

EQUAL RIGHTS AMENDMENT

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The lengthy battle over passage of the Equal Rights Amendment (ERA) came at a time when issues of gender equality were beginning to come to the forefront of American politics. In 1972, the year the Amendment was passed by Congress, issues of sex discrimination and the changing role of women played an integral role in the nation's political climate. The Supreme Court was largely responsible for lending issues of gender equality this national importance; in the years before and during the battle for passage of the ERA, the Supreme Court decided a number of cases which set important precedents for legal treatment of issues of gender equality. These decisions had a profound impact on the fate of the ERA because they encouraged activism among the Amendment's opponents and apathy among its supporters.

The new political prominence of the abortion issue was one of the most important in rallying strong opposition to the ERA. The timing of the Court's announcement of its decision in *Roe v. Wade* contributed to the ERA's failure. Announced on January 22, 1973, less than a year after the Amendment was passed by Congress, the *Roe* decision recognized a fundamental right to privacy which encompassed a right to abortion.¹ Not surprisingly,

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Roe and the ERA drew almost identical bases of support and of opposition—the National Organization for Women, for example, was both the leading sponsor of the ERA and one of the strongest advocates for an unfettered abortion right.² Opponents of the ERA were thus able to draw on an existing coalition of organizations and individuals in their efforts to prevent ratification by the states. In addition, their loss in *Roe v. Wade* made anti-feminist forces doubly determined to prevent ratification of the ERA. Jane Mansbridge explains:

...Conservative activists saw abortion and the ERA as two prongs of the “libbers” general strategy for undermining traditional American values. Unable to overturn the *Roe* decision directly, many conservatives sought to turn the ERA into a referendum on that decision. To a significant degree, they succeeded. The opponents began to organize and convinced the first of several states to rescind ratification—a move that had no legal force but certainly made a political difference in unratified states.³

After their loss in *Roe v. Wade*, anti-abortion forces tried to prevent any further federal support for a woman’s right to choose. If the ERA were passed, many people believed, the Amendment’s guarantee of equality would mandate federal funding of abortions since other medical procedures were federally funded. Passage of the ERA would therefore significantly undermine the anti-abortion movement. Opponents of the ERA used the “ERA-abortion connection,” to rally opposition to the Amendment.⁴ Before the argument could carry full weight, however, a test case was necessary to determine whether the Court would require the government to fund abortions regardless of whether the ERA was ratified. In 1976, Congress passed the Hyde Amendment, a statute which limited the use of federal funding for abortions. Pro-choice forces hoped that the statute would be struck down as too great a limitation on the right to abortion established by *Roe v. Wade*; anti-choice forces hoped that the statute would be upheld both so that the abortion right could begin to be limited and so that passage of the ERA would pose a significant change from the status quo; it would require government funding of abortions.⁵ The test case, *Harris v. McRae*, reached the Supreme Court in 1980. On a 5-4 vote,

the Court upheld the constitutionality of the Hyde Amendment.⁶ This result solidified anti-choice opposition to the ERA and gave ERA opponents a strong argument against ratification—that the Amendment would overturn the Hyde legislation and require federal funding for abortion. As Gilbert Y. Steiner explains, this decision was disastrous for ERA supporters:

The ERA formally died on June 30, 1982, but exactly two years earlier *McRae* delivered it into the hands of its enemies. After *McRae*, because they could no longer assert the unconstitutionality of restrictions on spending for abortion, and because they did not want to deny that an ERA might supersede such possible restriction, many ERA supporters were backed into tacit acknowledgment of an ERA-abortion connection. Before the decision, they could insist that Hyde restrictions would surely fail the test of constitutionality, and that the alleged connection would be undermined. A contrary decision—Hyde formally confirmed by the Supreme Court—qualifies as a disaster for ERA's prospects and a boon to its opponents' prospects.⁷

Just as anti-choice forces mobilized because the ERA would result in a significant change in the status quo by mandating government funding of abortions, those who opposed the drafting of women saw the ERA as a significant threat to women's exemption from the draft. The principle was similar to that which made *Harris v. McRae* and the Hyde Amendment significant in the battle over ratification of the ERA—while pre-ERA legislation exempted women from the draft, an ERA might cause this type of delineation based on sex to be declared unconstitutional. Also like the abortion issue, it was unclear whether the Court would uphold the constitutionality of the discrimination in draft registration procedures even without the passage of an Equal Rights Amendment. While ERA opponents argued throughout the Amendment's ratification period that ratification of the Amendment would significantly harm the status of women by making them eligible for the draft, their argument would have been seriously undercut if the Court had ruled that such a distinction was unconstitutional under the Fifth Amendment's Due Process Clause even without the ERA being passed. Decided in 1981, just one year before the ratification period for the Amendment was to expire, the destruction of one of the most persuasive arguments in opposition to the

ERA might have persuaded the necessary three states to ratify. However, the Supreme Court's decision in *Rostker v. Goldberg*, the case which questioned the constitutionality of the discriminatory draft registration policy, only served to further support the argument that the ERA would pose a significant change in the status quo. By deciding that the discriminatory draft registration law was necessary for the government's purpose of using the draft to raise troops (the Court did not address the constitutionality of the policy that only men were allowed to participate in combat), the Court upheld the existing policy and lent credence to the claim that women would lose this one remaining piece of protective legislation if the ERA were passed.⁸

It is important to note that the ERA would not, in fact, have necessitated a change in the military's drafting policies, nor would it have required women to participate in combat. As the *Rostker* decision explained, "Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked...None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context."⁹ Because of the significant freedom which the Court gives to Congress in the area of military regulation and national security, it might have been possible for the Court to continue to grant Congress the ability to decide qualifications for combat and therefore for the draft even if the ERA were passed. However, proponents of the ERA failed to consider this opportunity, instead trying to encourage public support for a gender-neutral military by espousing the idea that equality of rights mandated equal responsibilities. This tactic was a political failure because the idea of women serving in the military was far too radical to be supported by any significant percent of the American public—during the ratification period, only 22 percent of the public thought that women should be drafted and eligible for combat.¹⁰

Even when Supreme Court decisions did not directly impact the scope of women's rights and as a result the amount of power the ERA would hold if passed, perceptions of the Supreme Court's role in American politics made state legislatures wary of ratifying the Amendment. The broad power that the 14th Amendment had given to the Court made states concerned that the ERA would further increase the Court's power to "legislate" against civil rights abuses. The ERA thus became an issue of states' rights as well as an issue of gender equality. In states which were particularly averse to the use of broad federal power, this association was enough to prevent ratification. Janet K. Boles notes in *The Politics of the Equal Rights Amendment* that "in Georgia, the issue of states' rights was linked with hostility toward the Supreme Court and fear of the Court's interpretation of the Amendment."¹¹ This fear was sufficient to prevent Georgia from ratifying.¹²

As Supreme Court decisions gave ERA opponents a real reason to mobilize by supporting legislation which might be undermined by passage of the ERA, they simultaneously contributed to a dangerous apathy among ERA supporters. As the Court began to rule more and more consistently that legislation which discriminated on the basis of sex was unconstitutional, the benefits which supporters hoped to guarantee through a constitutional amendment were guaranteed without one. As cases began to appear which asked the Court to strike down legislation which treated men and women differently on the basis that the legislation violated the Fourteenth Amendment's Equal Protection Clause, the Court initially denied any need to afford women special legal protection. In *Goesaert v. Cleary*, for example, the Court upheld a Michigan statute which prohibited women from tending bar unless they were the wives or daughters of bar owners.¹³ And in *Hoyt v. Florida*, the Court upheld the constitutionality of a Florida statute which made jury duty mandatory for men and voluntary for women.¹⁴ The legacy of cases like *Goesaert* and *Hoyt*, which were largely unchallenged until the 70s, was that women did not need special constitutional protection and as a result, the Court was justified in applying the minimum standard

of scrutiny when evaluating the constitutionality of legislation which differentiated between people on the basis of sex. This minimum standard required only that the state have a “rational basis” for enacting the legislation for it to be constitutional.¹⁵

As issues of gender equality began coming more to the forefront of American society, the Supreme Court began gradually to accept a more stringent standard for evaluating legislation which discriminated on the basis of sex. This trend began in 1971 with *Reed v. Reed*, in which the Court for the first time explicitly recognized that sex discrimination was subject to some sort of standard of scrutiny. Exactly what that standard would be was clarified through the sex discrimination cases of the next decade. The *Reed* decision struck down an Idaho statute which established a list of priority relationships according to which an administrator would be appointed if someone died without leaving a will. The statute also stipulated that, if a man and a woman had the same “priority relationship” to the deceased, the man would automatically be given priority and become the estate’s administrator.¹⁶ In striking down the statute as a violation of the Fourteenth Amendment’s Equal Protection Clause, the Court established a standard for judging the constitutionality of legislation which reflected a sex bias. The two-fold standard required first that the legislation be “reasonable, not arbitrary” and second that it “rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”¹⁷ The Court held that the government’s objective in trying to minimize lawsuits over administration of estates was not sufficient justification for discrimination, and thus that the legislation was unconstitutional.

Although the Court struck down the legislation which was at issue in *Reed v. Reed*, the standard which they set up for evaluating legislation which discriminated on the basis of sex was a discouraging one. Unlike the standard of “strict scrutiny” which was applied to legislation which discriminated on the basis of race or religion, and which gave a *de facto* guarantee that all such discriminatory legislation would be overturned as unconstitu-

tional, the standard to which the Court held legislation which discriminated on the basis of sex was much less stringent and made it far more difficult to get such legislation overturned. The early decisions that relied on this standard made the need for an ERA apparent—it seemed that the Supreme Court would not provide the protection which would be necessary without one. Writing in 1973, shortly after the *Reed* decision but before a stricter standard was adopted, Marlow W. Cook explained why an ERA was necessary to provide the protection that the Supreme Court refused to give:

The majority of the Supreme Court may have found that sex is an “invidious” classification, but not that sex is a “suspect” classification. Thus, the constitutional test to be used in judging future cases is in doubt. No one knows how important a government interest is needed to uphold a statute or governmental practice that discriminates on the basis of sex. We need a more definite standard by which judges, legislatures and public officials can act. We need a standard which cannot be abrogated by future courts or public officials. We need a constitutional amendment...Judges would have to take judicial notice of the new standard rather than follow the concededly bad history of discriminatory precedents adhered to in the past.¹⁸

Cook wrote the essay excerpted above shortly after the announcement of a decision which reaffirmed the need for an Equal Rights Amendment. Decided in 1973, *Frontiero v. Richardson* once again failed to declare sex an inherently suspect classification like race or religion. Although their plurality did not set precedent, however, four justices concurred in the opinion that legislation which discriminated on the basis of sex should be subject to strict scrutiny. Both this opinion, written by Justice Brennan for the Court, and Justice Powell’s concurring opinion refer to the ERA in their justification for why sex should or should not be a suspect classification.¹⁹ Brennan’s opinion cites the Congressional passage of the ERA as proof that sex discrimination must be given serious consideration: “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under our consideration.”²⁰ Justice Powell, who concurred in judgment but disagreed with the

four justices who supported making sex a suspect classification, used the battle in the states over ratification of the ERA as a reason why the Court ought not apply the standard of strict scrutiny at the present time: “There is another...reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the states...It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.”²¹ Powell’s was the deciding vote which prevented sex from becoming a suspect classification; if we believe Cook’s analysis about the necessity of the ERA, Powell was single-handedly responsible for this necessity.

A later case, *Craig v. Boren*, once again fell short of classifying sex as suspect, but established a standard of heightened scrutiny by which to evaluate legislation which reflected a sex bias. Using as its basis the standard set out in the *Reed* decision, Justice Brennan added to that standard two exceptions—government interests which could not justify discrimination. The first exception, which had been suggested by the circumstances of *Reed* but had not been established as a general principle, was administrative convenience. The second exception which did not form a valid government interest was the desire to preserve stereotypical notions of gender roles. Justice Brennan’s opinion in *Craig* explained:

‘Archaic and overbroad’ generalizations could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’ were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.²²

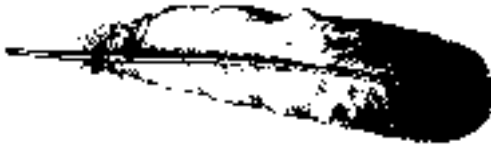
Since many of the state’s arguments, like those made in *Hoyt v. Florida*, rested on the notion that work in the public sphere was unsuited to the nature or temperament of women, the standard

provided in *Craig* represented a significant change from the standard of minimum scrutiny which had been applied in the past.²³ These court decisions reflect a definite trend toward greater protection of women's rights under the existing constitutional structure. The Court's leap from upholding the minimum standard of scrutiny in *Reed* to a heightened standard in *Craig*, with only one vote needed to guarantee a majority which would support treating sex as a suspect classification, indicated that gender equality had found a friend in the Supreme Court. And while the Court's willingness to look out for the interests of women was heartening, it was also fatal for the ERA. With each Court victory the feeling that the Court would soon make an ERA unnecessary grew stronger. At the time when strong support for the ERA was most crucial, support began to wane because it was no longer seen as vital for ensuring women's equality. Jane Mansbridge explains how the Supreme Court's expanded reading of the Fourteenth Amendment affected the battle for ratification in state legislatures:

By 1980, when I did my interviewing, many legislators, both for and against the ERA, answered my question on its impact by saying that they thought the ERA would have very little impact. This suggests that the Court's evolution had significantly affected the way they thought about the ERA... One legislator said he had changed his vote and now opposed the ERA because he had come to believe there was now no need for it.²⁴

Sarah Weddington, a special assistant on women's issues to President Carter during the ERA's ratification period, concurs: "Those who favored the ERA had been so successful in changing customs and laws that had limited women that it was difficult to maintain the ERA's status as a top priority for the necessary number of citizens."²⁵ The failure of the ERA can therefore be attributed to two major factors. First, the significant changes in the status quo that the ERA would bring about received strong and broad-based opposition. Second, the widely held opinion that the ERA would soon cease to be necessary caused political apathy among the Amendment's proponents at a time when votes for the Amendment in state legislatures were most necessary. Neither of these

factors would have existed, however, without the Supreme Court decisions leading up to and during the Amendment's ratification period. By making decisions that upheld the status quo, the Court ensured that the ERA would result in a significant change in American society; that change was not one which enough state legislatures were willing to support. The Court also exhibited a trend toward broader interpretation of the Fourteenth Amendment to include protection from legislation which discriminated on the basis of sex. Many people believed that this broad interpretation would have a *de facto* result nearly identical to passage of an ERA; the resulting attitude regarded the ERA as largely unnecessary in light of the Supreme Court's new protection of women's equality. The combination of the apathy which this attitude brought on in supporters and the increased activism which the threat to the status quo provoked in opponents proved fatal for the Equal Rights Amendment.



- ¹ *Roe v. Wade*, 410 U.S. 113 (1973)
- ² Jane J. Mansbridge, Why We Lost the ERA (Chicago: University of Chicago Press, 1986) p. 13
- ³ *Ibid.*, p. 13
- ⁴ **Phyllis Schlafly**, “Beating the Bra-Burners,” George (June 1997) p. 44
- ⁵ Gilbert Y. Steiner, Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment (Washington, D.C.: The Brookings Institution, 1985) pp. 101-102
- ⁶ *Harris v. McRae*, 448 U.S. 297 (1980)
- ⁷ Steiner, p. 102
- ⁸ Lee Epstein and Thomas G. Walker, Constitutional Law for a Changing America (Washington, D.C.: CQ Press, 1995) pp. 703-704
- ⁹ *Rostker v. Goldberg*, 453 U.S. 57 (1981)
- ¹⁰ Mansbridge, pp. 80-81
- ¹¹ Janet K. Boles, The Politics of the Equal Rights Amendment (New York: Longman, Inc., 1979) p. 170
- ¹² *Ibid.*, pp. 2-3
- ¹³ *Goesaert v. Cleary*, 335 U.S. 464 (1948)
- ¹⁴ *Hoyt v. Florida*, 368 U.S. 57 (1961)
- ¹⁵ Kermit L. Hall, ed., The Oxford Companion to the Supreme Court of the United States (New York: Oxford University Press, 1992) pp. 328-335
- ¹⁶ Epstein and Walker, p. 690
- ¹⁷ *Reed v. Reed*, 404 U.S. 71 (1971)
- ¹⁸ Marlow W. Cook “In support of the ERA,” (1973); in Kermit L. Hall, ed., Major Problems in American Constitutional History, 1870 to the Present (Lexington, MA: D.C. Heath & Co., 1992) p. 419
- ¹⁹ *Frontiero v. Richardson*, 411 U.S. 677 (1973)
- ²⁰ *Ibid.*
- ²¹ *Ibid.*
- ²² *Craig v. Boren*, 429 U.S. 190 (1976)
- ²³ Joan Hoff-Wilson, ed., Rights of Passage: The Past and Future of the ERA (Bloomington, IN: Indiana University Press, 1986) p. 100
- ²⁴ Mansbridge, pp. 46-47
- ²⁵ Sarah Weddington, A Question of Choice (New York: Penguin Books, 1993) p. 195

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