



### **Efforts to Resurrect the Equal Rights Amendment**

Considerable ideological and procedural controversy has arisen over recent attempts to resurrect the Equal Rights Amendment. The proposed wording of the ERA seems innocuous enough: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>1</sup> However, its interpretation has been hotly debated.

Proponents maintain that such an amendment will reduce normalized, sex-based disparities such as unequal pay for equal work, prejudiced hiring and promotion practices, chauvinism in legal cases concerning child custody or domestic violence, and the absence of paternity leave.<sup>2</sup> Perhaps the primary concern is that a federal ERA could enshrine abortion as a constitutionally protected right.<sup>3</sup>

In 1985 Ruth Bader Ginsburg advocated that reproductive autonomy—a due process issue clearly tied to abortion rights—is in fact intrinsically connected with gender-based classification and equal-rights protections. Ginsburg admits that the two seem very different to the public. Removing gender-based classifications for employment opportunities and benefits, alimony, and so on is relatively noncontroversial,

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1. Equal Rights Amendment, accessed January 6, 2020, <https://www.equalrightsamendment.org/>.

2. “Equal Rights Amendment,” Rep. Carolyn B. Maloney, accessed January 27, 2019, <https://maloney.house.gov/issues/womens-issues/equal-rights-amendment>; and Maggie Astor, “The Equality Rights Amendment May Pass Now. It’s Only Been 96 Years,” *New York Times*, updated November 7, 2019, <https://www.nytimes.com/2019/11/06/us/politics/virginia-ratify-equal-rights-amendment.html>.

3. Bob Marshall, “Leftists Resurrecting ‘Equal Rights Amendment’ to Make US Constitution Pro-Abortion,” *LifeSiteNews.com*, November 7, 2019, <https://www.lifesitenews.com/opinion/leftists-resurrecting-equal-rights-amendment-to-make-us-constitution-pro-abortion>.

especially compared with the turbulent passage of laws expanding or restricting access to abortion. However, the burdens of an unintended pregnancy—such as stigma, major responsibility for childrearing, and so on—fall primarily on women. This disproportionate burden, Ginsberg argues, is an artifact of social classification, not a natural effect of motherhood. Consequently, abortion extends far beyond medical necessity or social pragmatism to include “a woman’s autonomous charge of her full life’s course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.”<sup>4</sup> In this sense, Ginsberg argues, abortion becomes an intrinsic aspect of the equal protection of life, liberty, and the pursuit of happiness.

As roundabout as this argument might appear, concerns about its effectiveness are supported by court rulings on state-level equal-treatment laws. For example, in *New Mexico Right to Choose/NARAL v. Johnson*, the New Mexico Supreme Court decided that, under the state’s ERA, taxpayer funds can be used to pay for medically necessary abortions for Medicaid-eligible women. The court reasoned that failing to do so creates different standards of medical necessity for men and women.<sup>5</sup> Another concern is that the ERA would promote transgender ideology and further erode the biological significance of sex.<sup>6</sup> This concern seems to be supported by the proposed Equality Act, which states, “The term ‘sex’ includes . . . sexual orientation or gender identity.”<sup>7</sup> Finally, since the 1970s, critics have voiced concerns over a variety of possible ramifications of the ERA, such as the inclusion of women in the draft.<sup>8</sup>

The way in which proponents attempt to pass the ERA also has drawn harsh scrutiny. The ERA originally was proposed in 1923, and Congress passed the amendment in 1972; but only thirty-five states ratified it before the 1982 deadline, leaving it three states short of the thirty-eight ratifications required to become part of the US Constitution. However, Nevada, Illinois, and Virginia ratified the ERA in 2017, 2018, and 2020, respectively. Supporters claim that the 1982 deadline is irrelevant. It already was extended once, and Representative Jackie Speier (D-CA) suggests that it similarly can be removed all together. All previous votes to ratify the amendment would be counted retroactively. However, critics maintain that because some states have also rescinded their ratification, and because the deadline has passed, the ERA must be re-ratified by all the states.<sup>9</sup>

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4. Ruth Bader Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” *North Carolina Law Review* 63.2 (1985): 383.

5. *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788 (1998), § 1 and 2. According to the judges, “An abortion is ‘medically necessary’ when a pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.”

6. Marshall, “Equal Rights Amendment.”

7. Equality Act, H.R. 5, 116th Cong., § 1101(a)(4).

8. Marshall, “Equal Rights Amendment.”

9. Astor, “Equality Rights Amendment”; Marshall, “Equal Rights Amendment”; and Veronica Stracqualursi, “Virginia Reaches Long-Awaited Milestone by Ratifying Equal

## Promoting Abortion with USAID Funds

In September 2019 an amendment submitted by Senator Jeanne Shaheen (D-NH) to the Senate’s State–Foreign Operations Appropriations bill drew criticism because, despite the amendment’s seemingly straightforward goals, opponents maintained that it “undermines pro-life reforms at USAID.”<sup>10</sup> Although the Shaheen amendment was not included in the final appropriations bill,<sup>11</sup> it is notable because, as with the ERA, considerable controversy involved its ambiguous equal-rights language.

Concern over the amendment was twofold. First, it sought to increase aid for family planning and reproductive health services (FP/RH) by \$57.6 million. In 2017 President Donald Trump issued a memorandum reinstating and expanding the Mexico City Policy.<sup>12</sup> Under the resultant Protecting Life in Global Health Assistance Policy, foreign nongovernmental organizations that perform or promote abortions are ineligible to receive not only federal funds, but all federal global health assistance.<sup>13</sup> However, the additional appropriations proposed by Shaheen would still be available to US NGOs that promote abortion overseas. The strong emphasis on FP/RH in the amendment also implicitly promoted contraception and abortion rather than an integrated approach to maternal–child health.<sup>14</sup>

As a second concern, the amendment laid out a reporting mechanism through which USAID would inform the Senate Committee on Appropriations when contractors discriminate against beneficiaries on the basis of “race, color religion, sex (including gender, identity, sexual orientation, and pregnancy),” age, and so on.<sup>15</sup> According to a Shaheen aide, this measure was intended for situations, for example, where an unmarried woman is denied prenatal care.<sup>16</sup> Pro-life legislators worried that in practice, however, providers would be accused of age-based discrimination if they decline to provide contraceptives to minors without parental consent. Similarly, contractors who do not provide abortions could run afoul of the regulation for pregnancy-based

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Rights Amendment, but Legal Fight Looms,” CNN, January 27, 2020, <https://www.cnn.com/2020/01/27/politics/virginia-equal-rights-amendment-trnd/index.html>.

10. Senate Pro-Life Caucus, “Pro-Life Concerns in the Senate FY 2020 State/Foreign Operations Appropriations.”

11. “SBA List Celebrates Rejection of Anti-Life Policies in Gvmt. Spending Bill,” press release, Susan B. Anthony List, December 16, 2019, <https://www.sba-list.org/newsroom/press-releases/sba-list-celebrates-rejection-of-anti-life-policies-in-gvmt-spending-bill>.

12. The Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 25, 2017).

13. “Global Health Legislative and Policy Requirements,” USAID, updated October 3, 2019, <https://www.usaid.gov/global-health/legislative-policy-requirements>.

14. Senate Pro-Life Caucus, “Pro-Life Concerns.”

15. Amendment added by Senator Jeanne Shaheen, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020, S. 2583, 116th Cong.; and 48 C.F.R. §175.7038.

16. Jennifer Shutt, “Foreign Aid Rider Tangles Up Final Spending Talks,” *Roll Call*, December 6, 2019, <https://www.rollcall.com/news/congress/foreign-aid-rider-tangles-final-spending-talks>.

discrimination. Ultimately, the reporting mechanism would bypass due process and create a “shame list” based on ideologically driven complaints.<sup>17</sup>

In practice, this sort of implementation would discourage many pro-life and faith-based organizations from partnering with USAID.<sup>18</sup> Also at issue is a perceived attack on the Trump administration’s efforts to increase partnerships with religious NGOs, which the administration maintains is a necessary aspect of any effective development strategy. Shaheen stressed that these fears misrepresent the intent and scope of the amendment. She said it did not target faith-based groups or promote abortion but merely ensured that “any funds distributed around family planning should be done in accordance with the law,” including the provision of contraceptive FP/RH.<sup>19</sup>

### **Respectful Treatment of Fetal Remains**

Bills introduced in both chambers of Congress promote the respectful treatment of fetal remains after an abortion. Senator Mike Braun (R-IN) proposed the Dignity of Aborted Children Act, which would require the provider or parents to inter or cremate fetal remains after an abortion procedure. Although providers could be fined or imprisoned for violating the law, parents would not face prosecution.<sup>20</sup> The bill was penned after 2,411 preserved fetuses were found in autumn 2019 at both the home and a business property of the late Ulrich Klopfer, an abortion provider in Indiana. The discovery was shocking for individuals on both sides of the abortion debate. Rachel Kelly, who twice had been a patient of Klopfer, said, “I was horrified and heartbroken—I was just filled with so many feelings.”<sup>21</sup> A similar bill was introduced in the House in early 2019 by Representative Robert E. Latta (R-OH). Under his proposed Protecting the Dignity of Unborn Children Act of 2019, disposing of fetal remains in a landfill would be punishable by a fine or imprisonment. As in the Senate bill, a mother could not be prosecuted.<sup>22</sup>

Similar laws enacted by state legislatures have been challenged in court on the grounds that they place excessive burdens on providers, that the increased cost of abortions disproportionately affects low-income women, that women’s personal beliefs are not respected, and that women would be penalized for miscarriages.<sup>23</sup> In May 2019 the Supreme Court reversed a lower-court ruling invalidating Indiana’s

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17. Senate Pro-Life Caucus, “Pro-Life Concerns.”

18. *Ibid.*

19. Shutt, “Foreign Aid Rider.”

20. Dignity of Aborted Children Act, S. 2590, 116th Cong.

21. Stefano Esposito, “South Suburban Abortion Doctor Who Hid Thousands of Fetuses Carried His Secrets to His Grave,” *Chicago Sun Tribune*, October 25, 2019, <https://chicago.suntimes.com/2019/10/25/20921224/abortion-doctor-ulrich-klopfer-fetuses-fetal-remains-mystery-crete-township-will-county>.

22. Protecting the Dignity of Unborn Children Act of 2019, H. R. 1671, 116th Cong.

23. Kimberly Leonard, “GOP Senators Introduce Fetal Burial law after Discovery of 2,246 Abortion Remains in Ulrich Klopfer Garage,” *Washington Examiner*, September 27, 2019, <https://www.washingtonexaminer.com/policy/healthcare/gop-senators-introduce-fetal-burial-law-after-discovery-of-2-246-abortion-remains-in-ulrich-klopfer-garage>.

fetal burial law, saying that such a law does not “impose an undue burden on a woman’s right to obtain an abortion.” Furthermore, the law is within, although “not perfectly tailored to,” the state’s interest in the “proper disposal of fetal remains.”<sup>24</sup>

### Prohibiting Abortions Due to Down Syndrome

Identical bills have been proposed in the House and Senate, both titled the Down Syndrome Discrimination by Abortion Prohibition Act.<sup>25</sup> The proposed law would make it illegal to provide an abortion if the mother’s decision to terminate her pregnancy is influenced by the suspicion that her child has Down syndrome. The bills mention that this belief could be based either on the results of prenatal testing and diagnosis or on “any other reason.” An abortion provider would be required to ask a woman if she has reason to believe her child has Down syndrome and to inform her of the prohibition against obtaining an abortion on the basis of this disability. The bills also give the father a right to bring civil action if an abortion is provided. Like other anti-abortion bills, the mother could not be prosecuted or held civilly liable for violating this law.

The legislation’s introduction coincided with Down Syndrome Awareness Month. A press release from Senators James Lankford (R-OK) and Jim Inhofe (R-OK) and Representative Ron Estes (R-KS) noted that, although “individuals with Down syndrome enrich countless lives and communities,” more than two-thirds of unborn children with a positive prenatal diagnosis are aborted in the United States. Inhofe described this as “a heinous effort to eliminate a vibrant community through abortion.”<sup>26</sup>

In *Box v. Planned Parenthood*, which involved a similar Indiana law, the Supreme Court declined to rule on disability-related abortions until the issue has been examined more thoroughly by lower courts.<sup>27</sup> Nevertheless, Justice Clarence Thomas, writing for the majority, stated that such laws “promote a State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>28</sup>

Some critics insist that such laws would encourage providers to withhold information needed for medical decision making—in particular, during high-risk pregnancies—as well as discourage discussion and erode trust among patients and physicians. Such critics downplay the concern over a eugenic mentality, insisting that disability is not a significant factor for those deciding whether to have an abortion. Conversely, they see such proposed legislation as “a brilliant tactic” to use “disablism to sneak past an abortion ban or put abortion advocates in an uncomfortable

24. *Box v. Planned Parenthood of Indiana and Kentucky*, 587 U.S. \_\_\_\_ (2019), 2–3.

25. Down Syndrome Discrimination by Abortion Prohibition Act, H.R. 4903, 116th Cong.; and Down Syndrome Discrimination by Abortion Protection Act, S. 2745, 116th Cong.

26. “Senators Lankford, Inhofe Introduce Legislation to Prohibit Discrimination of Babies with Down Syndrome,” press release, October 30, 2019, <https://www.lankford.senate.gov/news/press-releases/senators-lankford-inhofe-introduce-legislation-to-prohibit-discrimination-of-babies-with-down-syndrome>.

27. *Box* 587 U.S. at 3.

28. *Ibid.*, slip op. at 2 (Thomas C., concurring).

position.”<sup>29</sup> Although less incredulous of the bills’ motives, other commentators suggest that, rather than restricting abortion, lawmakers would have a greater effect by pursuing social and health care policies that create an environment where “mothers do not bear complete responsibility for the care of their children, and where disability itself is destigmatized.”<sup>30</sup>

### **Separate Insurance Payments for Abortion**

In December 2019 the US Department of Health and Human Services issued a final rule stating that, to be compliant with the Affordable Care Act, insurance providers must collect separate premium payments for general medical services and abortion-related services not allowed under the Hyde-Weldon amendment. (Hyde-Weldon does not apply to abortions in cases of rape, incest, life-threatening maternal conditions, and so on.) HHS enacted the new rule to ensure that public funding—in this case premium tax credits and cost-sharing reduction funds—does not pay for abortions.<sup>31</sup> Critics point out the burden this rule places on patients and insurance providers. For example, compliance will cost an additional \$229 million dollars each year by 2023. HHS has proposed clarifying the rule so that patients do not lose coverage if they inadvertently fail to pay both bills.<sup>32</sup>

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29. S. E. Smith, “Disabled People Are Tired of Being a Talking Point in the Abortion Debate,” *Vox*, May 29, 2019, <https://www.vox.com/first-person/2019/5/29/18644320/abortion-ban-2019-selective-abortion-ban-disability>. See also “Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly,” Guttmacher Institute, January 2020, <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly>.

30. Pasquale Toscano and Alexis Doyle, “Legal Abortion Isn’t the Problem to Be Solved,” *The Atlantic*, June 19, 2019, <https://www.theatlantic.com/ideas/archive/2019/06/selective-abortion-bans-treat-disability-tragedy/592000/>.

31. Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 FR 71674 (Dec. 27, 2019).

32. Katie Keith, “HHS Acknowledges Larger Costs in Finalizing Rule on Separate Transactions for Abortion Coverage in Marketplaces,” *Health Affairs Blog*, December 23, 2019, <https://www.healthaffairs.org/doi/10.1377/hblog20191223.862619/full/>.