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After Suffrage Comes Equal Rights? ERA as the Next Logical Step

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<3>The work of the National Woman's Party is to take sex out of law—to give women the equality in law they have won at the polls. ~ Alice Paul, 1922

<3>The point of E.R.A. is to get people to recognize that change is already here. ~ Eleanor Holmes Norton, 1978

In July of 1978, at the largest march for women's rights in the nation's history up to that time, Equal Rights Amendment (ERA) supporters poured onto the mall at the center of the nation's capital in a desperate plea for more time to get the remaining three states needed for ratification. Likely very few of these dedicated marchers fully realized the timespan of the campaign of which they were now a part, or were fully aware of its tortured history. In 1978 a push for an amendment to the U.S. Constitution guaranteeing women equal rights with men was over a half century old, having gotten its start in the wake of a woman suffrage amendment passed before many on the mall that day were born; few but the very eldest of the leaders could have recalled the arguments that they or their predecessors may have once mounted against ERA. In the crowd of one hundred thousand—three times as large as the largest suffrage parade held in the 1910s and twice the size of the first historic march on Washington in support of the ERA in 1970—were virtually all of the leaders of progressive women's organizations representing a vast coalition of interests and activist causes (National Organization of Women, n.d.). This time around, few women identifying as feminists disagreed that it was time for a federal amendment guaranteeing and constitutionally enshrining women's equality under the law.

The provisions of the ERA were not what feminists gathered on the mall to debate. All

that activists were asking for on that hot day in July was more time to bring three more states around and achieve the required two-thirds majority for ratification. Well aware of the historic nature of this watershed moment, Eleanor Holmes Norton, recent Chair of New York City's Commission on Human Rights, newly-appointed first female Chairman of the U.S. Equal Employment Opportunity Commission, and future first African American Congresswoman from the District of Columbia, queried the crowd, "How will people look at us fifty years from now if Congress doesn't even give us more time?" She continued, "We look back on history and wonder, what all the fuss was about over an issue. The point of E.R.A. is to get people to recognize that change is already here" (Dismore 1978).

In hindsight it appears Norton was right on her latter point at least—much of the change that an Equal Rights Amendment to the U.S. Constitution portended and promised was well underway in the 1970s, having been achieved in the decades since the adoption of woman suffrage in 1920. These achievements came in fragments and through the enormous efforts of thousands of recently enfranchised women pushing for legal and policy changes at the ballot box and in the context of the courts, state and federal legislatures, national and local educational institutions, the armed forces, workplaces, and in the media. In the next half-century following the marches of the 1970s, a whole lot more would be accomplished in these areas still. But despite such progress, few feminists today would agree that sex inequalities have been eradicated in law or in society. The campaign for the ERA, as of this writing, remains an aspiration for many activist feminists and a dead dream to the point of irrelevancy for many more. The march on Washington in 1978 accomplished its immediate aim—an extension was granted—yet neither that limited extension, nor the persistence of diehard ERA activists subsequently, resulted in additional endorsements from the states, causing a "blanket amendment" to the U.S. Constitution

to fade from the agendas of most feminist organizations and from public view.

Yet, the amendment proposition lives on. A campaign to ratify ERA survives literally—in annual efforts to introduce the amendment into congressional committee that continue to this day. The spirit of the campaign endures—in legal battles over individual issues and points of law that have been taken up by state and federal legislatures and the U.S. Supreme Court. And, conflict and debate between women over ERA and the principle of equal rights for women also persists—most strikingly in battles between progressives and conservatives who see women's interests in stunningly divergent ways. The history of disagreement and disunity among women concerning ERA is as longstanding as the campaigns themselves. Significantly, the logic of an Equal Rights Amendment was never universally evident or endorsed—even by the suffragists who fought most vigorously for a constitutional right for women to vote.

The political wake left by the passage of the Nineteenth Amendment did nothing to smooth the way for unity among women activists on the subject of equal rights. Once ratified, the arguments among feminist organizers over tactics to achieve suffrage were replaced with arguments over whether an ERA would menace what many viewed as the most important accomplishments of female organizers apart from suffrage itself: protective legislation for women's employment. Even after the Fair Labor Standards Act of 1938 quieted the mainstay of labor advocates' concerns, virulent disagreement over ERA among women organizers continued throughout the middle decades of the twentieth century. It was not until the late 1960s and 1970s that battle lines between women organizers would be redrawn, and even then the fundamental question of women's difference from men—whether physical, psychological, or social—did not evaporate. Indeed, with ratification of the ERA as distant a goal as it seems at present, the politicized public culture and vigorous democratic debate over women's nature and role that has

been inspired and sustained by a century-long effort to enshrine women's equal rights into the U.S. Constitution may well be considered the ERA's principal if not singular achievement.

Almost a full century in the making, the campaign for an ERA has far exceeded in longevity the campaign for woman suffrage, however much a “logical next step” it seemed to some following the spectacular achievement of the Nineteenth Amendment (Neale 2013: 1). Its history reveals how resistant to the idea of equality between men and women a political system—even one that includes women as voters—can be. In this chapter, we re-examine the route taken by the ERA through its many permutations in the century since the passage of woman suffrage. We begin by revisiting the sunset of the woman suffrage movement that also was the dawn of the first ERA campaign initiative.

<1>In the Wake of Woman Suffrage, 1920-1925

The first ERA campaign is most closely identified with Alice Paul and a coterie of former suffragists she gathered around her to lead the National Woman's Party (NWP). The NWP formed in the several years preceding the achievement of woman suffrage in 1920 and was crucial to the success of that effort. For some like Paul, virtually simultaneous with women winning the right to vote came an ambition to expand on women's rights as citizens generally. Specifically, this meant undoing the 1875 U.S. Supreme Court decision in *Minor v. Happersett* (1875) that confined women to a “special” class of citizenry under the federalist provisions of the Fourteenth Amendment.¹

Though very much in the minority among feminist women, Paul and the NWP leadership were not entirely alone in viewing an equal rights amendment as a necessary next step to suffrage. Historian Nancy Cott (1989) points to an early manifestation of support for an ERA by

a small group based in New York City called the “Feminist Alliance.” The Alliance called for something similar to ERA as early as 1914, six years before suffrage was achieved. No determined plan, however, existed for how to achieve equal rights for women in all areas of the law until March of 1921 when the NWP voted in favor of a slate of equal rights objectives. The resolutions adopted at this meeting included the following simple statement: “That, the immediate work of the new organization be the removal of the legal disabilities of women” (*Vassar News* 1921:4). The wording of this resolution did not mention an ERA, but it was clear that this was the determined direction Alice Paul intended the NWP to move in.

In opposition to the NWP’s expressed intention to push for an equal rights amendment, major women’s groups organized the Women’s Joint Congressional Committee (WJCC), a national lobbying group, and chose Maud Wood Park to head it. As former head of the Congressional Committee for the National American Woman Suffrage Association (NAWSA) (1916-1920), Park had virulently opposed Alice Paul’s sensationalist tactics that had brought the suffrage campaign to a controversial fever pitch in the late 1910s (Cott 1990). Park continued to oppose Paul and her decision to turn the political machinery of the NWP towards an ERA campaign, drawing the strength for her opposition from the threat that many female activists felt ERA posed to protective legislation for women in employment.

Once Park was chosen to lead the WJCC, little chance of reaching an agreement about an ERA across organizational lines was likely. This was not for lack of effort. Florence Kelley, a former NWP leader, one-time close ally to Alice Paul and newly-named Director of the National Consumers League, attempted to bring the major women’s organizations together in hopes of reaching a compromise position on the question of ERA. In December of 1921, she coordinated a meeting between Alice Paul and the NWP leadership and leaders from the General Federation

of Women's Clubs, the Women's Christian Temperance Union, the National Women's Trade Union League, and the League of Women Voters to discuss the issue. Delegates left convinced more than ever that no compromise was possible. But such opposition did not dissuade Paul or her supporters from their decision to champion ERA.

Within three years of the passage of the Nineteenth Amendment, Alice Paul formally kicked off a campaign for an Equal Rights Amendment on July 21, 1923, in Seneca Falls, New York. Well-known for her flair for political theater and use of historical flourish, Paul chose her date and venue carefully. The occasion was a commemorative celebration of the Woman's Rights Convention held there seventy-five years prior on July 19-20, 1848, out of which had come the Declaration of Sentiments—a founding moment and document in the long campaign for woman suffrage. Paul's proposed amendment, named for a prominent nineteenth-century suffragist and women's rights activist, Lucretia Mott, read: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction," and included a sentence endowing Congress with the power to enforce its provisions (Neale 2013: 2). Soon after introducing the initiative to enthusiastic supporters at the commemoration in July, Paul arranged to have her proposal introduced to the Sixty-Eighth Congress in December of 1923 by both a Senator and Representative of Kansas, one of whom was the nephew of famed suffragist, Susan B. Anthony (Woloch 2015).

As wrapped in history and resonant of collective women's activism as the rollout of the first ERA purposefully was, the proposed amendment was nonetheless deeply resented by most female organizers and even most former suffragists who viewed the logic of an ERA as, at best, flawed and the implications of it as dangerous to women's interests. Forming themselves into the non-partisan and politically neutral League of Women Voters (LWV), many former suffrage

workers in the aftermath of suffrage turned to the task of promoting women not only as voters but also as candidates for elected or appointed office. The League saw itself as a mechanism adding balance to the political landscape. Its initial primary concern lay with safeguarding the rights of women as enfranchised citizens whose full participation in an electoral system was still being widely questioned and even openly challenged by lawsuits such as *Lesser v. Garnett* (1922). The suit characterized the Nineteenth Amendment as an unconstitutional dilution of men's right to suffrage by rendering men's voting power "half strength." That logic was cursorily rejected by the Supreme Court, but the suit nonetheless put former suffragists on their guard against large and small challenges to women as voters and pushed them to find ways to institutionalize women's participation in local, state, and national politics. Their goal was not to create "blanket" legal equality for women with men on the national level, but to work state by state carving out space within the existing legal framework for women to participate as political actors.

Other former suffragists chose to lend their energy to organizations working for legislative reforms that seemed, to them, more germane to the struggles that women endured outside of the political sphere, especially at the workplace. Such women ignored Alice Paul's call to attend the 1923 Seneca Falls celebration and instead flocked to Washington D.C. that same year to attend the Women's Industrial Conference to discuss prospects for expanding protective legislation for women workers (Lipschultz 1996; U.S. Department of Labor 1923). These women believed further political reform should hinge on women's seemingly inevitable gender-specific experiences as a distinct class of particularly vulnerable workers and as mothers with principle responsibilities for child rearing and home making. Whether as members of the increasingly prominent League of Women Voters or as determined labor rights advocates, most

female activists and professional organizers either saw Paul's proposed ERA as a pipedream or as a specific and potent threat to the protective labor legislation that they had worked for several generations to put into effect.

The tendency of female activists and organizers to divide over the ERA depended more than any other factor on their class background and experience in the labor movement.

According to Cynthia Harrison (1988), this is true even across racial lines with black women's organizations splitting over the question of ERA along much the same lines as white women's.

As an example, Harrison points to the early endorsement for ERA by the National Association of Colored Women (NACW) and attributes this to the influence of its founder and first president, Mary Church Terrell. Terrell's father was a self-made millionaire; she received an elite education at Oberlin College and went on to co-found the National Association of University Women (NAUW) as well as the National Association for the Advancement of Colored People (NAACP).

In contrast, though Mary McLeod Bethune was an educator also, having founded the Bethune-Cookman Institute for African-Americans in Daytona Florida, in her public work she placed special emphasis on creating opportunities for black employment. During the Depression, Bethune served as the Director of Negro Affairs for the National Youth Administration in the Works Progress Administration under President Franklin Roosevelt. Unconvinced by Paul's insistence that ERA would not endanger employment protections, Bethune kept the organization she founded, the National Council of Negro Women (NCNW), distanced from the ERA through the 1930s without making any public declarations of disavowal. After many years expressing the need for more sustained study of the matter, finally in 1944, the NCNW went on record as officially opposed to the amendment, specifically citing its "concern for protective labor legislation" (Harrison 1988: 11).

Experience in the labor movement did not automatically or inevitably lead to hostility to the ERA. Alice Paul had gotten her start as a professional organizer advocating for women laborers, and at first was not unsympathetic to the view that there ought to be a way to retain some protective labor laws for women even within the context of equal rights for men and women under the law. Early on, in part to counteract the impression that the NWP and the ERA were anti-woman worker and with the hope of bringing pro-labor organizers and associations on board, Paul initially tolerated including a “construing clause” into the equal rights legislation that she and the NWP promoted in the 1920s. Though legal scholars and consultants at the time questioned how such a clause might be construed in practice (Hart 1994), such a clause would, presumably, exempt protective employment legislation for women workers from the imposition of gender-blind interpretations of equal rights otherwise mandated by the amendment. Throughout the 1920s, Alice Paul and the lawyers and legal experts central to the leadership of the NWP experimented with the possibility of creating laws that could both sustain protective provisions for women in labor legislation while also serving the larger principal of women’s equality to men. Compromise on this point however proved to be unsustainable.

While hoping to find the correct wording and argumentation sufficient to bring large numbers of women organizers around to support ERA, in the 1920s the NWP chipped away at the problem of women’s inequality under the law through direct challenges. As early as 1921, Paul chose Burnita Shelton Matthews, later the first woman to be appointed a federal district judge, to lead the NWP’s Industrial Committee. The committee was composed of thirteen female attorneys charged with making a study of discriminatory laws in each state concerning women’s property rights, child custody, divorce and marital rights, jury duty, education and professional employments, national and citizen rights. Their mandate was to expose legal inequalities

between men and women that were embedded in all facets of law. The committee was charged also with proposing new legislation to counteract such inequalities. According to Amelia Fry (1986), by the end of the decade, the NWP could point to about three hundred state laws changed out of the six hundred the committee had identified or targeted throughout the country. Pressing state by state for equal access to jury duty, guardianship, and fair wages, arguing that women should be treated equally with men, the activities of the NWP's Industrial Committee were not that far from the "specific bills for specific ills" program of the League of Women Voters (Mathews and De Hart 1990: 29). In addition, according to its own internal history, the NWP mirrored some of the League's primary emphasis on getting more women elected and appointed to office by launching two major "Women for Congress" campaigns in 1924 and 1926 and lobbying for women to be appointed to high federal office and prominent governmental positions (Library of Congress n.d.).

Paul's hope that shared ground between the NWP and post-suffrage organizations like the League could bring women activists en masse into the campaign for an ERA was emboldened by an early victory for women's equal rights in Wisconsin. Before Paul had even formulated an ERA campaign, in 1921, NWP leader Mabel Raef Putnam helped push through the first state-wide equal rights law guaranteeing women equality under the law except where the law offered women "special protection and privileges which they now enjoy for the general welfare" (Lemons 1973: 187). It was not very long, however, before the wisdom of that clause would reveal itself as flawed in exactly the way Paul feared when, in 1923, the Wisconsin Attorney General cited it in his refusal to strike down a 1905 law that barred women from employment in the state legislature due to the "very long and unreasonable hours" the work involved (McBride 1993: 298). Supporters of equal rights for women were appalled by this application of the

construing clause, interpreted in this instance at least, to keep women literally out of the halls of power. Subsequently, Paul would cease to see any sort of exemption as inadvisable. She viewed such clauses as inconsistent with her larger vision for an ERA, in part because of her belief that inevitably the inclusion of special exemptions would hold women back from advancement in employment as well as every other facet of social life. Soon after embarking on an ERA campaign, Paul as well as other leaders in the NWP came to accept as definitive the views of Gail Laughlin, an NWP lawyer and first president of the National Federation of Business and Professional Women, who contended that sex-based labor legislation was not, as women's labor advocates insisted, a lamentable but practical necessity. "If women can be segregated as a class for special legislation," she warned, "the same classification can be used for special restrictions along any other line which may, at any time, appeal to the caprice or prejudice of our legislatures" (Cott 1990: 47).

Although Paul and the NWP were adamant on this point, most female organizers and activists continued to support sex-based legislation and to have serious reservations about ERA. The questions raised by ERA, whether over its usefulness as a strategy, its feasibility within existing legal frameworks, or its foundational assumptions about men's and women's nature and experiences, were thoroughly aired in a series of debates held in 1924 between the amendments' proponents and opponents. The most commonly referenced of these, "The 'Blanket' Amendment—A Debate," held in August of 1924 between Doris Stevens and Alice Hamilton was sponsored by the Consumers League of New York and reported in its organ, *The Forum*. There were several other heavily publicized debates on the issue, including one held earlier in March of that same year between Alice Paul and Mary Van Kleeck titled, "Is Blanket Amendment Best Method in Equal Rights Campaign?"—a title designed to suggest the question

remained open. A second debate held in August of 1924, featuring Sophonisba Breckinridge and entitled “Could Mothers’ Pensions Operate Under Equal Rights Amendment?” posed the question in a way designed to highlight women’s presumably special needs as mothers and widows. Another debate held the following month put labor legislation at its center, posing the question, “Should There Be Labor Laws for Women? No, Says Rheta Childe Dorr, Yes, Says Mary Anderson” (Women and Social Movements n.d.). Despite the seeming variety of focus in the structure of these debates, their substance echoed one another closely as did the stalemate quality of their tone. As early as 1924, few minds appeared open enough to be changed by the ventilation of the intricacies of either side’s arguments. Almost immediately after the passage of suffrage in 1920, the lines of battle between women passionately devoted to improving women’s lives under conditions of inequality were clearly drawn and, by the middle of that decade, appeared to be unresolvable.

<1>The Battle Over Protective Labor laws for Women, 1925-1940

The next fifteen years saw continued infighting among feminist activists, repeatedly pitting the ERA against protective labor laws for women. Social feminists like Kelley were dedicated to lobbying for labor laws for working-class women, to protect the “mothers of the race” from exploitation by industrial management and to compensate for women’s disadvantage in the workplace (Lehrer 1987; Woloch 2015). These social reformers also advocated women’s labor laws as an “entering wedge” strategy to extend workplace safety laws to all workers. In the first two decades of the twentieth century, most states had passed some type of women’s labor laws of maximum hours, minimum wages, night prohibitions, and occupational exclusions. Legislatures and courts, however, resisted such laws for men as contradictory to notions of masculinity and physical strength and instead determined that men were entitled to liberty and

freedom of contract in employment bargaining. Women, on the other hand, were deemed different, weaker and in need of special protection from the abuses of the workplace (Woloch 2015).

Social feminist reformers feared, correctly, that an equal rights amendment would prohibit different treatment of women workers, and thus invalidate their efforts to enact special protective legislation. Leaders like Kelley wanted “to protect at least women and children from the worst ravages of capitalism” (Mansbridge 1986: 8). She worked to improve the economic conditions of working-class women who worked long shifts in unhealthy conditions and were paid wages less than men. Kelley’s approach was to emphasize women’s difference—their smaller, weaker bodies, their home demands of childcare and housekeeping, and the impact of working conditions on pregnancies (Becker 1981).

Egalitarian feminists also prioritized economic opportunity and autonomy for women, but they disagreed that special protective legislation for women’s was the appropriate legal means to that end. These legal equality feminists refused to support any law classifying women separately based on their alleged inferiority, difference or need for protection. “Protection” had been the common-law rationale for denying women civil and legal rights going back to 18th-century England. Equality feminists objected to any insertion of ideas of protection in the law. Practically, egalitarian feminists also feared that special employment rules for women would mean women’s loss of work, as employers hired men who were free from these rules. If women faced restrictions on overtime or night work and required minimum wages or maternity leaves, they were less valuable to an employer than a male worker who had no such limitations. If employers were reluctant to hire women, then women were limited in their ability to support themselves and their families (Woloch 2015). Given the rift among women’s organizations

regarding the ERA, any shared agreement on specific legal reforms, like marital property and child custody, was lost by the conflict over a blanket amendment, with social feminists leveraging women's difference and separateness and egalitarians demanding formal equality (Woloch 2015).

Early in the twentieth century, the U.S. Supreme Court endorsed social feminists' efforts by upholding protective legislation for women--but not men. In its seminal decision in *Lochner v. New York* (1905), a divided Court in 1905 struck down a state law setting maximum hours for male bakers. The case established a new theory of substantive due process holding that the Constitution did not authorize states to legislate in violation of an employee's freedom to contract. Three years later, however, a unanimous Court in *Muller v. Oregon* (1908) upheld a similar maximum-hour law for women limiting their work in factories and laundries to ten hours per day.² The Court distinguished women from men in the need for protection in "woman's physical structure and the performance of maternal functions," including smaller physical size, maternity and menstruation, and housework demands (*Muller* 1908: 421). "Differentiated by these matters from the other sex, [woman] is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained" (*Muller* 1908: 422). The Court was influenced by the novel "Brandeis Brief" of data and sociological evidence of women's physical disadvantage submitted by lawyer and later Justice Louis Brandeis and compiled by Florence Kelley and her NCL colleague Josephine Goldmark, Brandeis's sister-in-law (Woloch 2015). Kelley's entering wedge strategy proved effective, as a decade later, the Court extended this protectionist rationale to men by upholding a general maximum-hour law for all workers (*Bunting v. Oregon* 1917).

But *Lochner's* theory of freedom of contract for employees and employer survived as well, subject to the caveat of protecting health. The Court refused to extend its reasoning to uphold protective labor legislation in the form of minimum wage standards, even for women. Following the ratification of the Nineteenth Amendment, the Supreme Court took the occasion to strike down a minimum wage law specifically for women, which strengthened women's equality rights. In *Adkins v. Children's Hospital* (1923), a split Court held that the Nineteenth Amendment exemplified a general guarantee of gender equality altering the older legal cases of protection based on gender difference (Siegel 2002). The decision, written by newly-appointed Justice Sutherland, who had counseled Alice Paul on suffrage and the proposed ERA, held that "the ancient inequality of the sexes, otherwise than physical," had come "almost, if not quite, to the vanishing point" (*Adkins* 1923: 553). The Court held that "while physical differences must be recognized in appropriate cases," like *Muller* which concerned women's health, it rejected the "doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances" (*Adkins* 1923: 449). To do so, the Court continued, would be to ignore all implications of trends in legislation and common thought "by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships" (*Adkins* 1923: 553). An amicus brief submitted by the NWP helped the Court articulate this idea of women's equality (Woloch 2015). However, while *Adkins* represented a step forward in women's equality, just one year later, the Supreme Court returned to its endorsement of women-only protective legislation, upholding a state law banning women from night work in New York restaurants (*Radice v. New York*, 1923).

Adkins was decided the same year Alice Paul introduced the ERA to Congress and the public. The decision helped solidify the battle between social and egalitarian feminists. Any hope of reconciling their approaches of formal equality and special protection was abandoned. (Cott 1989). As Harriot Stanton Blatch, one-time NWP member and daughter of feminist leader Elizabeth Cady Stanton expressed, a middle road approach was “the worst possible solution, doubling rather than neutralizing the damage” (DuBois 1997, 222) Blatch viewed the abstract guarantee of ERA as useless, believed in concrete worker protections for all workers, and despised any special classifications for women based on biological weakness (Ibid.) .

Egalitarians, on the other hand, opposed any classification by sex, and social feminists rejected equality as harmful to women. As social feminist Kelley wrote, “The cry Equality, Equality, where Nature has created inequality, is as stupid and as deadly as the Cry Peace, Peace, where there is no Peace” (Lemons 1973: 185). Political acrimony intensified, as egalitarian feminists found themselves in allegiance with Republicans and business interests against laboring women and Democrats, and social feminists prioritized questions of class over gender (Woloch 2015). The proposed ERA came to have a “symbolic association with white professional women single-mindedly devoted to formal equality and indifferent to the plight of poor women and women of color” (Mayeri 2004: 784).

The Supreme Court continued to reject minimum wage laws for all workers. In 1936, a split Court reaffirmed *Adkins* in *Morehead v. New York ex rel. Tipaldo* (1936), invalidating a New York minimum wage law for women and minors. Yet just one year later, in *West Coast Hotel Co. v. Parrish* (1937), the Court reversed that decision in another closely-divided decision, this time upholding the minimum wage law for women in favor of a female hotel maid. The *West Coast Hotel* Court affirmed that state legislatures could enact laws for workers’ protection,

particularly women workers, because of “the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances” (*West Coast Hotel* 1937: 398). *West Coast Hotel* rejected *Lochner*’s absolutist theory of freedom of contract.

Importantly, though, this logic helped clear the way for protective legislation for all workers. The next year, Congress passed Roosevelt’s Fair Labor Standards Act (FLSA) of 1938, shepherded by the first female Secretary of Labor, Frances Perkins. The new law established a minimum wage of 25 cents for all workers and a maximum 40-hour work week.

In effect, Kelley had won. Her vision of protective legislation for all workers was accomplished. In so doing, much of the social feminists’ opposition to the ERA evaporated, as women’s equality and protection for women workers were now both accomplished by protective labor laws for both women and men. One might expect, then, that the ERA would now experience smooth sailing. The FLSA had removed the impediment to the ERA for the social feminists that had bogged down the equality movement in the first decades after suffrage. With the infighting among feminists deflated, it seemed ERA was ripe for action. Indeed, the amendment made initial progress. ERA reported out of committee favorably in May 1936 for the first time since its introduction in Congress in 1923 (Fry 1986). But, as we will show, advocates clung to old allegiances, with labor and union feminists refusing to endorse what they increasingly viewed as a conservative, pro-business amendment (Woloch 2015).

<1>Taking Sides During the War and After, 1940-1960

The Fair Labor Standards Act of 1938, and its affirmation by the U.S. Supreme Court in 1941 (*United States v. Darby*), did not come close to demolishing the deep rift between the NWP

and labor organizations. But, in the 1940s, the combination of the new law and a public relations campaign to drum up enthusiasm for women's entrance into nontraditional forms of employment after the outbreak of war altered the cultural landscape in ways that seemed to clear the way forward for some progress on the ERA. In the context of a nation at war captivated by "Rosie the Riveter," women's effective and experiential equality to men seemed less unimaginable as well as less objectionable. According to Cynthia Harrison (1988), in this period, the ERA appealed more to conservative and mainstream capitalists steeped in individualist rhetoric and confidence in America's commitment to free enterprise and individual opportunity as co-extensive with the American dream. She argues that a "pro-business" view of the ERA had its advantages as Roosevelt's New Deal drew to a close and at the end of a period during which labor achievements appeared to many to have gotten too much of an upper hand. Unlike during the Depression when the Roosevelt administration pushed as far in the direction of labor as possible, the Cold War period saw more conservative presidential administrations scrambling to put forth a positive agenda of change of their own resulting in both the Republican and Democratic Party including endorsements of the ERA in their national platforms in, respectively, 1940 and 1944 (Cott 1990). By the early 1940s several major women's organizations also had come around to supporting the amendment. Not only the National Federation of Business and Professional Women's Clubs but also the extremely large and ecumenical General Federation of Women's Clubs—after a ten-year study and reconsideration of the question, according to an internal history of the organization published in 1953—agreed to endorse (Freeman 1996; Stephenson 1944; Wells 1953).

Seizing on the opportunity that a change in the cultural zeitgeist appeared to portend, Alice Paul reorganized the NWP's internal organization and amplified its lobbying efforts

(Harrison 1988). Rather than a mass membership, Paul saw the NWP's effectiveness as lying with the small, elite cadre of professional organizers and lobbyists at its core. This organizational philosophy, however, led to charges of elitism, adding fuel to the claims of its pro-labor opponents that the NWP was out of touch with the conditions and experiences of the average American woman who lacked the education, affluence, and independence enjoyed by many in the NWP leadership.

To counteract such charges, and to "benefit from the power of numbers," Paul created an umbrella organization, the Women's Joint Legislative Council (WJLC) whose membership consisted of "all the organizations that endorsed the ERA," bringing according to Harrison (1988: 17), the combined membership to "between five and six million members, a formidable constituency." In an age of media saturation and in the context of a public culture obsessed with celebrities, Harrison (1988) notes that Paul sought endorsements from leading lights in fields as disparate as aviation (Amelia Earhart), Hollywood film (Kathryn Hepburn), popular literature (Pearl S. Buck), and fine arts (Georgia O'Keefe) as well as professional and academic fields such as social science (Margaret Mead), education (Mary Woolley, former president of Mount Holyoke College), public health (Margaret Sanger), law (Judge Sarah Hughes), and politics (Congresswoman Margaret Chase Smith) (1988). While the NWP was far from populist in its orientation as well as its messaging, through high profile endorsements it sought to attract public notice and appear as a big tent filled with the most influential and distinguished of female allies that it could muster to its side.

In the hope of taking advantage of a change in the political climate, and to head off opposition coming from Southern states concerned with state's rights principles, in the early 1940s, Alice Paul reconsidered the wording of the Lucretia Mott Amendment. She consulted

with members of Congress and male attorneys to produce the most effective while least objectionable amendment possible. The newly-worded proposal, unofficially dubbed the “Alice Paul Amendment,” removed language that the earlier iteration had included which might have suggested the ascendancy of the federal government over individual states and echoed more perfectly the Nineteenth Amendment in its structure: “Equality of Rights under the law shall not be denied or abridged by the United States or by any state on account of sex” (Neale 2013: 2). Official sanction to the new wording and to the proposed ERA was provided by a favorable review in 1942 by the U.S. House and Senate subcommittees (*Congressional Digest* 1943). But, according to Jo Freeman (1996), once it reached the House Judicial Committee in 1943, pressure from Catholic organizations, particularly the National Council of Catholic Women and the National Catholic Welfare Conference, appeared to sway the votes of key Congressmen with large Catholic constituencies to reverse their support. The proposed amendment went down in a vote 11 to 15.

The closeness of this vote, followed by the endorsement in 1944 by the Democratic Party as well as the support of newly sworn in President Truman in 1945, signaled an apparent shift in the responses of official institutions to the ERA. New support for the amendment piqued the concern of left-leaning feminists and those in the labor coalition, led by those in the Women’s Bureau of the Department of Labor which had long strenuously rejected an ERA. They responded to what they perceived as a new level of threat by forming an oppositional alliance specifically aimed at halting the ERA’s advance (Berry 1988). The name of the alliance, the “National Committee to Defeat the Un-equal Rights Amendment” left no room for doubt about what it considered the primary threat to women’s rights at the close of World War II. The same year the U.S. helped defeat the Axis powers, a committee hoping to defeat the ERA once and for

all produced a brochure that outlined what women could lose if an ERA were passed. These potential losses included “family support” which might mean elimination of the right of wives to expect or demand husbands’ financial support or might even, the pamphlet suggested ominously, require wives to support husbands. The brochure also listed protections for widows that would be at risk such as Social Security benefits and allowances or creditor protection pending estate settlements. The brochure concluded its list of the implications of this “dangerous amendment” by insisting that the ERA was “misleading” because it “masquerades as a progressive measure, whereas it would actually destroy progress toward equal rights, and would undermine the foundations of family life” (National Archives 1945). The latter comment likely reflected the inclusion of groups in the National Committee such as the leadership of the YWCA and the national councils of Jewish, Catholic, and Negro Women as well as the LWV and leaders from the AFL and CIO (Steiner 1985). According to Steiner, this large alliance of anti-ERA forces was responsible for the narrow defeat of the ERA in July of 1946, when despite being fast tracked past hearings in the House committee of the Seventy-Ninth Congress, the amendment proposal made it out of senatorial committee only to be defeated on the floor of the Senate in a nail biter 38-35 vote against passage.

A few years later, in 1950, a fateful compromising clause, drafted by the leadership of the Women’s Bureau, was added to the amendment following a heated debate regarding the proposal on the floor of the Senate. Senator Carl Hayden (D-AZ) proposed the addition of a clause thereafter known as the “Hayden rider,” that read: “The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex” (Neale 2013: 3). According to Thomas H. Neale, the rider caught ERA proponents off guard, and according to Freeman (1996) many Senators “took advantage of

the opportunity to vote for both amendments,” allowing the rider to pass 51-31 and the ERA with rider attached to pass 63-19. Only Senator Margaret Chase Smith (R-ME), the lone female Senator at the time, opposed the addition (Neale 2013).³ In the eyes of Alice Paul and the NWP, the rider compromised the principle of equality and thus had rendered the proposal utterly worthless. The NWP demanded it be withdrawn. In 1953, during the Eisenhower administration, according to Jo Freeman (1996), “history repeated itself” and the ERA with attached rider achieved congressional approval by a large margin.. And, again, the NWP insisted it be tabled.

The Eisenhower administration, devoid of the labor radicals that had supplied much of the energy and vision to the Roosevelt and Truman administrations, proved a good deal more friendly to the ERA than previous administrations. In place of Frieda Miller whose long career as a strong labor organizer and whose longtime opposition of ERA was widely recognized, President Eisenhower appointed Alice Leopold as head of the Women’s Bureau of the Department of Labor. Leopold was a former Connecticut Secretary of State who, as a freshman member of the 1949 General Assembly, was instrumental in passing legislation providing “equal pay for equal work” in that state (Leopold 1955: 7; *Sunday Herald* 1953). Although Leopold was not able to orchestrate the adoption of ERA, she focused attention more on women’s professional work in scientific and medical fields, and gave both tacit and non-tacit support for the ERA despite the Department of Labor’s continuing official stance against it (O’Farrell 2015). Aside from Leopold, Eisenhower himself proved to be the most enthusiastic supporter of ERA in his administration. Near the beginning of his second term of office, he included a rousing endorsement of “equal rights” for women in what historian Gilbert Yale Steiner characterizes as a “major campaign speech on civil rights”; Eisenhower did so again in his budget message to Congress in January, 1957 (Steiner 1978: 10).⁴ In 1958, Eisenhower asked a joint session of

Congress to pass the ERA, but when the amendment was introduced the wording included the Hayden rider, rendering it unacceptable to the NWP, again compelling its leadership to demand that it be withdrawn.

As a result of the impasse resulting from the introduction of the Hayden rider to the ERA, no real progress would be made to advance the ERA in the postwar period, including the few years of John F. Kennedy's presidency. The lack of action during the Kennedy administration was due, in part, to his appointment of a staunch labor advocate as Assistant Secretary of Labor for Labor Standards. Esther Peterson, the first woman lobbyist for the AFL-CIO and a longtime advocate for the rights of working women, consistently opposed the ERA throughout her tenure as Assistant Secretary, although, according to Karen O'Conner, she would become a "driving force" behind the passage of the Equal Pay Act of 1963 (O'Conner 2010: 274). In the early 1960s, Peterson, like many others of her generation, saw equal pay for working women as a pro-labor initiative while continuing to view the ERA in terms of the rifts between women activists characterizing those first divisive years of the 1920s.

This entrenched pattern of opposition between women organizers endured for two generations until a pro-ERA campaign emerged in the second half of the 1960s in the wake of Civil Rights legislation that reconfigured political alliances and legal strategizing. By the 1970s, as a state-by-state ratification process unfolded, women split along very different lines from those that had prevailed mid-century. The issue of protective labor legislation ceased to divide feminist-minded women, even as some of the same ideas about women's difference from men and need for special protections and privileges that labor advocates once articulated as foundational to their arguments became even more pronounced in heated public debates between feminists and a new coalition of conservative women.

<1>The Re-emergence of ERA in the Context of Civil Rights and Feminism, 1961-1982

Mayeri (2004: 757) explains that “[a]fter decades of bitter division over the Equal Rights Amendment,” women’s rights activists “overcame long-standing racial, class, and ideological rifts to unite around a dual strategy—the simultaneous pursuit of a constitutional amendment and judicial reinterpretation of the Fourteenth Amendment.” The judicial front of the equality battle came out of the President’s Commission on the Status of Women convened in late 1961, where participants were eager to develop an alternative legal strategy to circumvent the impasse over ERA. The Supreme Court had just decided *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), rejecting a Fourteenth Amendment challenge to women’s exemption from state jury service because women were different from men as “woman is still regarded as the center of home and family life.” The Commission asked Pauli Murray, attorney and civil rights activist, to research and evaluate possible strategies, and Murray recommended a renewed litigation effort under the Fourteenth Amendment drawing heavily on the analogy between race and sex discrimination in the “Jane Crow” laws (Murray and Eastwood 1965). This flexible, case-by-case approach allowed for incremental movement that mediated the absolutist positions of feminists on the ERA and concretely and politically linked women’s rights with the burgeoning civil rights movement. The American Civil Liberties Union (ACLU), a longtime opponent of the ERA due to its labor union allegiance, “enthusiastically embraced the Murray proposal” (Mayeri 2004: 766). Ardent ERA supporters initially resisted the judicial Fourteenth Amendment approach, thinking it to be an end-run around the amendment; but following the success of the race-sex connection in the passage of Title VII, these opponents came around to accepting the alternative strategy.

Title VII of the Civil Rights Act of 1964 and its prohibition of employment discrimination on the basis of race or sex proved to be a crucial step in building support for an equality amendment (Mansbridge 1986). The original bill targeted race discrimination in private employment, but was amended to include sex discrimination as well. Conservative, segregationist Howard Smith (R-VA) introduced a bill to add sex, many believed as a tactic to defeat the legislation, though Smith supported some view of women's rights (Mayeri 2004). Representative Martha Griffiths (D-MI), a longtime women's rights advocates, allegedly authored the amendment, but let Smith offer it knowing that this approach might garner political support even if derived from racial prejudices (Berry 1988). Title VII passed with the addition of gender, though early enforcement by the Equal Employment Opportunity Commission (EEOC) gave lesser priority to sex discrimination complaints than to those of race discrimination (Mayer 2004).

The National Organization of Women (NOW), newly formed in 1966 by Betty Friedan and Murray, pressed for full enforcement of the new Title VII and actualizing its mandate of equality in employment (Fry 1986). By 1970, federal courts, the Department of Labor, and the EEOC all interpreted Title VII as invalidating women-specific rules, including protective labor legislation, and more importantly, requiring extension of any protections like minimum wages to men rather than eliminating them for women (Mansbridge 1986). Union and social feminist opposition to the ERA finally began to wane, with the long-standing concern over worker protection laws now addressed (Mayeri 2004).

NOW quickly prioritized the ERA. The 1960s had seen little litigation successes with the judicial approach, and legal activists believed they needed the political leverage, if not the substantive right, of an equality amendment campaign (Mayeri 2004). NOW adopted the ERA as

a top priority at its conference in 1967. It rejected Pauli Murray's alternative proposal for a Human Rights Amendment that would have more broadly granted a "right to equal treatment without differentiation based on sex," potentially encompassing sexual orientation and explicitly addressing private action and reproductive rights (Mayeri 2004: 787). Longstanding ERA proponents, now much older, adamantly opposed any change in the wording of the ERA that might broaden it to more radical agendas, fearing it would jeopardize existing support (Mayeri 2004). This had the effect of reducing feminist demands to "the lowest common denominator" rather than pursuing a wider social justice agenda. Pursuing a constitutional amendment, however, did not mean abandoning the Fourteenth Amendment litigation. And so by 1970 "most legal feminists had reached a consensus that the constitutional change they sought could and should be pursued simultaneously through the dual strategy" of amendment and litigation." (Mayeri 2004: 800)

In early 1970, the Pittsburgh chapter of NOW used direct action to support its demand for an ERA, disrupting a hearing of the U.S. Senate Subcommittee on Constitutional Amendment on another proposed amendment, with protesters demanding hearings on the long-proposed ERA (Mansbridge 1986; Mathews and De Hart 1990). A Citizens' Advisory Council on the Status of Women petitioned President Nixon to endorse the amendment, and for the first time, the U.S. Department of Labor supported the ERA. In May, the Senate Amendment Subcommittee held hearings and referred the equality amendment positively to the Senate Judiciary Committee. There Senator Samuel Ervin Jr. (D-NC), a states' rights opponent of the civil rights' laws, and later of Watergate hearings fame, "became the amendment's chief antagonist" (Mathews and De Hart 1990: 36) He opposed ERA because of its threat to social norms, concerned about losing the traditional physiological and functional differences of gender to what he characterized as a

passing fad. He attacked “militant women who back this amendment,” saying “they want to take rights away from their sisters” and pass laws “to make men and women exactly alike” (Mathews and De Hart 1990: 37-39). Ervin moved the debate beyond the abstract principles of equality to concerns with specific effects of gender equality including the draft, divorce, family, privacy, and homosexuality. Harvard Law Professor Paul Freund also testified about the “parade of horrors the ERA might produce, including the legalization of same-sex marriage, the abolition of husbands’ duty of familial support, unisex bathrooms, and women in military combat” (Mayeri 2004: 808). The opposition succeeded, and the bill failed in the Senate (Mansbridge 1986).

Meanwhile, ERA passed in the House. Martha Griffiths used a rare procedural move of the discharge petition to “pry the ERA out of the House Judiciary Committee” where it had languished for years while the liberal chair, Emanuel Celler (D-NY) “kept it in his bottom drawer” because of the persistent opposition by labor (Mansbridge 1986: 13). After only an hour’s debate, the House passed the ERA by a vote of 350 to 15 on August 10, 1970. When the Senate failed to pass the bill, it was reintroduced the next year where the House passed ERA for a second time on October 12, 1971 by a vote of 354 to 23. This time the Senate passed ERA on March 22, 1972 by a vote of 84 to 8 with a seven-year timeline for the required three-fourths of the states to ratify the amendment (Mansbridge 1986). States initially rushed to ratify the ERA. Hawaii was the first state to ratify the amendment, twenty-five minutes after the Senate vote. The next day, three states ratified, and two more the following day. By early 1973, less than one year after Congress’s passage, twenty-four states had ratified, most unanimously or with quick hearings and debate.

This trajectory halted in 1973 with the Supreme Court's decision in *Roe v. Wade* finding a woman's constitutional right to choose abortion. *Roe* stopped the advancing ratifications, shifted the public discourse, and overturned previous support by Republicans (Ziegler 2015). "The battle against the ERA was one of the first in which the New Right used 'women's issues' to forge a coalition of the traditional Radical Right," (Mansbridge 1986: 16) concerned with "national defense and the Communist menace" (Mansbridge 1986: 5) and religious evangelicals to activate a previously apolitical segment of the working and middle classes that "was deeply disturbed by cultural changes" (Mansbridge 1986: 16). ERA became linked with abortion as both were sponsored by radical "women's libbers" who were a threat to traditional women and family values. The debate became framed as women versus women.

The face of women's opposition to ERA was conservative activist Phyllis Schlafly and her STOP ERA (Stop Taking Our Privileges) organization (Berry 1988; Neuwirth 2015). Schlafly, a mother to six children, offered herself to the anti-ERA movement as a voice for stay-at-home mothers in need of special privileges and protections under the law. The irony that she, much like all the most prominent reformers historically lining up on either side of the ERA amendment (such as Alice Paul, Florence Kelley, and Pauli Murray), held a law degree and enjoyed a flourishing decade-long career in the public eye, was utterly elided in her rhetoric. Doggedly focused on women's roles as mothers and home-makers, Schlafly trumpeted the cause of women's difference from men—championing the special rights of women as citizens who, ideally, did not work outside the home. She asserted that equality was a step back for women: "Why should we lower ourselves to 'Equal Rights' when we already have the status of 'special privilege?'" (Wohl 1974: 56). She and other ERA opponents reframed the issue as forcing women into dangerous combat, co-education dormitories, and unisex bathrooms. Feminist

advocates responded by clarifying that privacy rights protected concerns about personal living spaces in residences and bathrooms, but their counsel was unheard in the din of threat to traditional family and gender roles. Opponents equated ERA with homosexuality and gay marriage, as the amendment's words "on account of sex," "were joined with 'sexual preference' or homosexuality to evoke loathing, fear, and anger at the grotesque perversion of masculine responsibility represented by the women's movement" (Dehart-Mathews and Mathews 1986: 49). Schlafly hurled insults at the ERA supporters, urging her readers to view photographs of an ERA rally and "see for yourself the unkempt, the lesbians, the radicals, the socialists," and other activists she labeled militant, arrogant, aggressive, hysterical, and bitter (Carroll 1986: 85). When ERA supporters "gathered at the federally financed 1977 International Women's Year Conference in Houston and endorsed homosexual rights and other controversial resolutions on national television, they helped to make the case for ERA opponents" (Berry 1988: 86).

The shift in debate slowed and then stopped ratification of the ERA. In 1974, three states ratified the amendment, one state ratified in 1975 and in 1977, and then ended with only 35 of the 38 required (Mansbridge 1986). At the same time, states began to rescind their prior ratifications, with five states voting to withdraw their prior approval (Neuwirth 2015). The legality of the rescissions was unclear, but these efforts had political reverberations in the unratified states (Mansbridge 1986).⁵ When the deadline arrived without the required three-fourths approval, Congress voted in 1978 to extend the ratification deadline three years to June 30, 1982. Not a single additional state voted to ratify during this extension (Berry 1988). In 1980, the same year President Jimmy Carter proposed registering women for the draft, the Republican Party dropped ERA from its platform and newly-elected President Ronald Reagan came out in opposition to the ERA. Businesses, manufacturers, and insurance companies all

increasingly opposed the amendment (Burroughs 2015). ERA supporters escalated with more militant demonstrations of hunger strikes and marches. They chained themselves to the gates of the White House fence and Republican National Committee headquarters and trespassed on the White House and governors' lawns. But such protests had little effect, and proved counterproductive, as they alienated Republican sponsors and reinforced portrayals of the radicalness of the proposed amendment (Carroll 1986). Despite an extension, the ERA was defeated on June 30, 1982, three states short of the required super-majority of states. Congress immediately reintroduced the amendment, holding hearings in late 1983. The floor vote of 278 to 147 in the House came six votes short of the two-thirds needed for passage. Despite how close this generation of campaigners had come to achieving their goal, for most, the ERA was now dead (Farrell 1983; Mayeri 2009).

The broader goals of the ERA however, were not dead or abandoned. All through the previous decade, legal feminists led by the ACLU and Ruth Bader Ginsburg had been pursuing the second front of litigation and doing so with some success. In 1971, for the first time the Supreme Court struck down a law as arbitrary sex discrimination under the Fourteenth Amendment. In *Reed v. Reed* (1971), the high court overturned a state law that presumptively made a father, and not a mother, the administrator for a deceased child's estate. Two years later in *Frontiero v. Richardson* (1973), a plurality of the Court applied heightened scrutiny to strike down a law automatically granting military benefits to wives, but requiring military husbands to show dependency. The pros and cons of the dual constitutional strategy played out in *Frontiero*. The Court's plurality endorsed strict scrutiny for sex-based classifications because of congressional passage of the ERA, thus harmonizing the two. But the concurrence held that the pendency of legislation weighed against judicial decision, and required waiting for the final

outcome of the constitutional process. In 1976, a majority of the Court definitively applied equal protection to sex discrimination in *Craig v. Boren* (1976), adopting, however, only an intermediate judicial scrutiny, one more permissive than that for race.⁶ As Mayeri (2004: 826) notes “[t]his Goldilocks solution” in *Craig* captured the “Court’s ambivalence about both the procedural and the substantive aspects of a revolution in gender roles.” The ambivalence is apparent in that while striking down the law in *Craig* denying young men equal access to 3.2% beer, the Court upheld other discriminatory laws, like veterans’ preferences for men, statutory rape for minor women, and military pensions for men (*Schlesinger v. Ballard* 1975; *Kahn v. Shevin* 1974; *Geduldig v. Aiello* 1974). Equal protection proved an imperfect solution, and easily manipulable in the hands of the Court. For many activists, this indicated that perhaps an ERA was needed after all.

In the 1980s, at the time of ERA’s defeat, polling found that a majority of the electorate remained in support of the amendment (*Businessweek* 1983; *Gallup Report* 1981; Mansbridge 1986). According to Pleck (1986: 107-08), “[i]n the midst of a national conservative tide, popular support for the ERA was very strong.” Most national leaders, political conservatives, and “major national organizations from the American Bar Association to the Girls Scouts had gone on record in favor of it.” Then why did ERA fail? Scholars and activists have searched for possible explanations. Some suggest it was process, a rushed political process that failed to build the necessary state consensus on women’s rights to match the federal consensus along with inadequate state organizational structure to secure ratification, outdated campaign tactics and failure to use mass-media, and lack of legislative prioritization (Berry 1988; Carroll, 65; Mansbridge 1986; Mayo and Frye 1986; Pleck 1986; Steinem 1983). Other scholars point to deep substantive disagreements about women in military combat and revolutionary changes in

traditional motherhood, which threaten women personally as they perceive a danger to themselves and their daughters (Dehart-Mathews and Mathews 1986). Berry (1988: 85) notes that “[e]quality may have seemed simple to proratificationists, but to others it meant sexual permissiveness, the pill, abortion, living in communes, draft dodger, unisex men who refused to be men, and women who refused to be women. . . . and a fear that men would feel freer to abandon family responsibilities and nothing would be fined in exchange.” Some members of the public began to question the need for an ERA given intervening Supreme Court decisions extending equal protection to women and federal legislation like Title VII and Title IX of the Education Amendments (Mansbridge 1986; Mayeri 2004).

Congress continued to reintroduce the Equal Rights Amendment every year after its defeat, but it went nowhere. Glimmers of action appeared in 2007 when a bipartisan group of lawmakers rechristened the amendment the “Women’s Equality Amendment” (Mayeri 2009: 1224) and in 2013 when Representative Carolyn Maloney (D-NY) proposed new language for an equality amendment to make the equality abstraction more concrete: “Women shall have equal rights in the United States and every place subject to its jurisdiction.” But the time and urgency for an ERA seemed to have passed.

<1> Conclusion: Equal Rights One Hundred Years After Suffrage

In 2014, a new ERA Coalition of major women’s rights organizations formed, fueled by a new generation of young people outraged at continuing inequality and energized to action (Neuwirth 2015). The year brought renewed grassroots interest in the ERA sparking popular reconsideration of an equality amendment endorsed by celebrities like Meryl Streep and feminist icon Gloria Steinem (Babbington 2015). Justice Ruth Bader Ginsburg publicly called for the

ERA to ensure future generations that women's equality is "a basic principle of our society," just as she had thirty-five years earlier (Schwab 2014).⁷ Even legal feminist scholar Catharine MacKinnon (2014: 569), previously opposed to the ERA as a weak, formalistic attempt at equality, now believed that an ERA is "urgently needed, now as much as or more than ever." Surveys have shown over the last decade that most voters, as high as 96 percent support equality for women and 91 percent believe equality should be guaranteed by the Constitution (Neuwirth 2015). However, these surveys also show that 72 percent of people believe, *incorrectly*, that such rights are already included in the Constitution.

The ERA Coalition believes the time is ripe again for an ERA given the next generation's interest and recent political activity (Neuwirth 2015). In 2014, Oregon passed a state ERA referendum with 64 percent of the vote. Illinois and Virginia also passed state ERA laws, two states that had not previously ratified the federal ERA. Equality proponents advocate a "three-states-more" strategy which assumes the continued validity of the prior ratifications and seeks ratification of only three states. The ratification of the Twenty-Seventh Amendment, providing that any salary change for Congress must take effect the following term, supports this approach as it was sent to the states for ratification in 1789, but not ratified until 1992 when the last states joined (Burroughs 2015).

A key question is whether legally women need the ERA, or whether its goals of general equality and specific rights have effectively been accomplished through other means. The virtually unanimous consensus of legal scholars is that the ERA's goals have been effectively achieved through the Supreme Court's equal protection jurisprudence (Mayeri 2009; Siegel 2006). Courts now review gendered state action under intermediate scrutiny requiring that any laws treating women differently be justified by important governmental interests and that the

laws be closely tailored to those interests (*U.S. v. Virginia* 1996; *Mississippi v. Hogan* 1982). Other scholars, however, have emphasized the limitations of equal protection analysis for sex equality (Brown et al. 1971; MacKinnon 2014; Mansbridge 1986). For gender discrimination cases under equal protection, the Court utilizes a lower standard of intermediate scrutiny, rather than the strict scrutiny used in race and religions discrimination. This lower standard tolerates many of the continuing instances of less overt sex discrimination and laws that have discriminatory effect rather than textual prohibitions on gender (Siegel 2002). The equal protection approach is also limited because it requires proof of intent--defendants thinking bad thoughts about women--which MacKinnon (2014: 572) notes “doesn’t address how discrimination mostly operates in the real world,” where “the vast majority of sex inequality is produced by structural and systemic and unconscious practices” inherited from centuries of gender hierarchy. Equal protection law’s formal classification structure, she explains, which rigidly treats only exactly similar things the same, is incapable of assessing the ways in which people “can be different from one another yet still be equals, entitled to be treated equally” or where affirmative diversity is needed to treat alike those whom are different (MacKinnon 2014: 571).

Some scholars (Ginsburg 2014; Hoff-Wilson 1986) also conclude that equality for women has essentially been achieved for women without the ERA because the specific substantive goals of the amendment were accomplished through a variety of federal legislation on specific issues as well as the parallel state constitutional amendments. Twenty-three states adopted mini-ERAs and such amendments have helped strengthen women’s ability to challenge discriminatory laws in those states. Courts often interpret the state ERAs to require strict scrutiny, and two states mandate an even higher absolute standard that presumes any

discriminatory law to be unconstitutional (Burroughs 2015; Wharton 2005). In addition, federal legislation has mandated equal employment and education in The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Pregnancy Discrimination Act of 1978, and the Violence Against Women Act of 1994. Such piecemeal legislation, however, is subject to the political ebb and flow and can be rolled back, as the Violence Against Women Act was when the Supreme Court held in *United States v. Morrison* (2000) that Congress had no power to address civil remedies for domestic violence (MacKinnon 2014).

The renewed campaign for an ERA emphasizes the continued systemic harms to women of economic inequality, violence against women, and pregnancy discrimination and the limits of existing laws to address these concerns (MacKinnon 2014; Neuwirth 2015). Proponents of ERA emphasize the need for a permanent constitutional guarantee to control an overarching legal and social principle of women's equality. The U.S., unlike the majority of other countries, has refused to incorporate such an express guarantee in its written constitution or adopt the international women's bill of rights by ratifying the United Nations' treaty (MacKinnon 2014; Neuwirth 2015).⁸ The absence of an express guarantee permits traditional literalists like Justice Antonin Scalia to opine: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't" (*California Lawyer* 2011) The ERA offers a corrective to this thinking and the equivocal state of women's rights under the law. It offers a textual guarantee of sex equality, an inspiration for public policy, and a powerful symbolic support of women's equality in all social and legal venues (Ginsburg 2014; MacKinnon 2014).

The equality amendment fulfills the hope first envisioned by proponents of a suffrage amendment to fully integrate women into every aspect of the citizenry with full recognition of their humanity (Siegel 2002). Now, almost one-hundred years later, perhaps the time is right. Or perhaps the time is right to embrace the larger social justice legacy of the women's equality movement and expand the amendment to all human rights to include aspects of sexual orientation discrimination and reproductive rights. These broaden the concept of sex discrimination to encompass the ways in which gender is practiced and experienced in our society. Perhaps dovetailing with recent advances and political consensus in civil rights of same-sex marriage will give women's equality the final push it needs to be enacted.

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¹ *Minor* (1875) held that the Privileges and Immunities Clause of the newly-enacted Fourteenth Amendment includes women as “persons” and national “citizens,” but that voting is a privilege of state, not national, citizenship.

² *See also* *Riley v. Massachusetts*, 232 U.S. 671 (1914) (law similar to *Muller*); *Miller v. Wilson*, 236 U.S. 373 (1915) (upholding eight-hour law for female hotel maids); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (upholding maximum-hour law for female hospital workers).

³ According to Neale, while she voted against the rider, Senator Smith voted yes on final passage of the resolution as amended, which included the rider. Senate debate, *Congressional Record*, vol. 96, pt. 1 (January 25, 1950); Congressional Quarterly Almanac 1950.

⁴ Steiner (1978) cites as sources the Republican Platform 1956, in Donald Bruce Johnson, comp. *National Party Platforms* (1978: 554), “Address in Madison Square Garden, New York City, October 25, 1956,” and “Annual Budget Message to the Congress for Fiscal Year 1958,” *Public Papers of the President: Dwight D. Eisenhower, 1956* (GPO 1958: 1020) and 1957 (GPO 1958).

⁵ One federal court upheld the rescissions, but expiration of the ERA ratification deadline mooted the question before the Supreme Court could review the case. *Idaho v. Freeman*, 529 F. Supp. 1107 (1981), *stayed*, Jan. 25, 1982. The evidence against the legality of rescission is that states which attempted to rescind their ratification of the Fourteenth Amendment were still included as enacting states (Berry 1988).

⁶ The strict scrutiny test requires that state laws based on race be justified with compelling interests that are narrowly tailored to necessary regulation, thus invalidating most laws based on race. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

⁷ For Ginsburg’s early pro-ERA writings, see Ruth Bader Ginsburg, “The Fear of the ERA,” *Washington Post*, Apr. 8, 1975, A21; Ruth B. Ginsburg and Kathleen W. Peratis, “Equal Rights for Women,” *New York Times*, Dec. 31, 1975, 21; Ruth Bader Ginsburg, “Let’s Have E.R.A. as a Signal,” *ABA Journal*, Jan. 1977, at 70; Ruth Bader Ginsburg, “Sexual Equality Under the Fourteenth and Equal Rights Amendment,” 1 *Washington University Law Review* 161 (1979).

⁸ The U.S. is one of only seven countries that has not ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including Iran, Somalia,

Sudan, South Sudan, Palau, Tonga. The treaty was signed by President Carter in 1980, but failed to get the two-thirds Congressional vote necessary for ratification (Neuwirth 2015).