initially, before the income tax amendment became a part of the constitution, the federal government had no authority to impose a direct tax on its citizens, but the states could tax their citizens in almost any way the people would permit.

George Washington explained it very simply,

"Congress has powers in all matters relative to the great purposes of war and of general concern by which the states unitedly are affected, [with the states] reserving to themselves all matters of local and internal policy." (quoted in James T. Flexner, Washington. the Indispensable Man (Mentor, 1979), p. 133.)

The word "general" is used in the Constitution the same way it is used by Washington. It is intended to restrict the powers of the federal government to matters which no single state could be expected to handle alone.

The members of the Philadelphia Convention had no question in that regard. Consequently they saw their responsibilities as being limited almost entirely to defining, in the Federal Constitution, the "general" or umbrella functions of the central government. These were matters of the "common defense", like regulating the military and conducting foreign affairs; and "general welfare" such as establishing and regulating of the postal and monetary systems. Since each state already had a constitution of its own, the authors of the Federal Constitution wrote into their document almost nothing about state powers. Thereby implicitly recognizing, or so they believed, that all remaining power belonged to neighborhood or state governments.

But having only an implicit guarantee was not good enough for the states. When the Constitution was sent to them for ratification, several, like Massachusetts, insisted that a Bill of Rights be added which would protect each citizen from the unfair practices of all governments, and protect state and local governments from infringement by the national government. The latter guarantee was made an explicit part of the Constitution by the 10th Amendment. It assures that hometown matters will be handled by governments whose powers would be wiped out if ERA is ratified.

For almost one hundred and fifty years, Americans held the idea of dual sovereignty in as much esteem as the written words of the Bill of Rights, and restrained federal encroachments upon state and local governments. But since about the turn of the century that restraint has been severely eroded by the creation of broad-powered federal agencies (ICC was the first) and more recently by attaching strings to federal money. Environmental regulations, interstate commerce and artificial crises have also been used. So far, these attempts to get control of local affairs have been only piece-meal, but the ratification of ERA would change that. In a single stroke it would transfer to the federal government all powers to control individual lives, and thus, for all practical purposes, render meaningless the words of the tenth Amendment.

This would be done because ERA places legal restrictions on both the state and federal governments (Section One), while giving power to enforce those restrictions only to Congress.

(Section Two). The proposed ERA Amendment reads in full:

"Section One: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

"Section Two: The Congress shall have the power to enforce, by appropriate legislation the provisions of this article.

"Section Three: This amendment shall take effect two years after the date of the ratification."

Section one of ERA requires absolute equality ("Equality" here means sameness not fairness.) of the sexes, throughout the nation. Section Three gives the states only two years to bring all their laws into perfect conformity so "equal rights" within each state would be precisely the same as "equal rights" in <u>every</u> state. Such uniformity would have to be perfect in order to assure the sameness of equality in every area.

It is absurd to expect all the states could rewrite all their potentially discriminatory laws in exactly the same way within two years. For this reason many opponents of ERA believe its adoption would throw the whole question of equality upon the courts, creating an entanglement which may last for a generation. But others fear just the opposite. They foresee the hands of the state courts being tied in such a way that they could do little to defend their citizens against this new federal authority. There are two reasons why this might be so: 1. When Congress wrote the amendment, it deliberately excluded all moral, religious or physical excuses for legal un-sameness between the sexes. Consequently, the courts could not base their judgements on such criterion. 2. Congressional laws supersede and make void any state or local law to the contrary. So a carefully worded act of Congress could superimpose its regulations upon state and local governments, negating their laws in order to guarantee uniformity of equality in all the states. If that were done, state and local laws would not apply or be void. Whenever strictly federal statutes have been breached and there is no comparable state statute, then the case is tried in the federal courts rather than in the state courts. So, if all these divergent state laws and regulations were negated by replacing them with a uniform national code, that would transfer original jurisdiction of all matters dealing with "equality" to the federal courts, and leave state court systems with little authority to interfere.

The key to understanding the potential impact of ERA is that Section One applies the rules to both the state and federal governments, but Section Two gives only Congress the power to "enforce" them. This means that ratification of ERA would remove from state, and local governments, and turn over to Congress and its bureaucracies, jurisdiction over every law, rule or regulation where there may be inequality. That includes all questions which deal with the legal relationship of any two people, since one of them may be a woman.

focal school boards would be very vulnerable. Because some children are male and others female, the ratification of ERA would obligate Congress to guarantee absolute equality (sameness) upon all school children in every part of the United States.

In order to achieve that equality, the federal government would have to establish and enforce uniform "stands" throughout the nation. This would necessarily include federal control of curriculum, selection of textbooks and all other instructional material, and regulations to insure that physical facilities and all opportunities, including sports, for both sexes be precisely the same. Similarly, the question of compulsory attendance at pre-school, at what age, and with what intent, and even whether the boys and girls could dress differently, would all be left to Congress and its appointed officials. It is unlikely that children attending private schools would be denied that sameness, because Congress would have both the authority and the responsibility to enforce their equality also.

With such federally-imposed equality, locally-elected school board officials would lose all power except to administer national regulations. Parents would no longer have influence over such matters as standards, curriculum, textbooks or discipline in their local schools, because all policy decisions would be made in Washington.

The passage of ERA could have almost the same kind of effect upon state and local governments as upon school boas. Since all laws regulating personal or business contracts or any other legal human relationship, have to do with people of some sex or other, ERA would transfer legal jurisdiction over all such relationships from the states, counties and cities to the federal government. Thereafter, locally-elected officials would have no authority in such matters as marriage; divorce; ownership of property; guardianship and parental responsibilities for children; inheritance; licensing of any sort, including business licenses and others which deal with the use of private property or any other kind of contractual agreements (private schools would fit here). These would all become part of the federal jurisdiction. Regulations would be made by Washington officials who are insulated by time, distance and civil service immunities, from the needs and desires of local people. Almost the only power the states would retain would be to help enforce federal regulations.

The whole question of ERA might not be so frightening if we could trust that Congress would make those regulations themselves. But recent Congressional history teaches us that Congress is not likely to do so. Instead it will only pass a law saying there should be equality, and then create a heavily funded agency with power to see that this ambiguous objective is achieved. It would then leave to this new federal equal rights agency the responsibility and the power to define what is meant by equality, create the rules and regulations to implement that definition, and impose those rules upon the citizenry.

There is sufficient precedent for such an agency. Congress has already created several and has given them powers so extensive that they are able not only to subjugate the states but to challenge the Congress itself. An example is the Environmental Protection Agency. When it was created Congress only passed a law saying there should be a clean environment and establishing an agency to define and enforce what that meant. It gave the agency such overriding authority it was able to stop the construction of water storage reservoirs even though they were already

approved by the states and funded by Congress.

So the precedent is established for Congress to create an Equal Rights Agency and give it overwhelming powers to regulate the personal lives of all Americans

The creation of such an agency would be the final blow against the constitutional assurance that laws which affect private lives will be made and enforced by local governments, but it would also be just as severe an attack against the principle of separation of powers which assures that no single individual or clique can get too much authority.

The Constitution incorporated this principle by providing that Congress makes the laws, the President enforces them, and the courts judge whether they have been broken. That principle still applies to the federal government itself, but this guarantee against concentration of power has not been applied to federal bureaucracies. They often exercise all of those powers under a single authority. They make rules which have the force of law, execute those rules, then, often in the agency's own court system, they judge those whom they accuse of not complying and impose penalties on those whom they find guilty. The people who control those agencies and exercise their powers are never elected by the citizens, neither can they be voted out of office. They are not threatened by public pressure because they are imbedded into the power structure by Civil Service immunities. If all of the power now held by state and local governments to deal with the rights and properties of individual citizens were turned over to such a bureaucracy, the potential for abuse would be overwhelming.

The fact that ratification of ERA would permit such a radical shift of the power from state and local governments to the federal government makes ERA the most dangerous threat to Constitutional freedom the American people have ever faced, and sheds a revealing light on the motives of those who use "woman'S rights" as a smoke screen to achieve that purpose. It also helps explain why those who wish to exercise that power refuse to let the defeated amendment became a dead issue.