THE EQUAL RIGHTS AMENDMENT—A PLUMBER'S PERSPECTIVE

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No, I'm not a plumber. I am a recently retired State Representative from Illinois. My role in the effort to ratify the Equal Rights Amendment ("ERA") as a state representative, however, is very much akin to that of a plumber.

I recently sat on a panel of legal experts discussing the implications of the ERA in the 21st century. My colleagues on the panel, including academics and activists, discussed caselaw regarding the Fourteenth Amendment and how it might apply to a newly ratified ERA. They evaluated whether information and intentions that have developed since the time the ERA was introduced play a role in its interpretation—the short answer is that they do. They also evaluated similar laws in other nations and how those nations' experiences might inform our own upon ratification. In my view, these panelists were very much like the architects and engineers who design, build, and evaluate the functional aspects of a beautiful building: What works? What doesn't work? What could be improved? As a state representative, my job was different—I needed to get ten Republican pro-life legislators to vote for the ERA in Illinois. If academics and activists are the architects of the ERA, then my fellow state representatives and I are the plumbers installing the pipes of that beautiful edifice.

I should note that I am both a Republican and pro-life. I have been a lawyer for 26 years, and was 8 years old when efforts to ratify the ERA first began.[1] Around the same time, I was told the metric system would soon become the standard in the United States. Like the ERA, that didn't exactly pan out—but I digress. When ratification of the ERA became a real possibility in Illinois in 2017 and 2018, as a result of a significant mood shift in the state's electorate after the 2016 Presidential election, I did my research. It became apparent to me that the opposition to the ERA was, at best, misinformed, and at worst, intentionally misleading in its arguments. I made it my goal to educate my fellow pro-life Republicans in Illinois why voting yes on the ERA would be good for us—a goal, I might add, that had eluded Illinois for 46 years.

I then spent many months working to educate Illinois legislators on the ERA, and developed a few strategies along the way. I found the strategies that worked and did not work for talking to legislators about the ERA were very similar to strategies for talking to legislators about most other bills or resolutions. The ERA just had 46 years of baggage attached to it, and the emotional attachment on both sides of the issue had become "baked in."

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[1] On March 22, 1972, the U.S. Senate passed the ERA and sent it to the states for ratification, but it did not receive the three-fourths approval needed. *See* Chronology of the Equal Rights Amendment, 1923-1996, Nat'l Org. for Women (Jan. 2014), https://now.org/wp-content/uploads/2014/01/Chronology-of-the-Equal-Rights-Amendment.pdf [https://perma.cc/5QDU-PQC6].

There are two common strategies for talking to legislators that are not as effective as one might think: use of good policy and use of facts.

While good policy is always important, on its own, it rarely passes bills. Opponents can obfuscate or create false arguments; they can suggest unintended consequences of the bill or suggest ulterior motives for the bill; and of course, they can outright lie. They can also suggest a political cost if one votes against their wishes, or they can attempt to call in favors to get a legislator to vote against the bill. Good policy cannot overcome these challenges. Opponents of the ERA employed each and every one of these tactics, including, unfortunately, lying. Not every opponent used the same strategy, and many believed their views in good faith, but not all.

Similarly, facts alone are not enough to pass bills, but not, as you might think, because of the concern of "fake news". No, the difficulty with facts that I am referring to has always existed and is not sinister. The reality is that if an issue is legally or factually complicated, and a legislator cannot internalize the arguments and reduce them to an easily reproducible statement, she will be unable to convince many constitutents. Statements such as, "the legal experts assure me that the ERA will not result in public funding for abortions," will quickly be countered by, "well, I've got experts that say otherwise." A battle of non-present experts will not assist a legislator in convincing her constituents of the correctness of her vote.

Furthermore, constituents themselves must understand the argument to believe it. Most constituents are not constitutional scholars. As such, the facts, while certainly important, may not move a legislator to vote yes if she believes her constituents do not really understand them. Finally, there is an adage that I have found to be very true: "If you have to explain, you've lost."

So, if sound policy and facts don't help to pass the ERA, what does?

1) Political Reality: While this is dependent on the specific legislator one is approaching, if a Republican legislator is in a "swing" district (that is, a district that often shifts between Republican and Democratic control), there may be times when voting for the ERA will be in their best interest.

In my efforts, I had success with this strategy with at least one legislator. My argument was simple: while your base of hardcore Republicans may not agree with your vote, they certainly are not going to vote for the Democratic candidate. Therefore, you will not lose their vote in the upcoming election. Moreover, this election cycle was most certainly the "Year of the Woman."[2] As a representative, one should grasp at any opportunity to gain favor with women voters and avoid going against their opinion in a swing district. Voting for the ERA is an excellent opportunity to show women in these districts a commitment to their cause. Furthermore, the timing to create such pressure was excellent, as Illinois was heading into the November elections.

Now, this decision is not without its risks. A legislator in a swing district may get a primary opponent in the next election because of such a vote. My suggestion to this legislator would be to worry about getting reelected now, instead

[2] *See, e.g.,* Maya Salam, *2018: Year of the Woman, in 5 Powerful Quotes*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/2018/12/28/us/women-2018-biggest-stories-me-too.html [https://perma.cc/23FS-3JUZ].

of worrying about a primary that they will never have in two years if they fail to get re-elected. The best option here is to equip this sort of legislator with solid arguments for voting for the ERA (notwithstanding my above comments on facts and policy), and then urge them to work very hard in the next two years on *other* issues their base cares about. Quite frankly, the electorate's memory is short.

2) Discrediting the Opposition. This often isn't possible, because the opposition is usually credible, and the disagreement is only on policy differences. However, the opportunity to discredit opponents of the ERA exists, and I was able to use their own material to do so. This is important because if a legislator cannot trust the truthfulness of the opposition, she may also distrust the group's support for her and view the group as a "fair-weather friend." Lying, if proven, can kill an advocate's ability to move people to their side of an issue.

In the context of the ERA, a historically significant group called the Eagle Forum, founded by Mrs. Phyllis Schlafly,[3] put out a circular called "STOP ERA" that opined on the many evils the ERA would create.[4] That circular refers to, as a source of support for claims of the ERA's many evils, a report authored, in part, by Justice (then attorney) Ruth Bader Ginsburg called *Sex Bias in the U.S. Code*.[5] This report identified sex-based references in the United States Code and recommended solutions that Congress and the President could take to end "the bias which remains in the law."[6] Quite fortunately for the speed of my research, the Eagle Forum cited to specific pages in the report for their alleged evils.

While there were many, below I detail just two instances where the pamphlet openly lied in making its point against the ERA.

First, the pamphlet claimed the *Sex Bias* report demonstrates that if the ERA is ratified, the age for consent will have to be lowered to 12 years of age.[7] However, a quick review of the report reveals the truth: the ERA would not require such a change. Rather, that section of the report simply advocates for gender neutral language regarding sexual offenses, and does not make any policy argument on the age of consent.[8] This example is important because it demonstrates not only the

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[3] I use the prefix "Mrs." as Mrs. Schlafly would certainly prefer. One of her best-known quotes was "I'd like to thank my husband, Fred, for letting me be here today." *See, e.g.*, Hannah Kozlowska, *Phyllis Schlafly, Arch-Enemy of American Feminists, Died at 92*, QUARTZ (Sept. 6, 2016), https://qz.com/774527/phyllis-schlafly-conservative-activist-and-equal-rights-amendment-opponent-dies-at-92/ [https://perma.cc/U3HP-2LA6] (noting that Schlafly used to enjoy using this line "because it irritates the women's libbers more than anything").

[4] *See* Pamphlet, Eagle Forum, STOP ERA, https://eagleforum.org/era/flyer/ERA-07.pdf [https://perma.cc/DA6P-AQV5] [hereinafter Eagle Forum Pamphlet].

[5] *See* U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE (1977), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12se9.pdf [https://perma.cc/6HK9-WATL].

[6] *Id*. at iii.

[7] Eagle Forum Pamphlet, *supra* note 4, at 1 ("Supreme Court Justice Ruth Bader Ginsburg's book, Sex Bias in the U.S. Code, documents much more mischief from the Equal Rights Amendment: ...The age of consent for sex must be lowered to age 12. (p. 102)").

[8] *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 102 (recommending that Congress revise certain language in the criminal code, including "[e]liminat[ing] the phrase 'carnal knowledge of any female, not his wife who has not attained the age of sixteen years' and substitute a Federal, sex-neutral definition of the offense patterned after S. 1400 §1633: A person is guilty of an offense if he engages in a sexual act with another person, not his spouse, and (1) compels the other person to participate: (A)

untruth of the Eagle Forum's circular, but the level of deception utilized. No rational person reviewing that very section of the *Sex Bias* report could conclude as the Eagle Forum did. It is simply not possible. As such, this is strong evidence of an intentional falsehood.

Second, the pamphlet also claimed that the report indicates that the ERA "would abolish the wife's and widow's benefit in Social Security."[9] Again, the actual report indicates nothing of the sort and instead advocates for changes that will ensure that spousal benefits remain regardless of sex.[10] Again, the report only advocated for neutralizing sex-based language.

These examples serve to show that the opposition in this case was promulgating falsehoods. When confronted with that reality, some legislators I worked with stopped accepting those groups' calls and began to see that perhaps the great evils these groups warned about were simply untrue.

3) <u>Anecdotes</u>: Anecdotes are, fundamentally, stories, and legislators like and can easily repeat stories. Stories can convey more to the public about a bill than plain facts ever will. In this context, the persuasion lies in positive or negative stories that compel people to action. I often told stories of the fights that occurred in the mid-twentieth century in courts across the country, including the U.S. Supreme Court, over women's ability to serve as bartenders.[11] While it seems preposterous now to suggest that women should not be allowed to have such a job, there was a time when this was prohibited in some states. It was through the efforts of ACLU attorneys (including then-attorney Ginsburg)—arguing for and establishing an "intermediate standard" of review for gender discrimination in statutes—that such laws were struck down. This story shows how far women have had to come, but when placed next to women's continuing struggle, which has generated, among other things, the #MeToo movement, it serves as a stark reminder of the distance yet to go and why the ERA is needed. This is an example of an anecdotal comparison that worked.

4) <u>Emotion</u>: Legislators are human too, and many have a strong desire not to disappoint a daughter or to be on the right side of history. Despite legislators' cynicism, most do, in fact, care about doing good.

In fact, I know one of my "yes" voters on the ERA did so for his daughter. And one of my proudest moments for a fellow legislator came during the ERA debate on the Illinois House floor. This Representative got up and said (and I

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by force or (B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping; (2) has substantially impaired the other person's power to appraise or control the conduct by administering or employing a drug or intoxicant without the knowledge or against the will of such other person, or by other means; or (3) the other person is, in fact, less than 12 years old.").

[9] Eagle Forum Pamphlet, *supra* note 4, at 1 ("Supreme Court Justice Ruth Bader Ginsburg: Her book makes clear that ERA would eliminate the Social Security benefits of wives, widows, mothers and grandmothers.").

[10] *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 45-51.

[11] *See, e.g.*, Goesart v. Cleary, 335 U.S. 464, 467 (1948) (upholding a Michigan law that restricted women from working as bartenders); *see also* Jeanette Hurt, *A Short History of Women Working Behind the Bar*, SUPERCALL (Feb. 14, 2017), https://www.supercall.com/culture/women-bartender-history [https://perma.cc/Z4WM-JK3G].

paraphrase): "I am tired of my religion being used against my sex. I refuse to accept that my religion means that women can't have equal rights. I will proudly vote yes and reject the arguments of those who are using my religion for what must be other unstated and ugly reasons." This Representative knew it was her time to stand up for what is good and right.

5) Pointing to Evidence that Something Did Not Happen: This involves showing that the opponents' arguments are incorrect, because the adverse consequences they describe did not occur in other states with similar statutes.

In the context of the ERA, we have such examples. A great many states have passed state level ERAs.[12] None of the supposed evils have occurred even though these state laws (or constitutional provisions) have been on the books for many decades. Indeed, Illinois itself has had such a constitutional provision since the 1970s.[13] As such, it was very easy for me to say: "Look at our own state—where is the evidence that the opponent's claims will occur? It doesn't exist."

However, there are a few states, such as Connecticut and New Mexico, that seemed to indicate that adopting a state ERA would mandate public funding for abortions.[14] This was difficult to address with my pro-life colleagues as the topic requires nuance, and as I mentioned above, when you have to explain, you lose. In this situation I had no choice but to educate, in detail, those legislators who were concerned about such cases. I succeeded in some instances and failed in others. As with all legislative efforts, nothing is perfect and you work with what you've got.

For the main cases, which came out of Connecticut[15] and New Mexico,[16] my explanation was reduced to this: these cases did not stand for the bare assertion that the ERA necessitates public funding for abortion. The facts of the New Mexico case, specifically, were that the state had attempted to change the definition of "medical necessity"—so that the term had a different meaning for women as compared to men—in order to limit state funding through Medicaid of abortions. Previously, the term, "medical necessity" had been defined as whatever the medical profession deemed necessary in *any* contemplated procedure. New Mexico attempted to change the meaning for women in the context of pregnancy so as to exclude abortion as an option to correct certain life-threatening conditions. The Supreme Court of New Mexico held that this change violated the state's Equal Rights Amendment, because it did not apply the same standard of medical necessity to both men and women.[17] The case stands for the proposition that a state cannot have one definition of "medical necessity" for men and a different one for women. What this case *does not* stand for is that enactment of the ERA requires states to

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[12] *See Ratification Info State by State*, ERA, https://www.equalrightsamendment.org/era-ratification-map [https://perma.cc/Z4WM-JK3G].
[13] Ill. CONST. art. I, §§ 17-18
[14] *See infra* notes 15 and 16.
[15] *See* Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).
[16] *See* New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).
[17] *Id*. at 845 ("We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance.")

allow abortions at will or to publicly fund abortions. All it stands for is a uniform "medical necessity" standard regardless of sex, which I believe is appropriate.

That explanation, while fairly concise, is typically too long and nuanced to persuade legislators and their constituents. But, again, you work with what you've got.

6) <u>Browbeating</u>. This was not my approach, but when the vote finally occurred, there was a short span of time when the total was two votes short of passing. A legislator voting in favor of the ERA noticed that his two seatmates had not voted at all. This pro-ERA legislator began to yell at them, telling them that if they did not vote for this, they would never have a woman's vote ever again and would never be re-elected. Both, at the last possible moment, voted yes and changed the course of the ERA's history. While my enthusiastic browbeating colleague's arguments may not have worked in a calmer environment, he knew what would work in the emotionally charged House of Representatives on that evening in Illinois. You work with what you've got, and he worked with fear and panic.

While some might be disappointed to learn that legislators do not base their decisions purely on facts or policy, my hope is that in explaining what does and does not work in persuading legislators, I have equipped those who continue to advocate for the ERA with the truth of how the "sausage gets made." Additionally, not a single strategy outlined above includes lying about, mischaracterizing, or manipulating facts or law. The strategies are ethical and can be used in good faith. Rest assured, opponents will use everything I've suggested and more.

In the end, we won, and on May 30, 2018[18], the ERA was ratified by the great State of Illinois.[19] We have one more state to persuade in order to potentially finish the country's ratification of the ERA,[20] and there will be additional work to do at the federal level. It is my sincere hope that my reflections and this "war story" will help one more state finish the work that was started so long ago. This is our generation's chance to correct a long standing wrong. I look forward to the day this fight is finished with victory.

I finish as I started: "Help Wanted: a plumber willing to work on finishing a grand edifice in the states of Virginia, North Carolina, Georgia, and others. Passion is required, all other skills can be learned on the job."

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[18] As a personal note, May 30th is my wedding anniversary. My wife told me that giving her equal rights was about the best anniversary present a woman could receive. As I have said, you work with what you've got!

[19] S.J. Res. Const. Amend. 4, 100th Gen. Assemb., Reg. Sess. (Ill. 2017), http://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004eng.pdf [https://perma.cc/LT5M-CD6T].

[20] To amend the Constitution, a minimum of 38 states must agree, and Illinois is the 37th state to ratify the ERA. However, even if a 38th state does ratify the ERA, it remains unclear whether this would finish the country's ratification of the Amendment. For a deeper look into the possible hurdles to ratification of the ERA in such a circumstance, see John F. Kowal, *The Equal Rights Amendment's Revival: Questions for Congress, the Courts and the American People*, N.Y.U. Rev. of L. and Soc. Change, [https://socialchangenyu.com/?post_type=harbinger&p=12184&preview=true]