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Emily Yoder

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### Congress and the ERA

The Equal Rights Amendment was a constitutional amendment that guaranteed that the “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> In this paper I will analyze the policy process in the critical years from the ERA's discharge from committee in 1970 to its passage through Congress in 1972 through both primary documents and scholarly opinion. By thoroughly examining the controversy over the ERA through the views and strategies of those advocating and opposing it, I will show how the momentum for social change characterized by the ERA is reflected in the governing institution of the United States, and furthermore I will illustrate how the process of amending the Constitution is used to advance or retract social agendas.

The ERA was drafted in 1923 by Alice Paul and the recently formed National Women's Party (NWP) and introduced in Congress the same year by Senator Charles Curtis (R-KS) and Representative Daniel Anthony (R-KS).<sup>2</sup> With the passage of the Nineteenth Amendment in 1920 women were granted the right to vote, but the amendments passage also provoked substantial controversy about the proper place of women in society.<sup>3</sup> Many of the women who had advocated for suffrage were concerned with protecting women and by extension the children who were a woman's primary responsibility, from mistreatment and exploitation.<sup>4</sup> These protectionists, among whom Eleanor Roosevelt was a vigorous advocate, felt suffrage was necessary for the

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1 Volume 86, *United States Statutes At Large* (pages 1523–1524)

2 Zimmerman, Joan G, “The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital*, 1905-1923”, *The Journal of American History* 78, no. 1 (1991): 223, <http://www.jstor.org>.

3 David E. Kyvig, “Historical Misunderstandings and the Defeat of the Equal Rights Amendment”, *The Public Historian* 18, no. 1 (1996): 48, <http://www.jstor.org>.

4 *Ibid.*, 49.

purpose of preventing abuse. After the Nineteenth Amendment they turned their attention to advocating legislation such as the Cable Act of 1922 which allowed American women who married foreigners to remain U.S. citizens, the Sheppard-Towner Act of 1921 which allotted federal aid for maternal and infant healthcare, and the failed Child Labor Amendment.<sup>5</sup> However Alice Paul felt that women's status as second-class citizens was enforced by protective legislation and absolute legal equality was necessary to combat discrimination. Both traditionalists, who believed that women belonged in the home taking care of the family and protectionist feminists, were vehemently opposed to the ERA's central demand, and this coalition managed to prevent the ERA from passing, despite its reintroduction in every Congress from 1923 to 1972.<sup>6</sup>

However, substantial legislative and social developments between 1923 and 1970 were integral in creating support for the ERA. Although action on the ERA was slight in Congress, in the period of 1923-1950 there were Judiciary Subcommittee hearings on the ERA almost every session in both the House and the Senate, although this did not always result in a favorable report to the respective floors and the ERA often died in committee.<sup>7</sup> In the House hearings ceased altogether after 1948 because the chair of the Judiciary Committee, Congressman Emmanuel D. Celler (D-NY), refused to schedule them.<sup>8</sup> In 1950 Senator Carl Hayden (D-AZ) introduced what came to be known as the Hayden rider, which stipulated that the passage of the ERA would not affect any existing protective legislation. Equal rights advocates preferred to kill such legislation rather than see notions regarding women's separate and different nature preserved in the

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5 Mary Frances Berry, *Why ERA Failed* (Indianapolis: Indiana University Press, 1986), 56.

6 Kyvig, 49-50.

7 Joan Hoff-Wilson, *Rights of Passage: the Past and Future of the ERA* (Bloomington: Indiana University Press, 1986), 13-15.

8 Janet. K. Bole, *The Politics of the Equal Rights Amendment: Conflict and the Decision Process* (New York: Longman, Inc., 1979), 38.

Constitution.<sup>9</sup> While the ERA was unsuccessful in Congress, other equalizing legislation prevailed. Both the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act were pivotal in increasing the ability of women to combat sex discrimination, particularly in the workplace. Additionally, the development of a vocal women's rights movement in the 1960's increased awareness of women's position in society and demand for increased legal equality.<sup>10</sup> Organizations such as the National Organization for Women (NOW), formed to support enforcement of the sex discrimination provisions of the 1964 Civil Rights Act. Meanwhile, the NWP and the Women's Equity Action League (WEAL) were instrumental in raising awareness and support for the Equal Rights Amendment.<sup>11</sup>

Despite burgeoning support for the ERA by 1970, Celler continued to refuse to schedule hearings in the House Judiciary Committee, as he had done for the past almost twenty years.<sup>12</sup> Celler was extremely powerful member of the House who as chair, set the agenda and tone for the Judiciary Committee<sup>13</sup>. Therefore his dislike of the ERA effectively impeded any House action.<sup>14</sup> He had also objected to the inclusion of "sex" in Title VII of the 1964 Civil Rights Amendment, calling it "illogical" and "improper".<sup>15</sup> The Senate Subcommittee on Constitutional Amendments held hearings in May 1970 at the instigation of Senator Birch Bayh (D-IN), chair of the committee. This encouraged the pursuit similar action in the House. In particular, Congresswoman Martha W. Griffiths (D-MI), who testified before Bayh's committee asserting the need for an equal rights amendment in the face of complacent courts and continued

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9 Kyvig, 50.

10 Berry, 60-62.

11 *Ibid.*, 62.

12 George, *Martha W. Griffiths*, (Washington: University Press of America, Inc., 1982), 149-156.

13 Lynette P. Perkins, "Member Recruitment to a Mixed Goal Committee: the House Judiciary Committee," *The Journal of Politics* 43, no. 2 (1981), 360, <http://www.jstor.org>.

14 *Ibid.*, 163.

15 *Ibid.*, 150

discrimination, felt the timely relevance of the ERA.<sup>16</sup> Griffiths herself was a tenacious advocate for women's rights in the House, from supporting the inclusion of "sex" in the non-discriminatory clauses of Title VII of the 1964 Civil Rights Amendment, to her attack on United Airlines for its policy of hiring only young, attractive, single women as flight attendants.<sup>17</sup> Griffiths knew that protective legislation, which governed what jobs and how many hours women could work only confined them to poorly paying occupations with little opportunity for advancement. For example, there was no law keeping women from holding multiple, low salary positions, but the jobs of executive were out of reach because state-level protective restrictions on working hours.<sup>18</sup> In her early political career Griffiths felt that the job of striking down discrimination belonged to the Supreme Court, although she was firmly committed to the Democratic Party's pro-ERA position. By the middle of the 1960's she was convinced that the courts were unsympathetic to women's rights issues and became the amendment's chief sponsor.<sup>19</sup>

Understanding that Cellar would never allow the ERA to be released from committee, on June 11, 1970 Griffiths delivered a discharge petition to the House clerk.<sup>20</sup> A discharge petition is a little used procedure that, by acquiring a majority of signatures, removes a bill from committee and sends it directly to the floor for debate and vote.<sup>21</sup> In Griffiths' case she was able to use her considerable influence as a senior member of the House Ways and Means Committee,<sup>22</sup> as well as her tenacity in personal interactions to gather the required number of signatures, sometimes

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16 Senate Subcommittee on Constitutional Amendments, *Hearings on the Equal Rights Amendment*, 91<sup>st</sup> Congress, 2<sup>nd</sup> see., May 5, 1970, 24-26.

17 George, 149-156.

18 *Ibid.*, 156-157.

19 *Ibid.*, 168.

20 *Ibid.*, 170.

21 Andrew D. Martin and Cynthia Wolbrecht, "Partisanship and Pre-Floor Behavior: the Equal Rights and School Prayer Amendments", *Political Research Quarterly* 53, no. 5 (2000): 712, <http://www.jstor.org>.

22 *Ibid.*, 717.

taking Congressmen by the arm and leading them down to sign the petition.<sup>23</sup> In the evenings Griffiths would call activists Virginia Allen and Marguerite Rawalt of Business and Professional Women (BPW) with the names of those who had yet to sign the petition. Allen and Rawalt would then bombard the reluctant Representatives with telegrams urging them to sign.<sup>24</sup> Although there were other women in the House, such as Edith Green (D-OR) and Bella Abzug (D-NY) who supported the ERA, the discharge petition seems to have been the work of Griffiths alone. On August 10, 1970 the ERA was discharged from the House Judiciary Committee and sent to the floor for a vote where it passed, 352-15, after one hour of debate.<sup>25</sup> The overwhelming success of the ERA on the floor of the House can be attributed to several factors. First was increased public awareness and backing for women's rights. By 1970 many polls indicated a nation-wide concurrence on the necessity of women's equality and the ERA had received endorsements from both President Lyndon Johnson and by 1972, President Richard Nixon.<sup>26</sup> Furthermore legal opinion was turning in support of the amendment, culminating in the 1971 Supreme Court decision *Reed v. Reed*, which ruled that laws distinguishing between men and women, in the case of *Reed v. Reed* the laws dealt with the administration of estates, were unconstitutional.<sup>27</sup> With this level of popular and scholarly support the only thing which had been blocking consideration of the amendment was Celler's refusal to schedule hearings.

After passing in the House, the ERA went to the Senate, where the full Senate Judiciary Committee began a series of hearings on the ninth, tenth and fifteenth of September. The main issue of contention during these hearings was the whether the amendment was necessary or if sex

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23 George, 170.

24 *Ibid.*, 171.

25 *1970 Congressional Quarterly Almanac*, Congressional Quarterly, Inc., Washington, DC, 1971.

26 Berry, 62-63.

27 Sarah A. Soule and Braydon G. King, "The Stages of Policy Process and the Equal Rights Amendment, 1972-1982," *American Journal of Sociology* 111, no. 6 (2006): 1874 <http://www.ebscohost.com>.

discrimination was best eliminated through individual court cases and specialized legislation. Critics of the ERA worried that the amendment was too large, too vague and would result in the retraction of much needed legal protections for women in the workforce. Advocates of the ERA argued, much as Alice Paul did when she first drafted the amendment, that those protections were both unnecessary and only justified discriminatory practices.<sup>28</sup> Senator Sam J. Ervin, Jr. (D-NC) disagreed. Insisting that “the Good Lord, who has been designated as ‘He’ or ‘She’ in a placard down here, decrees that there are physiological and functional differences between men and women, differences which can’t even be abolished by a constitutional amendment” Ervin charged that what the ERA activists needed was “a prayer to forgive them because they know not what they do”.<sup>29</sup> Debate began in the Senate on October 7, 1970 where Ervin argued that the ERA would take away many of the rights women enjoyed. Ervin introduced an amendment on October 12 that would exempt women from the draft. Despite the opposition of Bayh, who insisted that Ervin was only attempting to kill the legislation, Ervin’s amendment passed by a roll-call vote of 36-33. Additionally Senator Howard Baker (R-TN) then attached an amendment to the ERA which would allow for nondenominational prayer in public schools, and move which many felt was underhanded and uncalled for.<sup>30</sup> The ERA was never voted on in the Senate and no further action was taken until the next session of Congress.

The ERA was reintroduced in the House Judiciary Subcommittee in March of 1971, this time with added provisions suggested by Ervin in the previous Congressional session: a seven year time limit for ratification and an implementation date starting two years after

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28     *Ibid.*

29     Senate Subcommittee on Constitutional Amendments, *Hearings on the Equal Rights Amendment*, 91<sup>st</sup> Congress, 2<sup>nd</sup> sess., October 9, 1970.

30     George, 173.

ratification.<sup>31</sup>This was not the first time Congress had set a time limit for ratification. The power of Congress to set time limits on the ratification of amendments was affirmed in 1922 by a Supreme Court decision. In 1917 Senator Warren Harding had attempted to thwart the Prohibition constitutional amendment by adding a seven-year time limit for ratification, conjecturing that ratification would take longer than that. Harding was mistaken and the Eighteenth Amendment was ratified in less than five years.<sup>32</sup>Despite the impedimentary precedent set by earlier time limits and although there was no legal requirement for such a limit, Griffiths and Bayh accepted Ervin's proposition. Both felt that the widespread support for the ERA in both houses of Congress prefigured an easy ratification.<sup>33</sup>Hearings were conducted on March 24, 25, 31 and April 1, 2 and 5 of 1971. During these hearings both Griffiths and Ervin testified, the former in favor and the latter against, as well as other lawmakers, representatives from the ACLU (pro-ERA) and AFL-CIO (anti-ERA). Like the Senate hearings of the previous Congress, testimony centered on whether or not the ERA was necessary or if it would jeopardize the existing protections of women.<sup>34</sup>Ervin worried that the ERA would remove the "primary duty [of the husband] to support his wife or his children" and give the wife "exactly the same responsibilities in this field".<sup>35</sup>The Judiciary Subcommittee reported the ERA to the floor of the House on June 22, 1971 with an amendment stating that the ERA would not impair existing legislation exempting women from the draft and an amendment distinguishing between the rights of citizens and non-citizens.<sup>36</sup>After voting down both the committee amendments, the ERA was passed, in a roll-call vote of 354-23 on October 12. Of the eleven women in the House of

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31 George, 177.

32 Kyvig, 56.

33 *Ibid.*

34 *1971 Congressional Quarterly Almanac*. Congressional Quarterly Inc; Washington, DC, 1972.

35 House Judiciary Committee, *Hearings of the Equal Rights Amendment*, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., March 24, 1971, 76-77.

36 *1971 Congressional Quarterly Almanac*. Congressional Quarterly Inc; Washington, DC, 1972.



Representatives, nine voted for the amendment. Edith Green was not present at the time although she supported the amendment. Leonor K. Sullivan (D-MO) voted against the ERA as she had done in 1970.<sup>37</sup>

The argument over what legal differences, particularly in the workplace, applied to men and women based on their physical differences was central to the ERA debate. Opponents of the ERA contended that women were on average smaller and weaker than men, with the added distinction of being able to bear children. They believed the state laws which governed how many hours a woman could work or how much weight she could lift were essential to protect women in the workforce. As Myra K. Wolfgang testifying on behalf of the AFL-CIO in May 1970 stated: “Has culture created the differences in the size of the hands, in muscular mass, in respiratory capacity? Of course not, the differences are physical and biological. Nothing can alter that fact”.<sup>38</sup> A woman also had the responsibility for raising the children and keeping the home, as Wolfgang said, “the “dual role of women in our modern society, makes protective legislation a necessity”.<sup>39</sup> The fear was that ratification of the ERA would require women to work longer hours, which would negatively impact their roles as homemakers and childcare givers. In the 1971 House hearings Wolfgang gave an example of the social decay resulting from too much pressure on working mothers. One of these “harassed working mothers discovered that the home was being used by her 15-year-old daughter as the ‘place’ to go after school hours for ‘pot parties’”.<sup>40</sup> According to Kenneth A. Meiklejohn, also testifying on behalf of the AFL-CIO in the May, 1970 Senate hearings the ERA would eliminate “all forms of protections afforded

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37      *1971 Congressional Quarterly Almanac*, Congressional Quarterly, Inc; Washington, DC, 1972.

38      Senate Subcommittee on Constitutional Amendments, *Hearings on the Equal Rights Amendment*, 91<sup>st</sup> Congress, 2<sup>nd</sup> sess., May 6, 1970

39      *Ibid.*

40      House Judiciary Committee, *Hearings of the Equal Rights Amendment*, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., March 25, 1971.

specifically to women whether ‘restrictive’ or not—minimum wage laws, for example, rest period, meal periods, seating requirements, transportations at night and other provisions”.

<sup>41</sup>Finally, Katherine Ellickson testifying on behalf of the National Consumer’s League in the September, 1970 hearings insisted that women wanted “a 40-hour week and are looking toward 35 hours” because “they want to be permitted to make a home, raise a family, and live a little outside the hours they spend on the job... for a woman, whose ‘work is never done’ this includes marketing, shopping, washing, housecleaning, child care and the time for the family to live together”.<sup>42</sup>

It was in deference to these concerns that the Senate the Subcommittee on Constitutional Amendments reported the ERA to the Judiciary Committee with an amendment allowing for distinctions between men and women to be made on the basis of physiological function. This amendment was voted down by the larger committee, as were other attempted riders relating to, among other things, college admissions policies and an exemption for women from the draft.<sup>43</sup>The Equal Rights Amendment was reported as introduced to the floor of the Senate on March 14, 1972. Four days of debate followed, wherein Ervin proposed nine separate amendments similar to those proposed in committee, on draft exemption, state protection laws, paternal responsibility for child support, privacy and sex crimes. All of Ervin’s amendments were defeated and on March 22, 1972 the ERA was approved by the Senate and sent to the states for ratification.<sup>44</sup>

Hawaii and Alaska were the first to ratify, followed by twenty other states in 1972.

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41 Senate Subcommittee on Constitutional Amendments, *Hearings on the Equal Rights Amendment*, 91<sup>st</sup> Congress, 2<sup>nd</sup> sess., May 7, 1970.

42 Senate Judiciary Committee, *Hearings on the Equal Rights Amendment*, 91<sup>st</sup> Congress, 2<sup>nd</sup> sess., September 9, 1970.

43 *1972 Congressional Quarterly Almanac*, Congressional Quarterly, Inc; Washington, DC, 1973.

44 *Ibid.*

However, by 1973 opposition to the ERA was gathering strength in the form of several opposition groups, the most notable of which was Phyllis Schlafly's STOP ERA. Schlafly herself was a lawyer, political activist and publisher of the monthly conservative newsletter, *Phyllis Schlafly's Report*. Schlafly insisted that the ERA would take away the rights of women to their husband's financial support, safe working conditions, and draft exemption.<sup>45</sup> For Schlafly the issues at stake were not whether women could be admitted to institutions of higher learning or attain higher status positions at their jobs, but that the Equal Rights Amendment would destroy the family unit by indiscriminately forcing women to be treated as men. Schlafly also charged that the ERA would result in unisex bathrooms, legalized abortion and same-sex marriage.<sup>46</sup> By characterizing the ERA as anti-woman and anti-family, Schlafly was able to establish a coalition of women: Roman Catholics, Mormons, evangelical Christians, Orthodox Jews, activists and other women who resented what they perceived as an attack on the family advocated by the left.<sup>47</sup> Schlafly's skills as an organizer allowed her to bring the disparate elements of her coalition together with one goal: preventing the ratification of the Equal Rights Amendment.<sup>48</sup> While Schlafly was able to rally support around a single coherent issue, Pro-ERA forces were plagued by disunity of ideology and method. There were disagreements over the extent to which abortion and gay-rights issues should be pursued as part of the ERA as well as the tactics used by different groups. For example, NOW was in favor of mass demonstrations but ERAmerica, an umbrella organization encompassing some 120 pro-ERA groups, found NOW's

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45 Donald T. Critchlow and Cynthia L. Stachecki, "The Equal Rights Amendment Reconsidered: Politics, Policy and Social Mobilization in a Democracy", *The Journal of Policy History* 20, no. 1 (2008): 165-166, <http://www.ebscohost.com>.

46 *Ibid.*, 166.

47 *Ibid.*, 167-168.

48 *Ibid.*, 168.

tactics polarizing; ERAmerica instead preferred targeted lobbying efforts.<sup>49</sup> After 1972 ratification continued at a slower pace: in 1973 eight states ratified, in 1974 three ratified and only one state ratified per year after that until 1977. Although they were only three states short of the thirty-eight state ratifications needed, ERA supporters knew that they would be unable to attain the required number by 1979. On August 15, 1978 Congress granted an extension of the ratification deadline until 1982. The constitutionality of this extension was hotly contested, as well as the validity of state rescissions<sup>50</sup> but by 1982 only thirty-five states had ratified.

While Constitution has been the institution where the efforts of social change have been enshrined, the amendment process is responsive both to the peoples desires but also the will of government. However, as exemplified by the fight over the Equal Rights Amendment, despite broad based support, this process is not always successful. On March 27, 2007 Senate Democrats introduced a measure with the same wording as the original ERA but under the title Women's Equality Amendment.<sup>51</sup> On March 3, 2009 Representative Jesse Jackson, Jr. as H.J. Res. 31 reintroduced the Equal Rights Amendment, with an added provision guaranteeing reproductive rights. It was referred to the House Judiciary Committee and on March 16, 2009 it was referred to the Subcommittee on the Constitution, Civil Rights and Civil Liberties. No further action has been taken.<sup>52</sup>

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49 *Ibid.*, 169-170.

50 Berry, 70-71.

51 Juliet Eilperin, "New Drive Afoot to Pass Equal Rights Amendment," *Washington Post*, March 28, 2007, <http://www.washingtonpost.com>.

52 U.S. House. 111<sup>th</sup> Congress, 1<sup>st</sup> Session, *H.J. Res. 31., Proposing an Amendment to the Constitution of the United States Relating to Equality of Rights and Reproductive Rights*. ONLINE. GPO Access. 16 March 2009. Available at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.j.res.00031>>.