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# A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism

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## A NEW E.R.A. OR A NEW ERA? AMENDMENT ADVOCACY AND THE RECONSTITUTION OF FEMINISM

*Serena Mayeri\**

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## INTRODUCTION

In March 2007, almost exactly a quarter-century after the first Equal Rights Amendment's ratification failure, a bipartisan group of lawmakers reintroduced the rechristened but textually identical "Women's Equality Amendment" in both houses of Congress. Politicians and pundits declared the initiative the first serious attempt to revive the amendment in decades, suggesting that unlike previous quiet, desultory efforts, advocates of equal rights meant business this time.<sup>1</sup> The amendment's reintroduction provoked reactions ranging from enthusiasm to derision to incredulity. Some welcomed the ERA's revival as an opportunity to revisit unresolved questions of gender equality and justice.<sup>2</sup> Opponents bemoaned the amendment as tediously redundant, shockingly radical, or both.<sup>3</sup> Still others, including long-time proponents of women's rights, questioned whether a renewed campaign for a controversial and arguably ill-defined constitutional amendment was the wisest allocation of resources and political capital.<sup>4</sup> Commentators debated how an ERA would change existing law, how an increasingly conservative judiciary would interpret its text, and how the amendment effort would alter the political and partisan landscape.<sup>5</sup>

If these questions evoke a feeling of déjà vu, their eerie familiarity is no coincidence. The question of whether to continue to pursue feminist goals through a constitutional amendment despite the bitter ratification defeat of 1982 arose even before the first ERA's demise became official. Congressional proponents resolved to reintroduce the ERA in 1983, and both chambers held extensive hearings before and after the House narrowly voted to reject "ERA II." Early scholarly accounts of the ERA's rise and fall largely viewed ERA II as a postscript to ERA I, if they discussed it at all. This Article examines ERA II as a distinct phenomenon, with a constitutional and political meaning quite different from that of ERA I.

The debate over ERA II occurred at a pivotal turning point in the history of legal feminism and of constitutional amendment advocacy. In dialogue with their opponents, women's rights advocates grappled with difficult doctrinal dilemmas largely unaddressed in earlier congressional

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<sup>1</sup> Juliet Eilperin, *New Drive Afoot to Pass Equal Rights Amendment*, WASH. POST, Mar. 29, 2007, at A1.

<sup>2</sup> See, e.g., Martha Burk & Eleanor Smeal, *The One Sure Way to Guarantee Equal Rights for Women*, STAR-LEDGER (Newark, N.J.), Apr. 30, 2007, at 15.

<sup>3</sup> See, e.g., Phyllis Schlafly, *Equal Rights Redux: The ERA: Still a Bad Idea*, L.A. TIMES, Apr. 8, 2007, at M3; Phyllis Schlafly, *Left Schemes to Revive ERA*, HUMAN EVENTS, Apr. 16, 2007, at 1.

<sup>4</sup> See, e.g., Frances Coleman, *Don't Let It All Slip Away with the ERA*, PRESS-REGISTER (Mobile, Ala.), May 20, 2007, at D1; Rob Hotakainen, *Equal Rights Amendment Divides Party*, AKRON BEACON J., May 20, 2007, at A14; Jonathan Turley, *The Revival of the Equal Rights Amendment*, ROLL CALL, Apr. 16, 2007, at 4.

<sup>5</sup> See, e.g., Ilya Somin, *Be Careful What You Wish For*, LEGAL TIMES, June 4, 2007, at 58; Postings of Ilya Somin and Eugene Volokh to The Volokh Conspiracy (Apr. 9–13, 2007), [http://volokh.com/posts/chain\\_1176163135.shtml](http://volokh.com/posts/chain_1176163135.shtml).

debates over ERA I. They articulated a vision of “equality of rights under the law” that eschewed “equality in theory”—formal equality—and embraced “equality in fact,” which dismantled “neutral” laws and practices that disadvantaged women.<sup>6</sup> With ERA II, the proposed constitutional amendment enjoyed a new career as a partisan political weapon. Ultimately, feminists’ ERA II experience convinced the movement’s lawyers that amendment advocacy could not accomplish their reconfigured agenda. In reinventing the ERA, feminists took an important step toward transforming the legal aspirations and strategies of the women’s movement and the very nature of constitutional change advocacy.

\* \* \*

The Equal Rights Amendment’s ratification deadline passed on June 30, 1982, with the amendment failing to win the required three-fourths majority of states. Postmortems from scholars and advocates poured in over the next several years, assessing the reasons for the ERA’s defeat.<sup>7</sup> More recently, many scholars have shifted their attention from dissecting the ERA’s failure to measuring its stealthy success.<sup>8</sup> Though there is considerable disagreement over how the transformation came about, constitutional law experts agree that feminists ultimately succeeded in achieving many, if not most, of their goals through litigation and legislation, despite the ERA’s defeat.<sup>9</sup> Assessing the merits of this claim is tricky, for at least two reasons. First, answering the question of how much of what the ERA would have done that was instead accomplished through other means assumes that we can know what the ERA would have done—how it would have been interpreted by courts; how it would have been implemented by Congress and the Executive Branch; how advocates would have extracted new meanings and new ramifications with regard to issues the amendment’s earlier proponents

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<sup>6</sup> See *infra* Part II.B.

<sup>7</sup> See, e.g., MARY FRANCES BERRY, *WHY ERA FAILED* (1986); JANET K. BOLES, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT* (1979); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA* (1990); GILBERT Y. STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

<sup>8</sup> See, e.g., Cynthia Harrison, ‘Heightened Scrutiny’: *An Alternative Route to Equality for U.S. Women*, in *WOMEN AND THE UNITED STATES CONSTITUTION* 347 (Sybil A. Schwarzenbach & Patricia Smith eds., 2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 *CAL. L. REV.* 1323, 1332–34 (2006); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457 (2001).

<sup>9</sup> See, e.g., Ilya Somin, *What Effect Would the Equal Rights Amendment Have if Enacted?*, Volokh Conspiracy, Apr. 7, 2007, <http://volokh.com/posts/1176163135.shtml> (“As Northwestern University law professor Andrew Koppelman puts it, Phyllis Schlafly and other opponents [of the ERA] won the battle but lost the war: ‘The ERA was defeated, but its rule against sex discrimination was incorporated into constitutional law anyway, by judicial interpretation of the 14th Amendment . . . .’ In fact, says Koppelman, ‘it’s hard to imagine it making any difference at all.’”).

never contemplated; and how the answers to all of these questions would have changed over time. Second, the question of whether feminists gained by other means what they hoped to achieve through an ERA belies the fact that what they hoped to achieve was a moving target.

By the early 1980s, much of what feminists sought from the ERA diverged significantly from the preoccupations of proponents and opponents during the early-1970s creation of ERA I's legislative history. To some degree, the ERA's evolving meaning reflected feminists' successes and failures under existing constitutional provisions. But it also revealed substantial change over time in what feminists hoped to achieve through an amendment: a constitutional response not only to intentional discrimination and laws that explicitly denied women opportunities, but also to the unintentional perpetuation of inequality through laws and policies that appeared neutral on their face—a conception of equality that included the right to affirmative action, remedies for disparate impact discrimination, and broader freedom from discrimination based on pregnancy.

The debate over ERA II provides an excellent case study in the creation of constitutional meaning through amendment advocacy. Even (especially) after a decade of bitter contention over the ERA, the amendment's meaning—what it would do in the short and long term—was far from clear. Though the text of ERA II exactly replicated that of ERA I,<sup>10</sup> the ratification battle had transformed the contest's terrain, implicating issues barely contemplated in the original congressional debates. The initial ratification period had not proven conducive to a coordinated, internally consistent, and explicit account of the amendment's legal ramifications. Instead, proponents often found themselves on the defensive, and decisionmaking was diffuse. In contrast, the reintroduction of the ERA and the emergence of sophisticated opposition to the amendment in Congress forced advocates to reexamine exactly what they wanted from the ERA and to refine their account of its impact on the law. The congressional hearings on ERA II prompted feminists to evaluate how far they had come, to assess how far they wished to go, and to clarify exactly how much of their redefined agenda the ERA could help them achieve.

Today, it is far from obvious how one should interpret ERA II in the larger context of constitutional amendment advocacy. It was even less self-evident in 1982 and 1983, when feminists, their allies, and their opponents surveyed the political and legal landscape in the wake of the defeat of ERA I. Part I of this Article offers three possible accounts of ERA II's purpose and significance. Part I.A, which examines ERA II as a political weapon, suggests a role for amendment advocacy beyond the creation of constitu-

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<sup>10</sup> The text of the Equal Rights Amendment read as follows: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article. Section 3. This amendment shall take effect two years after the date of ratification."

tional meaning. While feminists primarily sought to alter women's legal and constitutional status, their congressional allies were at least as eager to make political hay of the Reagan Administration's less than enthusiastic embrace of women's rights. Even if a successful constitutional amendment remained out of reach, these politicians calculated, forcing opponents to vote "no" on equal rights for women might boost the electoral fortunes of Democrats and moderate Republicans, or at least help to discredit the Reagan Administration in advance of its reelection campaign and undermine social conservatives' apparent hold on the GOP. In the wake of the ERA's defeat, women's organizations publicly resolved to devote more energy and resources toward electing candidates who supported the ERA and other feminist positions, and to defeating those who did not. Reintroducing the ERA provided an opportunity to further this goal, highlighting not only how the preceding decade had transformed the amendment's ideological and partisan valence, but also how the very enterprise of amendment advocacy had evolved into a weapon of political combat.

A second possible account of ERA II was as a relatively seamless continuation of the debate over ERA I. In this account, described in Part I.B, it made sense to stand by the amendment's original legislative history as developed in the early 1970s, and to stress the abstract principle of equality rather than specific legal ramifications and doctrinal innovations. Despite broad agreement that ERA I fell short of promising the fulfillment of feminists' substantive goals, for some proponents, particularly veterans of the first ERA campaign, reinventing the amendment's meaning seemed politically futile and even counterproductive. Soon after the congressional hearings began, though, it became clear that proponents could not avoid probing questions about ERA II's theoretical and doctrinal particularities. Like it or not, the ERA II hearings compelled feminists to rethink their legal priorities. Despite their ambivalence about the political consequences, feminists seized this opportunity to redefine the amendment's constitutional meaning.

In the end, feminists created a new constitutional meaning for ERA II in dialogue with their opponents. Like the "de facto ERA" Reva Siegel has identified as the product of give-and-take between friends and foes of the amendment during the ratification period,<sup>11</sup> ERA II as defined by its defenders incorporated some of its opponents' assumptions as well as its proponents' aspirations. Unlike during the ratification period, though, when movement strategy was diffuse and decentralized, the process of constructing a legislative history for the new ERA was relatively deliberate and coordinated. This focusing of the collective mind proved both an advantage and a limitation for feminists. On the one hand, they presented a relatively disciplined, united front in favor of positions that would demonstrably have advanced the law beyond its current boundaries. On the other, political considerations still constrained their ability to implement many of the goals

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<sup>11</sup> Siegel, *supra* note 8, at 1324.

to which they privately—and sometimes publicly—aspired, and determined questioning from opponents forced the development of limiting principles to rein in revolutionary doctrinal changes. Proponents' positions on ERA II's legal consequences almost invariably occupied a middle ground between feminists' highest aspirations in 1983 and the meaning of ERA I as articulated in the 1971–72 legislative history.

Part II details the process by which proponents attempted to develop a new legislative history for the ERA. Part II.A briefly describes how the legal landscape of sex equality had changed since congressional passage of ERA I. Part II.B focuses on the controversy over the proper standard of judicial review under the ERA and the debate over how to address inequality that persisted despite the removal of most explicit sex-based classifications from the books. Part II.C looks at the struggle over how ERA II would affect private entities, in light of proponents' attempts to overcome the strictures of an increasingly conservative state action jurisprudence and opponents' concerns about incursions on the autonomy of private—and especially religious—institutions. Part II.D examines the formidable obstacles in the way of feminists' profound desire to transcend the strategic separation of reproductive rights from the ERA without spelling political doom for both causes. Part II.E addresses the substantive and strategic interactions between ERA II and other vehicles of constitutional change.

The final Part considers the legacies of ERA II. Part III.A revisits the frame of ERA II as political weapon, introduced in Part I.A. Hoping to create momentum for passage—or at least to embarrass conservatives—proponents forced an up-or-down vote on the amendment in the House, which they narrowly lost. ERA supporters faced criticism from both friend and foe for this parliamentary maneuver, but for a brief time it seemed as if the amendment's secondary role as a partisan battering ram might help Democrats and moderate Republicans to exploit the “gender gap.” Despite a short-lived boost from the first female vice-presidential candidacy, however, the ERA's career as a political weapon appeared over.

Nevertheless, the ERA II debate left important legacies for legal feminism and for constitutional amendment advocacy, as described in Part III.B. Arguments honed during the hearings became important bases for a new feminist constitutional agenda, particularly in the area of disparate impact analysis. Just as importantly, the ERA II controversy drove home the shortcomings of constitutional amendment as a means of implementing legal feminist goals. And the ERA II debate provides an important set of sources for scholars seeking to understand what changed—and what remained impervious to change—during one of the most crucial decades in the history of American women's legal status.

As the Article's conclusion suggests, the story of ERA II develops several themes salient to the literature on constitutional change and social

movement advocacy.<sup>12</sup> Most basically, focusing on the (re)introduction of a proposed constitutional amendment and the campaign for congressional passage highlights the importance of venues other than courts and processes other than litigation to the creation and contestation of constitutional meaning.<sup>13</sup> The ERA II debate also underscores the significance of amendment advocacy even in instances where a proposed Article V amendment is considered and rejected by Congress. In keeping with the emerging literature on constitutional culture and “democratic constitutionalism,”<sup>14</sup> the ERA II story emphasizes the extent to which the creation of constitutional meaning occurs through a dialogic process, forcing combatants to consider and even incorporate the arguments of their opponents into both substantive constitutional interpretation and strategic calculations.<sup>15</sup> The ERA II experience suggests that amendment advocacy may serve as a weapon of partisan political combat, as well as a vehicle for rethinking a social movement’s legal agenda.<sup>16</sup> Finally, ERA II’s role at a transitional moment in the history of legal feminism suggests that what appears to be devastating defeat may simultaneously liberate a movement’s constitutional imagination.

### I. THREE ACCOUNTS OF ERA II’S PURPOSE AND SIGNIFICANCE

After a bruising, decade-long ratification battle, the women’s movement had reached a crossroads. Back in 1972, when the ERA first passed Congress, ratification had seemed, if not assured, altogether likely. When House leaders reintroduced the ERA to the 98th Congress in January 1983, feminist leaders knew all too well the magnitude of the obstacles to passage and ratification, and they confronted the prospect of a rematch with considerable ambivalence.<sup>17</sup> But like it or not, Congress was considering the ERA once again. Faced with the alternative of allowing the amendment’s foes to define its meaning, women’s organizations launched a concerted effort to coordinate testimony and advocacy for “ERA II.” But before I examine that effort in detail in Part II, in this Part I explore various possible accounts of what proponents were doing, or believed themselves to be doing, when they launched and executed their campaign for ERA II.

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<sup>12</sup> For examples of this burgeoning field, see sources cited in Siegel, *supra* note 8, at 1328 n.13.

<sup>13</sup> A voluminous and growing literature critiques “juricentric” accounts of constitutional meaning. My aim in this Article is primarily descriptive: to uncover the rich constitutional contestation that occurs in the attempted creation of one proposed constitutional amendment’s legislative history.

<sup>14</sup> Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

<sup>15</sup> Siegel, *supra* note 8.

<sup>16</sup> I have explored elsewhere the mutual influence of constitutional change advocacy and internal social movement dynamics. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004).

<sup>17</sup> BERRY, *supra* note 7, at 101.



*A. ERA II as Political Weapon*

For some ERA proponents, most prominently the amendment's congressional sponsors, ERA II's primary function was to serve as a political battering ram to attack the Reagan Administration and the conservative wing of the Republican Party. For many feminists, this function, although not their first priority, provided an important secondary benefit. After all, many women's rights leaders realized that the ratification failure could be reversed only through persuading or defeating ERA critics and antiabortion advocates in Congress and the state legislatures. For those with Democratic leanings, Reagan-bashing was comfortable and dovetailed with a general political outlook. For Republican feminists, the President's opposition to the ERA symbolized a larger drift to the social and cultural right that dismayed and demoralized the party's liberals and moderates.

When Congress considered the original ERA in 1971 and 1972, the amendment had no particular partisan pedigree, and even its ideological valence remained ambiguous. Some of the amendment's most ardent supporters had been conservatives like Senator Strom Thurmond, Dixiecrat-turned-Republican from South Carolina,<sup>18</sup> while there was some Democratic opposition to the amendment because of the threat it posed to protective labor legislation. Senator Edward M. Kennedy (D-MA) was still a recent ERA convert in the early 1970s, as were many in the labor movement.<sup>19</sup> The amendment had the nominal support of the Nixon Administration and prominent women in the Administration were avid supporters. Anti-ERA witnesses included Paul Freund, a Harvard law professor with impeccable civil rights credentials.<sup>20</sup>

Political developments over the next dozen years transformed the ERA into a potent symbol of partisan and ideological polarization.<sup>21</sup> The Reagan Administration and the GOP opposed the amendment outright, while Democratic support for the ERA had become an article of faith, at least at the national level. Indeed, debates over gender roles and over the desirability

<sup>18</sup> On alliances between the National Woman's Party and segregationist Southerners, see, for example, LEILA J. RUPP & VERTA TAYLOR, *SURVIVAL IN THE DOLDRUMS: THE AMERICAN WOMEN'S RIGHTS MOVEMENT, 1945 TO THE 1960S* (1987); Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983).

<sup>19</sup> On labor opposition to the ERA during the pre-1970s period, see, for example, DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* (2004); CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968* (1988).

<sup>20</sup> Compare, e.g., Paul A. Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971) (arguing against the ERA and in favor of a case-by-case approach to combating sex discrimination under the Fourteenth Amendment), with Paul A. Freund, *Civil Rights and the Limits of the Law*, 14 BUFF. L. REV. 199 (1965) (defending proactive legal approaches to civil rights for African Americans).

<sup>21</sup> On the partisan realignment with respect to gender issues generally during this period, see Anne N. Costain, *After Reagan: New Party Attitudes Toward Gender*, 515 ANNALS AM. ACAD. POL. & SOC. SCI. 114 (1991).

of sex equality were in no small part responsible for an ongoing partisan realignment that placed cultural issues at the center of political discourse and marginalized moderate voices within the Republican Party. Pundits credited the newly powerful and visible “Religious Right” with Reagan’s victory in the 1980 election, and few individuals could take more credit for mobilizing grassroots support for religious conservative political activism—especially among Christian women—than the architect of the STOP ERA movement, Phyllis Schlafly.<sup>22</sup>

The 1980 election produced another new, much-discussed political phenomenon—the electoral “gender gap.” After decades of voting for Democrats and Republicans in proportions virtually identical to their male counterparts, women were turning away from Reagan and the GOP in unprecedented numbers.<sup>23</sup> The gender gap, commentators would later conclude, stemmed not so much from differences of opinion on issues like the ERA and abortion rights, but rather from concerns about Reagan’s aggressive foreign policy, his prioritization of defense over domestic spending, and deep cuts in social programs amidst recession and growing economic inequality. But although later scholarly assessments would undermine the theory that Reagan’s opposition to the ERA contributed significantly to the gender gap, contemporaneous media accounts gave the idea considerable currency.<sup>24</sup> Once in office, the Reagan Administration also came under fire from civil rights and women’s groups outraged at the Executive Branch’s failure to vigorously enforce antidiscrimination laws. By 1982, Republican feminists and moderates were openly breaking with the Administration and warning that the party risked permanently losing a crucial voting bloc if it continued to antagonize female voters.<sup>25</sup>

Women’s organizations like the National Organization for Women (NOW) recognized the gender gap as a political opportunity, or at least a silver lining on the rapidly gathering clouds of conservatism.<sup>26</sup> In the years

<sup>22</sup> For more on Schlafly, see DONALD CRITCHLOW, *A WOMAN’S CRUSADE: PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM* (2006); CAROL FELSENTHAL, *SWEETHEART OF THE SILENT MAJORITY* (1981); MATHEWS & DE HART, *supra* note 7.

<sup>23</sup> See sources cited *infra* notes 24–26.

<sup>24</sup> See, e.g., Steven V. Roberts, *Surveys on Women’s Reaction Worry White House*, N.Y. TIMES, Sept. 1, 1982, at B6; see also sources cited *infra* note 30. Political scientist Jane Mansbridge concluded that there was little or no evidence that female ERA supporters based their vote on the issue to any greater degree than men. Jane J. Mansbridge, *Myth and Reality: The ERA and the Gender Gap in the 1980 Election*, 49 PUB. OPINION Q. 164 (1985).

In the years since the emergence of the “gender gap,” scholars have advanced various hypotheses to explain the phenomenon. See, e.g., Jeff Manza & Clem Brooks, *The Gender Gap in U.S. Presidential Elections: When? Why? Implications?* 103 AM. J. SOC. 1235 (1998) (examining the impact of labor force participation on voting patterns).

<sup>25</sup> See, e.g., Associated Press, *Reagan’s Concept of America Hurts Party, Packwood Says*, N.Y. TIMES, Mar. 2, 1982, at D22.

<sup>26</sup> Mansbridge gives NOW the lion’s share of the credit for perpetuating the notion that Reagan’s opposition to the ERA caused the gender gap. See Mansbridge, *supra* note 24, at 166, 171.

before the ERA died its official death, women's groups mounted campaigns to defeat anti-ERA state legislators.<sup>27</sup> In some instances, female candidates, galvanized by the uphill battle for ratification, ran for local and state office on a pro-ERA platform.<sup>28</sup> When ratification failure appeared certain, ERA supporters vowed to reintroduce the amendment and hold legislators accountable for their votes in the 1982 federal and state elections.<sup>29</sup> The national press regularly ran articles emphasizing the electoral gender gap and its increasing importance to feminists' political strategy.<sup>30</sup> Even—perhaps especially—while in its death throes, the ERA proved a lucrative fundraising vehicle for organizations like NOW.<sup>31</sup> Feminist leaders frankly acknowledged that the large sums raised in the final months of the ratification campaign stemmed in large part from women's growing frustration with the Reagan Administration.<sup>32</sup> Feminist leaders argued that “[w]ith the backing of the proved fund-raising capability, the sharp criticisms of Mr. Reagan by women could be easily harnessed to have a major impact on the November elections.”<sup>33</sup> Columnist Ellen Goodman predicted in early June:

[E]ven if it fails, the amendment and the activism behind it aren't going to disappear in a puff of smoke . . . . These women have learned how the system works and how it doesn't work. In politics, the slogan is: Don't get mad, get even. In ERA politics, they know how to do both.<sup>34</sup>

To be sure, feminists were divided about the level of energy and resources they should devote to renewing the battle for an ERA, as opposed to pursuing their goals through other means. National Abortion Rights Action League director Nanette Falkenberg said on the eve of the ratification deadline, “There is a real raging debate . . . over whether the emphasis continues to go toward ratifying the ERA or whether the focus of activities should shift to abortion and other issues.”<sup>35</sup> At the local level, many ERA activists planned to “shift their energies, for the present, away from a sec-

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<sup>27</sup> See, e.g., John Herbers, *Women Turn View to Public Office*, N.Y. TIMES, June 28, 1982, at A1.

<sup>28</sup> Enid Nemy, *Feminist Cause Looks Back to Grass Roots*, N.Y. TIMES, Nov. 8, 1982, at B10.

<sup>29</sup> Associated Press, *Equal Rights Supporters Plan to Re-Offer Measure*, N.Y. TIMES, Mar. 23, 1982, at A16; Beverly Stephen, *ERA: The Good Fight Will Continue*, L.A. TIMES, June 16, 1982, at G3.

<sup>30</sup> See, e.g., Adam Clymer, *Women's Political Habits Show Sharp Change*, N.Y. TIMES, June 30, 1982, at A1; Bill Peterson, *Women's Political Views Shifting*, L.A. TIMES, Apr. 9, 1982, at G12.

<sup>31</sup> Jane Perlez, *NOW's Funds Soar Suggesting Extent of Women's Power*, N.Y. TIMES, May 20, 1982, at C1.

<sup>32</sup> *Id.* (“Mrs. Smeal and other feminist leaders believe that the money coming into NOW for the ratification drive is motivated in part by the far higher negative rating women give President Reagan than men give him.”).

<sup>33</sup> *Id.*

<sup>34</sup> Ellen Goodman, *ERA Foes Are Pigging Out on a New 'Harmony'-to-be*, L.A. TIMES, June 8, 1982, at C5.

<sup>35</sup> Joann S. Lublin, *Where Does the Women's Movement Go Now?*, WALL ST. J., June 29, 1982, at 26.

ond ratification campaign toward other fronts.”<sup>36</sup> On the other hand, plans to reintroduce the ERA proceeded apace. The *New York Times* predicted that “there will be an E.R.A. II, not because the male and female supporters of equal rights are diehards or sore losers but because it is necessary.”<sup>37</sup> Goodman forecasted that feminists would continue to push for an ERA, but that it would take at least another decade to achieve success.<sup>38</sup>

Over the weeks and months following the first ERA’s expiration, a new approach took shape: feminists would continue to support the amendment, but would devote more of their political resources and energies toward financing candidates who would stand up for feminist positions on all issues, including the ERA, and toward defeating those who opposed the amendment, abortion rights, and other issues of concern to feminists. When ERA supporters officially conceded defeat six days before the ratification deadline, NOW President Eleanor Smeal announced at a news conference that the organization’s primary goal would be to “chang[e] the composition of Congress as well as the state legislatures to include a significantly larger proportion of women and of men who are genuinely feminists.”<sup>39</sup> NOW would devote its fundraising and public relations apparatus to electoral politics. Electing more women and sympathetic men, feminists hoped, would both stimulate a new ERA ratification drive and promote better policies in areas such as child care, domestic violence, economic equality, and reproductive rights. Smeal foresaw the creation of “an independent third political force that will represent women’s interests.”<sup>40</sup> She announced in August 1982 that the organization would mark the anniversary of the Nineteenth Amendment with a \$3 million fundraising drive to back candidates who supported the ERA.<sup>41</sup>

Many Democrats and some moderate Republicans proved eager to embrace the new ERA. For members with sympathetic constituencies, signing on as a cosponsor was a costless way to curry favor with women’s groups, now a force to be reckoned with in American politics, and served as a welcome means of embarrassing the Reagan Administration. Two weeks after the first ERA’s defeat, more than two hundred senators and representatives reintroduced the amendment, as House Speaker Thomas P. “Tip” O’Neill (D-MA) and Senator Kennedy trumpeted their commitment to equality be-

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<sup>36</sup> Elsa Brenner, *E.R.A. Backers See Challenge in Defeat*, N.Y. TIMES, July 11, 1982, at CN1.

<sup>37</sup> Editorial, *Equal Rights, the Retail Way*, N.Y. TIMES, July 6, 1982, at A16.

<sup>38</sup> See, e.g., Ellen Goodman, *Amendment Runs Out of Time: Nothing Can Kill the Idea—It Will Start Again*, L.A. TIMES, June 29, 1982, at C5.

<sup>39</sup> Associated Press, *NOW Concedes Defeat on ERA*, L.A. TIMES, June 24, 1982, at A2.

<sup>40</sup> Lublin, *supra* note 35.

<sup>41</sup> United Press Int’l, *N.O.W. Opens \$3 Million Drive for Candidates*, N.Y. TIMES, Aug. 27, 1982, at A9. The election of Judy Goldsmith to succeed Smeal signaled, according to Goldsmith, “a very strong mandate for a continuation of our electoral, political, and economic direction that we have taken in the last year.” Associated Press, *Goldsmith Elected President of NOW*, L.A. TIMES, Oct. 11, 1982, at B14.

fore a crowd of several hundred in front of the Capitol.<sup>42</sup> Moderate Senator Bob Packwood (R-OR) predicted that his party would lose several House seats in the upcoming election and eventually “go out of existence” if the GOP continued to “write off 90 percent of minorities and 50 percent of women.”<sup>43</sup>

Despite some private ambivalence about the wisdom of reintroducing the ERA, feminist lawyers publicly reaffirmed the need for a new amendment. In a lengthy and detailed op-ed published in the *Los Angeles Times* in mid-July, NOW Legal Defense and Education Fund Legal Director Phyllis Segal called the ERA “essential” and declared, “The question is not ‘whether’ the ERA will become part of the Constitution, but ‘when.’”<sup>44</sup> A supportive editorial ran the next day, opining that “[t]he slate is clean. The backers of the equal rights amendment are starting over. This time around, they must define the issues themselves . . . .”<sup>45</sup> Despite her private misgivings, NOW President Judy Goldsmith enthused, “It’s like the classic experience when you say, ‘[i]f only I could do that over again and do it right.’ We have that chance.”<sup>46</sup>

Of course, feminists and liberal lawmakers were hardly the only potential beneficiaries of the ERA’s political fallout. ERA I had played a significant role in mobilizing a previously underappreciated political constituency—the conservative Christian women who flocked in large

<sup>42</sup> Lynn Rosellini, *U.S. Equal Rights Measure Is Re-Introduced in Congress*, N.Y. TIMES, July 15, 1982, at B13.

<sup>43</sup> *Id.*

<sup>44</sup> Phyllis N. Segal, *Women Won’t Be Satisfied with Piecemeal Reform*, L.A. TIMES, July 18, 1982, at E5.

<sup>45</sup> Editorial, “*We Are All Equal, That Is All*”, L.A. TIMES, July 19, 1982, at C4. Mixed results in the 1982 elections did not deter those who would link the ERA to the electoral gender gap. Indeed, NOW President Judy Goldsmith attributed NOW’s renewed push for ERA II to feminists’ “extraordinarily successful” efforts in the “Remember in November” campaign, an initiative to remind voters of the positions their legislators had taken on the ERA and encourage them to vote accordingly. Letter from Judy Goldsmith, President, NOW, to NOW Activists (Jan. 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 192, Folder 30). “The groundswell of support [in Congress] for ERA re-introduction is unmistakably a tribute to our political effectiveness and to the emergence of women as a political force that must be reckoned with,” Goldsmith told supporters in January 1983. *Id.* at 1; see also Memorandum from Mary Jean Collins to Goldsmith, Timmer, Webb, and Chapman, Reintroduction of the ERA 2 (Jan. 3, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 197, Folder 7) (“As you know our public position has been cautious on passage this year and to orient our strategy toward the 1984 elections. It appears that momentum is being created in Congress because of the 1984 elections and because Democrats are anxious to retain the support of women . . . . Because of the clear positive support we are responding positively in the press to the reality of reintroduction. The 1982 elections showed we remembered in November and that women’s political power and candidates’ positions on ERA will be an issue in November 1984 and other elections prior to that one.”). As the 98th Congress began its first session that same month, the *Los Angeles Times* editorialized that the second ERA campaign “may be just as difficult as the first, but this time around the amendment’s backers are organized and have proved they can punish their opponents at the polls.” Editorial, *ERA: Those Who Are Wrong*, L.A. TIMES, Jan. 5, 1983, at C4.

<sup>46</sup> Ellen Goodman, *Rules of the Road for a Bumpy ERA Rerun*, L.A. TIMES, June 12, 1983, at E5.

numbers to Phyllis Schlafly's STOP ERA movement. Threatened by feminism's assault on traditional gender roles and promotion of reproductive rights, female workforce participation, and sexual freedom, these women adeptly adopted the tactics of their opponents—political organizing, direct action, lobbying, public speaking, and direct mailing. Schlafly and her followers helped to foster the rise of grassroots conservatism within the Republican Party.<sup>47</sup> Conservative activists publicly professed disgust and disbelief at the amendment's reintroduction, though they could not resist an additional opportunity to paint their opponents as radicals bent on destroying the traditional family, forcing women into military service, providing abortion on demand, and promoting homosexuality.<sup>48</sup> GOP insiders reported that many Republican senators were loath to be forced to take a position on ERA II.<sup>49</sup>

However, conservatives in Congress were not without a stake in the amendment's reintroduction. At the very least, Senator Orrin Hatch (R-UT), the chairman of the Judiciary Committee's Subcommittee on the Constitution, apparently hoped that holding hearings would "make [the ERA] controversial so senators feel the heat."<sup>50</sup> Indeed, ERA II arguably provided Hatch with an opportunity to lend legitimacy and legal sophistication to an opposition movement often accused of hysteria, duplicity, and willful misunderstanding of the law. If he could interrogate proponents about the specific ramifications of the amendment in a calm, rational manner, their real agenda would be exposed without so much as a single reference to murdered babies or lesbian conspiracies.

Thus, political combat was one frame within which participants in the ERA II debate viewed their support or opposition. Of course, that frame had very different ramifications for different political actors. For liberal politicians, supporting the amendment was a relatively costless way of shoring up support among an increasingly important constituency and, moreover, of embarrassing the Reagan Administration and the right wing of the Republican Party in advance of the 1984 elections. For moderates within the GOP, support for the ERA was a means of asserting independence from a party that increasingly marginalized centrists. For feminist activists, the amendment could serve as a device to smoke out opponents of feminism and subject them to retribution at the polls, or at the very least, to raise

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<sup>47</sup> See CRITCHLOW, *supra* note 22.

<sup>48</sup> See, e.g., Letter from Jean E. Doyle, National Right to Life Committee (Oct. 27, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 191, Folder 1); Letter from Jerry Falwell to Jennie Thompson (Mar. 8, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 175, Folder 14). When President Reagan consulted with Schlafly in March 1983 to discuss possible approaches to the ERA, she urged him to focus on other constitutional priorities, like the human life, school prayer, and balanced budget amendments. George Archibald, *Hatch to Defy Right on Airing ERA*, WASH. TIMES, Apr. 28, 1983, at 3A.

<sup>49</sup> Archibald, *supra* note 48.

<sup>50</sup> *Id.*

money for sympathetic candidates and causes. For conservatives, the ERA's reintroduction was a potentially dangerous distraction, but also an opportunity to showcase their side's legal sophistication and highlight the weaknesses of proponents' arguments.

*B. ERA II as ERA I, Part II*

Given the temporal continuity of the first ERA ratification campaign and the amendment's immediate reintroduction without textual alteration, it is hardly surprising that many feminists—and the scholars who wrote the first wave of ERA histories—initially saw the campaign for ERA II as merely an extension of the debate over ERA I. References to the inevitability of a decade-long ratification campaign even in the event of successful congressional passage made ERA II seem more like a slightly nightmarish rerun than a carefully updated remake. There was considerable continuity between the two debates in that many of the issues that were front and center with respect to ERA II had arisen during the ERA I ratification campaign, and in that sense were not new. Rather than reassessing the ERA's meaning in great and reflective detail, it made sense to many proponents to stick with their preratification stance—focusing on the principle of equality and referring skeptics to the original 1971–72 legislative history when pressed for details.

A number of factors weighed in favor of a strategy characterizing ERA II in the abstract, as an important symbolic advance that would have significant but not revolutionary effects on women's legal status. If ERA supporters were to succeed in winning congressional passage of the amendment for a second time, it would likely not be through changing legislative minds about the substance of the amendment, but rather by convincing members of Congress that it was in their political interest to support ERA II—or in their political disinterest to oppose it.

Moreover, the ratification struggle had suggested to proponents that the more they could characterize the ERA as a matter of high principle—of equality and justice in the abstract—the better. Public opinion polls indicated that most Americans supported “equality” in these broad terms, but inevitably support softened when specific applications of the equality principle surfaced, or opponents had the opportunity to characterize the amendment's particular projected effects.<sup>51</sup>

Reliance on equality as an abstract principle also made sense as a long-term strategic matter. Given that courts were growing increasingly conservative in their interpretations of the Equal Protection Clause,<sup>52</sup> the ERA might meet a similar fate, at least in the short run. But if feminists could

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<sup>51</sup> On the ERA and public opinion, see Serena Mayeri et al., *Gender Equality, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* (Nathaniel Persily & Jack Citrin eds., 2008).

<sup>52</sup> See, e.g., cases cited *infra* notes 73–76.

achieve greater electoral success and more progressive judicial appointments, a general guarantee of equality might be more susceptible to expansive interpretation later on.

Purely pragmatic considerations also supported the characterization of ERA II as a replica of ERA I. Simply put, if ERA I couldn't win ratification, there was little reason to believe that a more ambitious version of the amendment would—especially in an increasingly conservative political climate. Further, part of the reason for refusing to give up the ERA ghost was a fear that the amendment's failure would be interpreted as a national rejection of the equality principle. If a large part of the ERA's continuing relevance was as a symbolic affirmation of sex equality and a rejection of the antifeminism the amendment helped to foment, then seeing ERA II as identical to ERA I made sense.

Finally, admitting that the ERA would have profound effects on the law and on women's status in American society belied the assurances proponents had grown accustomed to offering—that the amendment would have no effect on abortion, on the rights of homosexual persons, on family structure, and so forth. The “superfluity problem” would not go away—proponents had to proclaim the continuing need for an ERA despite advances under the Equal Protection Clause and through legislation.<sup>53</sup> Creating new meanings for ERA II would obviate this problem, but at the possibly fatal price of admitting that proponents wanted more than they had acknowledged seeking.

All of these factors militated in favor of resting ERA II on ERA I's original legislative history, enshrined in the 1971 *Yale Law Journal* article coauthored by Thomas Emerson and several feminist law students (the Yale ERA Article).<sup>54</sup> In this view, ERA II provided a second bite at the ratification apple and nothing more.

### C. *ERA II as the Dawn of a New Era*

A third way of framing the debate over ERA II was to view it as an opportunity to reassess the feminist legal agenda and to rethink the amendment's constitutional meaning. This perspective embodied an acute recognition of how much had changed—legally as well as politically—since Congress had first considered the ERA.<sup>55</sup> Feminists began strategizing about how to handle these changes almost immediately after the ERA's re-introduction, but it was the congressional hearings themselves that forced proponents to redefine the specific legal ramifications of their amendment and thereby begin to retool a post-ERA feminist agenda.

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<sup>53</sup> See Mayeri, *supra* note 16, at 821; Siegel, *supra* note 8, at 1403–04.

<sup>54</sup> Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871 (1971) [hereinafter Yale ERA Article].

<sup>55</sup> I detail these changes *infra* at Part II.A.



Many feminists were understandably reluctant to wade back into the ERA fight. But once Congress began its hearings, ERA opponents accused the amendment's supporters of evading the true legal ramifications of the amendment and forced them to provide detailed assessments of the amendment's projected legal impact. What exactly would the judicial standard of review be under an ERA? Precisely which laws would fail to survive judicial scrutiny? What was the true meaning of "equal rights under the law"? To some degree, ERA proponents had faced these questions during the ratification debates, but the context was new—advocates now had the opportunity to rewrite the ERA's legislative history in light of a decade of legal and social change. Though they steadfastly maintained that an ERA was just as necessary as it had been ten years earlier, feminists recognized that they faced a transformed legal and political landscape that required them to re-examine the assumptions, elisions, and compromises of the 1970s.

When ERA opponents demanded specific answers to specific questions about the ERA's legal meaning, feminist organizations were compelled to respond. This process forced feminists—and feminist lawyers in particular—to rethink what they wanted from the amendment, and from congressional consideration of the ERA. The reintroduction of the ERA provided a focal point for feminist lawyers to strategize together—to take a cold, hard look at the legal landscape, assess their options, and infuse the amendment with new legal and political content. After a decade of asking what they could do for the ERA, it was time for feminists to ask what the ERA could do for them.

In attempting to create a new legislative history for the ERA, proponents of the amendment were addressing multiple audiences. Most immediately, they responded to queries from skeptical or even hostile legislators like Senator Orrin Hatch, whose detailed questions were designed to highlight ambiguities that opponents warned were an invitation to judicial interpretation run amok.<sup>56</sup> They also addressed pro-ERA legislators, many of whom likely would have preferred to keep the debate at a high level of generality in order to reap maximum political gain and avoid grappling with the difficult doctrinal details.<sup>57</sup> A third important audience was internal: feminist lawyers and legal activists frustrated by ERA I's defeat and by the compromises that the ratification effort had required. Though feminists did not necessarily agree on strategy or tactics, many came to see the creation of a new legislative history as an opportunity, perhaps even an imperative, to reassess their constitutional agenda. By 1982, the Yale ERA Article's exposition of the amendment's meaning seemed outdated in its emphasis, if

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<sup>56</sup> This skepticism was nothing new, of course; Phyllis Schlafly and opponents of ERA I had similarly expressed scorn for the notion that legislative history would constrain judicial interpretation of the ERA. See Siegel, *supra* note 8, at 1394 ("As a literate member of her constitutional culture, Schlafly did not trust legislative history as a constraint on the ERA's adjudicated meaning . . .").

<sup>57</sup> See *infra* Part II.B.1.

not its content. Feminists who wished for a more expansive ERA II—or were forced to clarify the amendment’s meaning by determined questioning from skeptics—could not avoid reconstructing its legislative history.

Finally, the attempted creation of a new legislative history for the amendment ultimately anticipated a judicial audience.<sup>58</sup> The legislative history feminists tried to create for ERA II contemplated that courts, when called upon to interpret the ERA in future cases, would look to the debates and legislative reports they hoped Congress would eventually produce. During the debate over ERA I, the Yale ERA Article was widely viewed as the definitive exposition of the amendment’s projected impact.<sup>59</sup> Although the ERA’s opponents exploited fears that courts would not be constrained by the amendment’s legislative history, most of the disputants assumed that legislative history would play some role in defining the ERA’s scope and application to particular problems. If nothing else, persistent skepticism from opponents about the courts’ likely fidelity to legislative history virtually compelled feminists to provide repeated reassurances that legislative history would matter.<sup>60</sup>

On this third view, then, the reintroduction of the ERA offered feminists more than a second bite at the ratification apple; it offered them a chance to redefine the amendment’s meaning, and feminists seized this opportunity. They engaged in lively debates over how the amendment could improve women’s legal status given the sweeping and multivalent changes of the 1970s. However, as they grappled with the questions presented by pro- and anti-ERA legislators and with strategic disagreements within their own ranks, feminists refined and sometimes scaled back their constitutional aspirations. Thanks to the probing if sometimes disingenuous questions of ERA skeptics and supporters, feminists were compelled to think carefully about doctrinal intricacies they had preferred to leave vague during the ratification period. In the end, the legal meaning of ERA II was the evolving product of a series of compromises. Those compromises reflected external pressures from ERA opponents and legislators, as well as internal disagreements about how much a constitutional amendment could accomplish

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<sup>58</sup> As William Eskridge put it, “Both legislative history and constitutional history are strategic: players make statements with an eye on how other people will respond to them. In this century, legislative history has become strategic in another way: players make statements with an eye on how judges will construe their statutes.” William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302–03 (1998).

<sup>59</sup> Mansbridge questions the accuracy of this assumption. See Mansbridge, *supra* note 24, at 250–52.

<sup>60</sup> For a contemporaneous account of how the Supreme Court treated legislative history in the context of statutory interpretation in the early 1980s, see Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (“The Supreme Court increasingly is using legislative history in construing and applying federal statutes.”). During this period, constitutional scholars and government officials were also engaging in an increasingly heated debate over “originalism” in constitutional interpretation. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 132–63 (1996).

and about the role that the ERA should play in women's rights advocacy after the ratification failure.

## II. REDEFINING "EQUALITY OF RIGHTS UNDER THE LAW"

This Part recounts how feminists created a new constitutional meaning for the ERA through combative dialogue with their opponents. It quickly became clear that opponents would not allow feminists to promote the ERA as an abstract guarantee of equality, but rather would force them to account for the amendment's concrete effects on law and jurisprudence. Nevertheless, feminists struggled with competing impulses as they contemplated what kind of legislative history to create for ERA II. One possibility was to continue to emphasize equality as an abstract principle, and when pressed for details, stick with the positions taken in the first round of congressional deliberations in 1971 and 1972, the option suggested above by Part I.B. This position did not reflect satisfaction with the original legislative history, but rather a belief that the ERA was not a capacious enough receptacle for feminists' legal and constitutional aspirations. In other words, this was a conservative position not on the merits, but on the strategic questions proponents faced. The competing impulse, suggested by Part I.C, came from a kind of ratification fatigue—a weariness of the endless compromises entailed by amendment advocacy and an eagerness to move beyond the constraints imposed by the debate over ERA I. According to this view, drawing artificial lines between abortion and constitutional sex equality, for example, was counterproductive and ultimately injurious to the causes of reproductive rights and feminism. Focusing on the harm of explicit sex-based classifications made little sense in a world where most of these distinctions had been wiped off the books and yet sex-based inequality persisted. Ultimately, a new constitutional meaning for ERA II emerged out of these warring impulses.

### *A. The Legal Backdrop: A Decade of Change*

Much had changed since the debates over congressional passage of the ERA in 1971 and 1972. At the federal level, feminist lawyers had persuaded the Supreme Court to scrutinize and invalidate many sex discriminatory laws.<sup>61</sup> Statutes like Title VII and the Pregnancy Discrimination Act of 1978 provided the basis for lawsuits against private as well as public employers who discriminated on the basis of sex. Title IX forbade many forms of sex discrimination in education. At the state level, an examination of laws and policies that disadvantaged women was well under way, sometimes compelled by state constitutional changes—most prominently, state

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<sup>61</sup> See, e.g., *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 419 U.S. 636 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

ERAs.<sup>62</sup> The numbers of women pursuing traditionally male occupations, including law, medicine, and even military service, increased steadily.<sup>63</sup> As scholars of the ERA's failure recognize, these victories made arguing for the amendment more difficult in the latter years of the ratification process.<sup>64</sup> Changes in the law—both statutory and judge-made—between 1972 and 1982 removed many of the sex-based legal distinctions that the ERA originally was designed to vanquish. Political scientist Jane Mansbridge argued just a few years later that by the time the ERA officially expired, the amendment's direct, short-term impact probably would have been limited.<sup>65</sup> The reigning consensus within the legal academy today is that equal protection jurisprudence more or less incorporated ERA I's precepts, and this interpretation earned now-Justice Ruth Bader Ginsburg's blessing in the late 1990s.<sup>66</sup>

To say that by 1982 feminists had achieved through other means much of what the ERA was designed to accomplish is not to assert that feminists were satisfied with the legal changes they had won, however—far from it. In fact, the developments of the 1970s and early 1980s had themselves transformed the meaning of equality for advocates concerned with women's legal status. In the first hearings on the amendment in 1971 and 1972, explicit sex-based classifications that limited women's ability to break out of traditional roles topped women's rights advocates' list of grievances.<sup>67</sup> Now the crucial difference an ERA could make concerned the treatment of sex-neutral laws that disproportionately disadvantaged women.<sup>68</sup> In 1971 and 1972, the Supreme Court had only just begun to reconsider its traditionally deferential rational basis standard for reviewing sex-based classifications; by the early 1980s, the Court had struck down many sex-specific laws<sup>69</sup> and established a more rigorous standard of review: intermediate

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<sup>62</sup> For a comprehensive list of state ERAs and sex-based equal protection provisions, see LESLIE W. GLADSTONE, CONG. RESEARCH SERV., ORDER CODE RS20217, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS (2004), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7397:1>.

<sup>63</sup> See Serena Mayeri, *Women: United States Law*, in OXFORD ENCYCLOPEDIA OF LEGAL HISTORY (forthcoming) (on file with author).

<sup>64</sup> BERRY, *supra* note 7, at 99–100; MANSBRIDGE, *supra* note 7, at 45–59.

<sup>65</sup> MANSBRIDGE, *supra* note 7, at 141–43.

<sup>66</sup> Siegel, *supra* note 8, at 1334.

<sup>67</sup> See, e.g., Yale ERA Article, *supra* note 54, at 873 (“Our legal structure will continue to support and command an inferior status for women so long as it permits *any* differentiation in legal treatment on the basis of sex.”).

<sup>68</sup> The Yale ERA Article did recognize, in passing, the possibility that sex-neutral “functional” classifications “may in practice fall more heavily on one sex than the other.” *Id.* at 898. After observing that the courts had confronted similar problems in the areas of racial and religious discrimination, the authors suggested that “[p]rotection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment . . . . The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured.” *Id.* at 900.

<sup>69</sup> See, e.g., cases cited *supra* note 61.

scrutiny.<sup>70</sup> Whereas the ERA's effect on affirmative action had not been a prominent concern in the early 1970s, heated controversies over race-based remedies and the nebulous constitutional status of sex-based affirmative action increased the issue's salience.<sup>71</sup> Abortion had played only a minor role in the first set of hearings; however, a decade after *Roe v. Wade*,<sup>72</sup> it was a primary preoccupation of American politics. In the early 1970s, predictions that an ERA would lead to same-sex marriage could be dismissed as absurd; by 1983 they no longer seemed quite so outlandish.

At the same time that they had succeeded in eliminating many of the overtly sex discriminatory laws that had been the original targets of ERA I, feminists' success had certain limitations. Most prominently, the Supreme Court had declared that discrimination based on pregnancy did not necessarily constitute discrimination based on sex in violation of the equal protection guarantee;<sup>73</sup> that the Equal Protection Clause did not require that women and men be treated equally with respect to draft registration<sup>74</sup> or statutory rape laws;<sup>75</sup> that a strong showing of discriminatory intent was necessary to establish an equal protection violation even if a law exerted a dramatically disproportionate impact on women;<sup>76</sup> and that federal and state governments could deny funding for abortion services without running afoul of the Constitution.<sup>77</sup>

As a practical matter, the changes feminists did achieve meant that the overtly sex-based legal distinctions that remained on the books were often the most entrenched and emotion-laden—restrictions on women's participation in military service, including the exclusion of women from the draft and from combat; laws that defined marriage as a union between a man and a woman; and certain forms of sex separation, such as single-sex athletic teams, sex education classes, prisons, dormitories, and restrooms. As historians of the ERA ratification controversy have explicated, these issues played starring roles in the playbooks of ERA opponents. With the most frightening specters of androgyny and sexual license looming, and many—though certainly not all—of the ERA's original targets vanquished, making

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<sup>70</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>71</sup> The Yale ERA Article touched briefly on the subject of affirmative action. Presumably concerned that compensatory rationales would be used to uphold laws that differentiated between men and women to women's actual detriment, the authors struck a careful and somewhat cryptic balance between supporting the courts' "power to grant affirmative relief in framing decrees in particular cases," and disavowing an approach that would accord the same degree of deference to "compensatory aid" to women as to racial minorities. See Yale ERA Article, *supra* note 54, at 903–04.

<sup>72</sup> 410 U.S. 113 (1973).

<sup>73</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>74</sup> *Rostker v. Goldberg*, 453 U.S. 57 (1981).

<sup>75</sup> *Michael M. v. Super. Ct. of Sonoma County.*, 450 U.S. 464 (1981).

<sup>76</sup> *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979).

<sup>77</sup> *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

a compelling argument that the ERA remained necessary and desirable all but required a fresh account of the ERA's legal impact.

The ratification debates had not been an auspicious time for calm deliberation over the amendment's legal ramifications, however. Debates over ratification became highly symbolic and focused on inflammatory social issues such as the military draft, abortion, the projected demise of the traditional family, and homosexuality. ERA proponents lacked the centralization and organizational discipline of Schlafly's STOP ERA movement. They often found themselves in a defensive posture, compelled to spend much of their time describing what the ERA would *not* do rather than the positive changes it would bring. When proponents did attempt to invoke the ERA's legislative history to assuage the concerns of skeptics, they were constrained to referring back to the 1971 and 1972 congressional debates, which seemed increasingly distant now that judicial and legislative action had addressed many of the discriminations ERA promoters identified in the first place.<sup>78</sup> Once the ERA had gone down in defeat, though, feminists were at least partially liberated from these constraints. Now they could attempt a deliberate, coordinated reassessment of their legal agenda. In effect, they redefined the ERA to encompass many—though not all—of the goals that had evolved out of the legal and political changes of the 1970s and early 1980s. In the end, though, they could not wholly escape the political constraints that made the first ratification campaign so difficult, particularly once opponents interrogated them about the specific legal and doctrinal ramifications of ERA II.<sup>79</sup>

### B. "Equality in Theory" or "Equality in Fact"?

The hallmark of ERA II as constructed by a coalition of feminist lawyers and women's organizations was a definition of discrimination that emphasized the central role played by sex-neutral laws in the perpetuation of

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<sup>78</sup> The Yale ERA Article devoted the majority of its attention to the issues that generated the most debate and controversy in 1970–71: the fate of protective labor legislation, changes in domestic relations and criminal law, and the amendment's effect on military service. See Yale ERA Article, *supra* note 54, at 920–78.

<sup>79</sup> The fact that ERA II's text was identical to that of ERA I could have been a constraint on proponents' ability to create a new legislative history for the measure, but it does not appear to have been perceived as such by most proponents. Opponents sometimes resisted proponents' attempts to recast the amendment. See, e.g., *Equal Rights Amendment: Hearings on H.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 98th Cong. 798 (1983) [hereinafter *House Hearings*]. At least one witness, late in the hearings, opined that the "absolute" wording of the amendment would have consequences unintended by proponents and at odds with their objectives. Catherine Zuckert, a political scientist at Carleton College, testified that she was concerned that the ERA would make affirmative action for women unconstitutional and would reaffirm rather than contravene the narrow definition of sex discrimination expressed in cases like *Geduldig*. See *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, Part 2*, 98th Cong. 102–15 (1984) [hereinafter *Senate Hearings, Part II*] (testimony of Catherine H. Zuckert).

women's inferior legal, economic, and social status. In other words, feminists argued that the amendment would allow constitutional disparate impact challenges to laws that did not distinguish between men and women on their face, but that nevertheless had a sex-based disproportionate effect. The emergence of disparate impact analysis in the debate over ERA II underscored both the victories and the limitations of the legal changes that the civil rights and women's rights movements had secured during the 1970s. The disparate impact question had not been prominent in the first congressional consideration of the ERA in part because overt sex-based classifications were numerous enough that they were the amendment's primary targets. Further, in the early 1970s the door was still open to an expansive definition of actionable disparate impact under the Equal Protection Clause. Not long after the ERA's passage, feminists began to challenge veterans' preference laws using an equal protection theory that minimized the role of discriminatory intent and explicit sex classification. *Washington v. Davis*,<sup>80</sup> in 1976, was the first case in which the Supreme Court defined discriminatory intent as the key element of equal protection violation. Even in the wake of *Davis*, feminists won victories against some of the more extreme veterans' preference schemes in the lower courts.<sup>81</sup> It was not until *Personnel Administrator v. Feeney*, in 1979, that the Court appeared to virtually foreclose successful sex-based disparate impact challenges under the Equal Protection Clause.<sup>82</sup> Thus, only toward the end of the 1970s did it become clear to feminists that they would have to look outside of the Equal Protection Clause—perhaps to the ERA—to combat disparate impact under the federal Constitution.

By 1983, then, conditions were ripe for feminists to redefine the nature of equality under the ERA. Feminists did not always advertise this transformation, but they did not back away from it either. In contrast to their continued denials that the ERA would implicate abortion funding bans or laws concerning homosexuality, proponents acknowledged—and at times even emphasized—that the new ERA would call facially neutral laws into question. The challenge for feminist lawyers was to define a legal standard sufficiently rigorous to eliminate laws that perpetuated women's subordinate status but limited enough to assuage concerns that a constitutional assault on facially neutral laws would subject virtually every state and federal legislative act to judicial scrutiny.

I. “At Least Six Different ERAs”: *The Standard of Review Controversy*.—The standard of review that judges would apply under the ERA became a focus of congressional scrutiny almost as soon as Senate hearings

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<sup>80</sup> 426 U.S. 229 (1976).

<sup>81</sup> See *Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978) (striking down veterans' preference on remand for reconsideration in light of *Washington v. Davis*).

<sup>82</sup> 442 U.S. 256 (1979).

on the amendment began in May 1983. The ERA's primary Senate sponsor, Paul E. Tsongas (D-MA), was the first to testify before the Senate Judiciary Committee's Subcommittee on the Constitution, chaired by conservative Senator Orrin Hatch. Tsongas cast his prepared statement in general terms, attempting to allay concerns that the ERA would require the sex-integration of restrooms and prisons, force women into combat positions for which they were unqualified, and coerce homemakers into the workforce on pain of financial ruin. The very first question posed to a witness in the ERA II hearings was Hatch's query to Tsongas: "What precisely, in your view, is the standard of review that the equal rights amendment would establish for Federal and State legislation that employ sex classifications?"<sup>83</sup> But Tsongas declined to delve deeply into the legal intricacies of the amendment. "There is no one who would argue that we have at this point an exact understanding of where it will lead," he said at one point in the exchange.<sup>84</sup> When Hatch then asked whether Tsongas agreed that the analysis set out in the Yale ERA Article remained the "definitive statement" on the amendment's meaning,<sup>85</sup> Tsongas said he had not read the article.<sup>86</sup> Hatch followed up with a litany of specific questions about the ERA's projected legal impact on everything from abortion funding, to veterans' preferences, to seniority systems, to single sex schools, to maternity leave, to combat restrictions, to the legality of same-sex marriage. Tsongas dodged them all, emphasizing that all constitutional amendments contained some ambiguities and suggesting that Hatch had not subjected his own proposed human life (antiabortion) amendment to such a rigorous standard of certainty.<sup>87</sup> The exchange grew heated. "You knew damn well that these are specific issues, that no one coming here unprepared could answer," Tsongas shot back at one point.<sup>88</sup> The Associated Press described Tsongas as "visibly shaken."<sup>89</sup> Though he continued to accuse Hatch of hypocrisy, Tsongas agreed to submit a detailed list of answers to Hatch's questions.

Thus, in the first hour of the first hearing, Hatch had both established the agenda for the remaining hearings and created the impression that the amendment's proponents were long on platitudes and short on specifics. Even some ERA sympathizers were aghast at Tsongas's apparent inability

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<sup>83</sup> *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, Part 1*, 98th Cong. 22 (1983) [hereinafter *Senate Hearings, Part I*].

<sup>84</sup> *Id.* at 22.

<sup>85</sup> *Id.* at 23.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 23–31.

<sup>88</sup> Associated Press, *Two Senators in Hot Discussion on Equal Rights Amendment*, N.Y. TIMES, May 27, 1983, at A11.

<sup>89</sup> *Id.*



to answer basic questions about the amendment's meaning.<sup>90</sup> It had become painfully clear that ERA supporters faced a well-informed, legally sophisticated adversary and would be forced to articulate much more specifically the amendment's constitutional consequences.

Although Hatch's portrayal of the proponents' views as ambiguous at best and evasive at worst was somewhat unfair, his professed confusion over the standard of review that would apply under the ERA was not wholly unreasonable. The ERA's text itself did not specify a standard of review, stating only that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The 1971 Yale ERA Article, which the Amendment's supporters and opponents frequently cited as the most reliable predictor of the ERA's impact, had set forth an "absolute" standard, subject to three "qualifications," sometimes referred to colloquially as "exceptions." If courts followed the Yale Article's schema, laws that distinguished between individuals on the basis of sex would be absolutely prohibited except (1) where they involved a physical characteristic unique to one sex;<sup>91</sup> (2) where they were necessary to preserve other constitutional rights, such as the right of personal privacy;<sup>92</sup> or (3) where they were part of a genuine affirmative action policy designed to remedy past discrimination.<sup>93</sup> In each of these three exceptional instances, the classificatory law would be subject to strict scrutiny: the requirement that the classification be narrowly tailored to serve a compelling government interest.<sup>94</sup>

Frequently, however, during and after the ratification debates, both friends and foes of the ERA characterized the applicable standard of review as analogous to the standard applied to race-based classifications: strict scrutiny. The analogy to race generally, and strict scrutiny in particular, served as a kind of shorthand in part because strict scrutiny was usually, but not always, fatal to the challenged law. Similarly, the Yale ERA Article announced an absolute standard that in fact was subject to certain exceptions.<sup>95</sup>

Nevertheless, there were potentially significant substantive and symbolic differences between the absolute standard and a general application of

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<sup>90</sup> See, e.g., Goodman, *supra* note 46 (describing Tsongas as "shamefully unprepared" for his exchange with Hatch); Editorial, *Tsongas and the ERA*, BOSTON GLOBE, June 4, 1983, at 14 (criticizing Tsongas for "showing up unprepared"). *But see* Letter from Paul Tsongas to the Editor, Boston Globe (June 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 191, Folder 45) (defending his own testimony, including his decisions to defer technical questions to constitutional lawyers and to admit that courts would exert some control over the interpretation of the ERA).

<sup>91</sup> Yale ERA Article, *supra* note 54, at 893-95.

<sup>92</sup> *Id.* at 900-02.

<sup>93</sup> *Id.* at 903-05; see also discussion *supra* note 71.

<sup>94</sup> Yale ERA Article, *supra* note 54, at 888-909.

<sup>95</sup> *Id.*

strict scrutiny to all sex-based classifications. An absolute standard created a bright-line rule for a certain category of classifications that did not fall under any of the three exceptions. Strict scrutiny at least theoretically left open the possibility that any sex-based classification might be upheld if the government's asserted objective was sufficiently compelling and the means used to achieve that goal were necessary.<sup>96</sup> Moreover, the absolute standard carried particular symbolic weight because proponents perceived it to be even more stringent than the standard applied to race-based classifications, indicating to proponents a laudable seriousness about the gravity of sex discrimination missing from the Supreme Court's intermediate scrutiny formulation.

Opponents framed the absolute standard as epitomizing the ERA's inflexibility and its supporters' fanatical devotion to androgyny.<sup>97</sup> It was bad enough that many proponents asserted that the ERA would treat sex like race—to apply an even higher level of scrutiny added insult to injury. ERA skeptics also chided proponents for failing to specify which standard of review would apply. After Tsongas and the second pro-ERA witness, attorney Marna Tucker, attempted to gloss over the issue, anti-ERA witness Walter Berns of the American Enterprise Institute complained that “[w]hat this [vagueness about the standard of review] implies is that it is not necessary to know what the language means because in due course the courts will tell us what it means.”<sup>98</sup> To leave something this important up to the courts, Berns charged, was to “treat[] the Constitution with contempt.”<sup>99</sup> The first House hearing on ERA II, several weeks later, revealed continued confusion over the proper standard of review for sex-based classifications. Anti-ERA witness Grover Rees III, a professor at the University of Texas Law School, opined that this ambiguity produced so many different possible interpretations that there were, in effect, “at least six different ERAs.”<sup>100</sup> The U.S. Civil Rights Commissioner and Howard University Professor Mary Frances Berry immediately followed Rees and offered a definitive answer

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<sup>96</sup> As the Yale ERA Article's authors wrote:

The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered “suspect” and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by “compelling reasons,” it would permit some classifications based on sex to survive. Thus this standard too would not guarantee an effective system of equality which, as we shall argue, demands the elimination of all such classifications.

*Id.* at 880–81 (footnote omitted).

<sup>97</sup> See, e.g., MATHEWS & DE HART, *supra* note 7, at 167–68, 220.

<sup>98</sup> *Senate Hearings, Part I, supra* note 83, at 63 (prepared statement of Walter Berns, Resident Scholar, American Enterprise Institute; Professional Lecturer, Georgetown University).

<sup>99</sup> *Id.* As Mary Frances Berry has observed, “An underlying aspect of the committee hearings and the debate on the floor was a deep distrust of the role of federal courts in the American system of government . . . .” BERRY, *supra* note 7, at 108.

<sup>100</sup> *House Hearings, supra* note 79, at 28–30 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).

to the standard of review question. In response to a question from Representative Mike DeWine (R-OH), Berry testified that the standard would be analogous to that applied to race-based classifications under the Equal Protection Clause.<sup>101</sup>

Subsequent hearings in the House picked up on both the parallel to the Fourteenth Amendment and the apparent inconsistencies in proponents' testimonies about the proper standard of review. Phyllis Schlafly told the House subcommittee on October 20, "To predict what will be the effect of ERA in any area, just ask yourself, 'how do we handle it in race?' and you will have the answer."<sup>102</sup> During the same hearing, former Representative Charles Wiggins emphasized the importance of conclusively establishing the standard of review, arguing that if Congress did not wish to embrace the decisional law on race-based classifications, it should incorporate specific exceptions into the committee reports and other legislative history.<sup>103</sup> Representative DeWine expressed frustration with pro-ERA witnesses' reluctance to clarify definitively the proper standard of review. Many of the witnesses had deferred such questions, leaving them to others with greater expertise in matters of constitutional doctrine. Said DeWine, "I just hope that someday we get some witnesses in here, Mr. Chairman, with all due respect, who will talk about what the interpretation will be by the courts and what the test [will be]. That is the tough question."<sup>104</sup>

The chairman of the House Subcommittee on Civil and Constitutional Rights, Representative Don Edwards (D-CA), complied at a hearing one week later, calling as witnesses constitutional scholars Thomas Emerson of Yale and Ann Freedman of Rutgers. Emerson and Freedman were among the five coauthors of the famous Yale ERA Article, and their testimony did serve to clarify ERA proponents' position on the proper standard of review for sex-based classifications. Emerson eschewed the label "absolute," noting that it had acquired "pejorative" connotations during the ERA ratification debates.<sup>105</sup> But Emerson essentially reaffirmed the Yale ERA Article's general prohibition on facial sex classifications that did not fall under the three exceptions—narrowly drawn affirmative action programs, unique

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<sup>101</sup> *Id.* at 52 (statement of Mary Frances Berry, Commissioner, U.S. Commission on Civil Rights).

<sup>102</sup> *Id.* at 409–10 (statement of Phyllis Schlafly).

<sup>103</sup> *Id.* at 384 (statement of Charles Wiggins). In the next House hearing six days later, Columbia Law Professor Henry Paul Monaghan, a professed ERA sympathizer testifying on behalf of the anti-ERA Orthodox Jewish organization Agudath Israel, pointed out that while both the absolute and the strict scrutiny standards "will lead to the same result in the vast majority of cases involving gender-based classifications—namely, invalidation . . . the standards are not in principle identical." Allowing some explicitly sex-based laws and policies to stand if they served a compelling government interest would, for example, leave more room for gender differentiation in the military and combat settings. *Id.* at 640–41 (statement of Henry Paul Monaghan, Thomas M. Macioce Professor of Law, Columbia University).

<sup>104</sup> *Id.* at 593 (statement of Representative Mike DeWine).

<sup>105</sup> *Id.* at 797 (statement of Thomas Emerson).

physical characteristics, and conflicts with other constitutional provisions, such as the right to privacy.<sup>106</sup>

But what was noteworthy about Emerson's and Freedman's testimony before the House subcommittee was not so much their explication of the appropriate standard of review for overt sex-based classifications, which in practical terms had arguably become a distinction without a difference.<sup>107</sup> Instead, by this point in the hearings it was clear that the most important question about standards of review concerned not legal classifications explicitly based on sex, but rather sex-neutral laws and policies that had a sex-based disproportionate effect.

2. *A "Theoretical Dilemma": Disparate Impact Analysis and the New ERA.*—Feminist lawyers and activists immediately identified disparate impact as one of the key issues they would need to address as they attempted to shape ERA II's legislative history. "Disparate impact theory" had been one of several areas "for further research" identified in March 1983 at a meeting for representatives of a coalition of feminist groups, including Eleanor Smeal, Judy Goldsmith, Catherine East, Phyllis Segal, and Marsha Levick.<sup>108</sup> Segal, an attorney with NOW Legal Defense and Education Fund (LDEF), was charged with writing an initial memo laying out the substantive and strategic issues involved. The threshold question, Segal realized, was whether ERA proponents should attempt to clarify the application of the amendment to sex-neutral laws that had a disproportionately negative sex-based effect, or whether they should remain silent on the subject and leave ERA I's sparse legislative history on the issue to speak for them.<sup>109</sup> In her memo, Segal laid out three options: doing nothing; "act[ing]

<sup>106</sup> *Id.* at 736–39 (statement of Thomas Emerson).

<sup>107</sup> As NOW Legal Defense and Education Fund attorney Marsha Levick wrote to her colleagues: "[P]ractically speaking 'strict scrutiny' versus 'absolute' standard may be academic, if court has struck down every explicit racial classification since *Brown v. Bd. of Ed.*" Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee (May 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 32); *see also Senate Hearings, Part I, supra* note 83, at 519 (testimony of Ann Freedman, Associate Professor of Law, Rutgers Law School).

<sup>108</sup> Memorandum from Marsha Levick to Ellie Smeal, Judy Goldsmith, John Vanderstar, Mary Jean Collins, Catherine East, and Phyllis Segal, Re: Federal ERA—Legislative History Project (Mar. 22, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University). Each of these areas—disparate impact theory, affirmative action, unique physical characteristics, reproductive rights, homemakers' rights, and the state action doctrine—were both politically sensitive and technically complex.

<sup>109</sup> Memorandum from Phyllis Segal to ERA Legislative History Project (Mar. 21, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 29). The Yale ERA Article had spoken briefly to the issue:

Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment. Past discrimination in education, training, economic status and other areas has created differences which could readily be seized upon to perpetuate discrimination under the guise of functional classifications. The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured.

halfway by stressing disparate impact problems in describing the need for the ERA, without offering comments on the theoretical application or effect of the ERA in such cases"; and "present[ing] direct argument on this."<sup>110</sup> Avoiding the issue could backfire, she suggested, by limiting the ERA's "potential as a *legal* tool." Without further legislative history, there was a "serious risk that the Supreme Court will not apply the ERA to disparate impact cases, or will import an intent requirement" from equal protection jurisprudence.<sup>111</sup> Focusing exclusively on facial sex-based classifications also ran the risk of "trivializ[ing] the problems of sex discrimination," given "the dwindling list of laws that discriminate on their face."<sup>112</sup> It would be difficult to explain why the Equal Protection Clause did not suffice to address sex discrimination, unless the ERA would go significantly further than the Fourteenth Amendment in resolving disparate impact cases.<sup>113</sup> Putting the argument in more positive terms, Segal predicted that "expanding the impact of the ERA will increase support."<sup>114</sup>

Finally, Segal recognized that avoiding the issue was unrealistic: "Even if *proponents* don't focus [on] the issue [of disparate impact], a smart 'undecided' legislator, or opponents, will."<sup>115</sup> As if to prove Segal's point, Hatch raised the subject in the first Senate hearing on ERA II, asking Marna Tucker whether "disparate impact analysis" would apply to the ERA.<sup>116</sup> Tucker demurred, saying that she had not studied the issue.<sup>117</sup> Feminist lawyers realized they would have to be more forthcoming, but sought to strike a balance between explication and obfuscation. As feminist legal strategists discussed how to respond to the questions raised by Hatch in the first hearing, they established a "format for answering" questions about disparate impact: "1. Ask for specificity in question: what exactly is the questioner asking re: ERA and specific issue raised. 2. Preface answer with description of *disparate impact* this particular classification/issue has on women."<sup>118</sup> Proponents would emphasize the discrimination the ERA was meant to eradicate, and only address the legal technicalities of disparate impact analysis if pressed further.

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Yale ERA Article, *supra* note 54, at 900. Segal wrote: "While this article is an important part of the ERA legislative history . . . I am not aware of this particular passage being discussed." Memorandum from Phyllis Segal to ERA Legislative History Project, *supra*, at 6.

<sup>110</sup> Memorandum from Phyllis Segal to ERA Legislative History Project, *supra* note 109, at 9–11.

<sup>111</sup> *Id.* at 10.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Senate Hearings, Part I, supra* note 83, at 67 (statement of Senator Orrin Hatch).

<sup>117</sup> *Id.* at 70 (statement of Marna Tucker).

<sup>118</sup> Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 1–2.

a. *The search for a limiting principle.*—As the feminist lawyers constructed their strategy for responding to questions, they began to confront some of the challenges of articulating a theory of disparate impact that would reach the discrimination they wished to vanquish without appearing to be a radical and unworkable judicial intrusion on legislative decision-making. Because the range of laws exerting a sex-based disparate impact seemed potentially infinite, establishing a workable limiting principle was perhaps the most daunting challenge ERA proponents faced in formulating a method of disparate impact analysis.

The starting point for constitutional disparate impact analysis was the Supreme Court's treatment of such cases under the Equal Protection Clause. A finding of discriminatory intent was the primary limiting principle established by the Court in *Davis* and *Feeney*. Disparate impact alone would not trigger heightened scrutiny absent evidence of discriminatory intent, according to *Davis*.<sup>119</sup> Feminist lawyers had long emphasized that as difficult as it was to prove discriminatory intent in the context of racial discrimination, it was virtually impossible to find such evidence in cases of sex discrimination.<sup>120</sup> Yet the Court had in fact raised the bar even higher for sex-based disparate impact claims in *Feeney*. The majority in *Feeney* effectively rejected the more nuanced analysis of *Davis* in favor of a requirement that, for a claim to succeed, the challenged law must have been enacted "because of," not just "in spite of" its adverse impact on women. Even the dissenters in *Feeney* had not moved all that far away from an intent-based inquiry.<sup>121</sup> Justice Marshall wrote for himself and Justice Brennan that Massachusetts's absolute veterans' preference "evinces purposeful gender-based discrimination," and applied heightened scrutiny to the policy on that basis.<sup>122</sup> "[T]he critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment," Marshall opined, finding that among other factors, the "foreseeability" of the drastically adverse impact on women provided sufficient evidence of discriminatory purpose to trigger suspicion.<sup>123</sup>

This "foreseeability" standard thus provided one possible limiting principle that was less drastic than the *Feeney* majority's analysis. ERA proponents felt, however, that this standard still conceded too much to the preoccupation with intent that characterized the Court's equal protection analysis. From the start, their objective was to eliminate the intent require-

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<sup>119</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>120</sup> I address feminists' arguments to this effect in the *Feeney* case in greater depth elsewhere. See SERENA MAYERI, *REASONING FROM RACE: LEGAL FEMINISM IN THE CIVIL RIGHTS ERA* (Harvard Univ. Press, forthcoming).

<sup>121</sup> *Pers. Adm'r v. Feeney*, 442 U.S. 256, 281–82 (1979) (Marshall, J., dissenting).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 282–83.

ment altogether. Intent was far from irrelevant, feminists stressed, but they sought to ensure that evidence of a discriminatory purpose would be sufficient, rather than necessary, to trigger heightened scrutiny. Segal declared in her March 1983 memo: “While purpose or intent to discriminate would be definitive evidence to invalidate governmental action that has a disparate impact on females (or males), such evidence is not *required* (as it is in [equal protection] cases). This is the point that has not been articulated before.”<sup>124</sup> Most laws that had a disparate impact on women were not the product of deliberate malice, feminists argued, but of subtle attitudes and entrenched stereotypes about gender roles that exhibited the same constitutional infirmities as laws that overtly classified men and women. As Segal put it, “many rules that appear ‘neutral’ are designed essentially on world-view assumptions such as male wage worker/female childbearer-rearer role distinctions.”<sup>125</sup> Legal rules, moreover, often were “built on male norms,” but the “process of designing such ‘male-centered’ rules rarely includes—and more rarely provides evidence of—overt discriminatory intent.”<sup>126</sup>

But if feminists were unwilling to include an intent requirement—even in the more relaxed register of “foreseeability”—then they lacked a principle by which to limit the applicability of disparate impact analysis. As Segal recognized, they faced a “theoretical dilemma”: “the measure of when ‘disparate impact’ is sufficient to trigger ERA scrutiny . . . . This may of necessity be an issue left to future interpretation when the ERA is (at long last) implemented.”<sup>127</sup> However, ERA skeptics would not let proponents defer such questions indefinitely, particularly once witnesses took advantage of the more ERA-friendly atmosphere of the House hearings to highlight the ERA’s potential to attack disparate impact cases. In the second House hearing, held September 14, 1983, Tish Sommers of the Older Women’s League emphasized how disparate impact analysis could combat sex discriminatory effects of Social Security and ERISA rules, pension schemes, and divorce laws on older women.<sup>128</sup> NOW President Judy Goldsmith emphasized the difficulty, if not impossibility, of rooting out sex inequality under a discriminatory intent requirement, and detailed how assumptions about women’s economic dependency worked to their detriment in areas like employment, Social Security, pensions, and insurance rates.<sup>129</sup> League of Women Voters President Dorothy Ridings observed that “facially neutral policies” often perpetuated “occupational segregation,” discrimination in education and training, and contributed to the “feminiza-

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<sup>124</sup> Memorandum from Phyllis Segal to ERA Legislative History Project, *supra* note 109, at 9.

<sup>125</sup> *Id.* at 7.

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.* at 9. “Any thoughts?” she asked her colleagues. *Id.*

<sup>128</sup> *House Hearings*, *supra* note 79, at 153–54 (statement of Tish Sommers).

<sup>129</sup> *Id.* at 253–54 (statement of Judy Goldsmith, President, National Organization for Women).

tion of poverty.”<sup>130</sup> She touted the ERA’s requirement of “rigorous scrutiny” of “rules and policies that appear to be gender-neutral but which have had disproportionately negative effects on women.”<sup>131</sup> In the question and answer session that followed, Representative DeWine asked Goldsmith to clarify the pro-ERA position: “I think you are telling me, that we are going to look at the result of law . . . at how it applies, in fact. Is that a fair summary of what is involved?” Goldsmith replied, “That is correct . . . .” DeWine responded, “So we would not have to prove intent; we would not look to intent?” Goldsmith’s answer was unequivocal: “Exactly.”<sup>132</sup>

In the absence of a limiting principle to replace discriminatory intent, opponents could attack disparate impact theory as a boundless enterprise that, taken to its logical conclusion, contained limitless possibilities for undermining the legal and social order. The topic of disparate impact analysis arose most frequently in connection with substantive areas such as military regulations, veterans’ employment preferences, family law, abortion funding, and government benefits programs, especially Social Security. Each of these applications not only called into question entrenched assumptions about gender differences, but also appeared potentially to wreak havoc on the existing system of laws and regulations. Opponents often used hyperbolic language to forecast the ERA’s effects, but they also raised legitimate questions about the outer boundaries of disparate impact theory. Grappling with the objections of critics forced ERA proponents more specifically to define the limits of the disparate impact principle.

In arguing for a disparate impact theory of equal rights unbound to discriminatory intent, feminists first had to assure skeptics that their analysis would not subject every statute that had different impacts upon men and women to constitutional challenge.<sup>133</sup> One oft-cited example was the progressive income tax. Since men’s incomes were, as a group, higher than women’s, a progressive income tax disproportionately burdened men in a way that was easily foreseeable, if not inevitable.<sup>134</sup>

Feminists could have attempted to quantify the degree of disparate impact necessary to trigger special judicial scrutiny. They chose instead a qualitative definition. Rather than suggesting that all laws that disproportionately affected one sex were automatically suspect, proponents adopted a formulation that tied the application of heightened scrutiny to a particular type of disparate impact: that which, in the words of Ann Freedman, was “traceable to and reinforces, or perpetuates, discriminatory pat-

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<sup>130</sup> *Id.* at 275–76 (statement of Dorothy Ridings, National President, League of Women Voters).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 311 (statements of Representative DeWine and Judy Goldsmith).

<sup>133</sup> *See, e.g., Senate Hearings, Part I, supra* note 83, at 694 (testimony of Charles Shanor, Professor of Law, Emory Law School).

<sup>134</sup> *Id.*



terns similar to those associated with facial discrimination.”<sup>135</sup> Because the Court had already tackled many instances of facial discrimination under the Equal Protection Clause, Freedman could draw extensively from the language of the Court’s Fourteenth Amendment jurisprudence in characterizing those “discriminatory patterns.”<sup>136</sup> She then explained that the progressive income tax would not be vulnerable under this standard “because the disparate impact of the income tax on men is not the product of habit or stereotypical ways of thinking about the sexes.”<sup>137</sup> Freedman took the analysis one step further, attributing significance to the fact that the progressive income tax had redistributive consequences that “ameliorate[d]” sex inequality.<sup>138</sup>

*b. Applying the antihierarchy approach to family law.*—This antihierarchical or ameliorative approach to disparate impact analysis reflected feminists’ frustration with a conception of equal rights that appeared ultimately to benefit men. When NOW President Goldsmith described the need for the ERA to incorporate disparate impact analysis, she stressed the failure of equal protection jurisprudence to address sex discrimination’s particular toll on women. “Historically, in light of the Fourteenth Amendment, sex discrimination that disadvantages men is far more likely to be found unconstitutional than sex discrimination harming women,” she told the committee.<sup>139</sup> However, the Court’s emphasis on the harmful effects of sex stereotyping on both men and women created a potential tension between an antistereotyping impulse and the antihierarchical principle. Nowhere was this tension more apparent than in the realm of family law.

Visions of babies torn from their mothers’ breasts and homemakers forced to leave their children to go to work at low-wage jobs populated the imaginations of critics of disparate impact theory’s application to family law. Apocalyptic images of family breakdown, already tediously familiar

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<sup>135</sup> *House Hearings*, *supra* note 79, at 787 (statement of Ann Freedman, Associate Professor of Law, Rutgers Law School).

<sup>136</sup> *Id.* at 787–88 (“Many of the misconceptions and stereotypes that produce sex discriminatory neutral rules have been recognized and condemned by the Supreme Court in recent decisions under the equal protection clause invalidating facially discriminatory sex classifications. These include ‘the role typing society has long imposed’ on women, particularly the idea that the ‘female is destined solely for the home and the rearing of the family’ and not ‘for the marketplace and the world of ideas,’ and ‘assumptions that women are the weaker sex or are more likely to be childrearers or dependents’; the invidious relegation of classes of women ‘to inferior legal status without regard to the actual capabilities’ of individual women; the ‘nineteenth century presumption that females are inferior to males’; and the willingness to create gender-based hierarchies that keep women ‘in a stereotypic and predefined place’ and grant men more responsible and remunerative positions.” (footnotes omitted)).

<sup>137</sup> *Id.* at 789.

<sup>138</sup> *Id.* at 789–90.

<sup>139</sup> *Id.* at 259 (testimony of NOW presented by Judy Goldsmith, President). Goldsmith was apparently referring to the 1970s sex discrimination cases brought by male plaintiffs. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Her comment may have also reflected the Court’s failure to recognize discrimination against women in cases like *Feeney*.

from the ERA ratification debates, undoubtedly were overblown. As even Brigham Young University law professor Lynn Wardle, a staunch opponent of the amendment, conceded, the ERA “would accelerate the adoption of many beneficial reforms in existing family laws in order to equalize the general rights and obligations of fathers and mothers and husbands and wives.”<sup>140</sup> Once the strident rhetoric was stripped away, much of the disagreement between proponents and opponents did concern, as Wardle contended, the desirability of eliminating legal incentives for women to forego careers and pursue traditional roles as mothers and wives.<sup>141</sup> Although Schlafly and others regularly accused feminists of denigrating housewives, feminist lawyers had actually devoted considerable time, energy, and resources to addressing the legal plight of homemakers, particularly at divorce.<sup>142</sup> Feminists saw homemakers as caught in a no-win situation—a legal framework designed to encourage traditional roles, but that provided little if any protection to the wife in a traditional marriage gone awry. While many antifeminist critiques unfairly impugned feminists’ motives and distorted the extent to which existing law truly protected homemakers, the application of disparate impact analysis to family law nevertheless raised some vexing conceptual problems.

Child custody decisionmaking provides one example of the dilemmas raised by disparate impact theory’s application to family law. By 1983 and 1984, it seemed clear that the ERA would invalidate laws and practices that automatically granted a preference to mothers in child custody decisionmaking. The maternal preference, which sometimes took the form of the “tender years doctrine”—the presumption, given varying degrees of weight, that mothers were the best custodians for young children—was already on its way out in many jurisdictions, and joint custody was becoming increasingly common. Some feminists, like Women’s Legal Defense Fund staff attorney Nancy Polikoff, argued that judicial biases unfairly disadvantaged mothers, not fathers, in custody cases. Polikoff favored a “primary caretaker” standard that would reward the investment of mothers in childrearing.<sup>143</sup> This primary caretaker standard raised a disparate impact question: it

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<sup>140</sup> *Senate Hearings, Part II, supra* note 79, at 3 (statement of Lynn Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University).

<sup>141</sup> *Id.* (“Many people believe that there are other differences between men and women than just physical differences, that there are emotional differences and psychological differences, differences in the way that they nurture and relate to children, and that those differences ought to be taken into account or at least States ought to be allowed to take those differences into account in establishing family law.”).

<sup>142</sup> For a critical account of feminists’ focus on homemakers, see MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* 53–75 (1991).

<sup>143</sup> See, e.g., Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN’S RTS. L. REP.* 235 (1982); see also *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (rare case adopting primary caretaker standard); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 *WIS. L. REV.* 789 (questioning the benefits to women of a formal equality approach to family law decisionmaking).

seemed likely if not certain that facially sex-neutral decision rules that emphasized the best interests of the child or favored the “primary caretaker” would result in more mothers than fathers receiving custody because, as an empirical matter, they were far more involved in caring for children during marriage.<sup>144</sup>

The implications of the antistereotyping and antihierarchical principles in the custody context were not entirely clear. On the one hand, a father’s claim that custody decisions, even if ostensibly sex-neutral, exerted a sex-based disproportionate impact on men seemed consistent with feminists’ contention that even facially sex-neutral laws stemmed from and reinforced the sex stereotypes that relegated women to the home and accorded men exclusive access to the “marketplace and the world of ideas.”<sup>145</sup> If women’s inferior economic position derived at least in part from their disproportionate responsibility for child-rearing, which in turn aggravated the adverse financial impact of divorce, then a system that effectively favored women’s claims to custody might not only be unfair to men, but might in fact be contrary to women’s interests—particularly if accompanied by weak enforcement of the noncustodial parent’s child support obligations. On the other hand, altering the best interests of the child standard in a manner that would devalue women’s investment in childrearing after the fact seemed clearly detrimental to individual women and, potentially, to children.

Perhaps in part to deflect concerns about the applicability of disparate impact analysis to areas like child custody, feminists tended to emphasize property management and distribution rules as the primary targets of disparate impact analysis in the family law context. In this area, the tension between combating assumptions about the proper roles of men and women while acknowledging the social reality of disparate participation in child-rearing and homemaking activities seemed less acute. Feminists stood on somewhat firmer theoretical ground when they asserted that the ERA would undermine property distribution rules that undervalued homemakers’ contributions to the household. Challenging the distribution of financial resources between husbands and wives fit more comfortably with the antihierarchy principle because women were clearly the disadvantaged parties in jurisdictions that maintained title-based property distribution rules or otherwise failed to account for nonmonetary contributions in dividing property at dissolution. Applying disparate impact analysis to these distributive rules also allowed feminists to highlight how the ERA would bolster the position of homemakers. A similar analysis applied to alimony awards. When Senator Hatch asked NOW LDEF attorney Marsha Levick whether a

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<sup>144</sup> For a contemporaneous empirical analysis of child custody awards, see, for example, Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471 (1979).

<sup>145</sup> *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

jurisdiction that gave a disproportionate number of alimony awards to women would be subject to a disparate impact challenge, she could reply that no, “an increased number of support awards to women in the event that those awards were appropriately extended could not be considered to be discrimination against men. In fact, what they would be doing would be attempting to ameliorate the effects of discrimination against women.”<sup>146</sup> When anti-ERA activists accused feminists of devaluing homemaking, feminists protested that, in fact, the amendment would give homemakers additional protection both during marriage and at divorce. But, as the child custody example revealed, the tension between compensating women for their contributions to the household and upending legal rules that reinforced traditional gender roles was not easily overcome by a simple application of the antihierarchy principle.

*c. Veterans’ preferences, social services, and the ghost of equal protection.*—The antihierarchy principle did, at least in theory, limit disparate impact analysis to laws and policies that disadvantaged women. In the case of veterans’ employment preferences, perhaps the most prominent arena in which feminists promoted the disparate impact theory, the burden on women could hardly have been more pronounced. To ERA opponents, however, the veterans’ preference example proved too much because any government program that provided special benefits to veterans inevitably would benefit men almost exclusively. Opponents seized on this issue in the hearings: some suggested that disparate impact analysis would invalidate not only absolute veterans’ preference programs like the one at issue in *Feeney*, but all preferences for veterans in employment, and would even call into question the validity of veterans’ benefits programs more generally.<sup>147</sup>

Such predictions were, of course, calculated to cause maximal political consternation, but they also raised salient questions about the scope of disparate impact theory. The veterans’ preference issue was a mixed blessing for ERA proponents. Since the only Supreme Court case to address a constitutional sex-based disparate impact claim concerned veterans’ preferences and it was one of several specific targets of ERA II, proponents tended to use the Massachusetts program upheld in *Feeney* as an example of how disparate impact analysis would apply. Because the lower courts in

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<sup>146</sup> *Senate Hearings, Part II, supra* note 79, at 76 (statement of Marsha Levick, Legal Director, NOW Legal Defense and Education Fund). In addition to emphasizing areas in which the “amelioration of discrimination” argument was more straightforward, ERA proponents also referred to cases decided under state ERAs to answer opponents’ charges that the disparate impact standard would wreak havoc on family law in general, and child custody decisionmaking in particular. For instance, when Wardle cited child custody as an example of how disparate impact theory might apply to allow men to challenge custody regimes that resulted in fewer fathers receiving custody, Levick pointed to two Colorado cases in which courts rejected such arguments under the state’s ERA. *Id.* at 77.

<sup>147</sup> *See, e.g., House Hearings, supra* note 79, at 299–300; *Senate Hearings, Part I, supra* note 83, at 681–86; *see also* *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979).

*Feeney* had engaged in the kind of factfinding that proponents envisioned occurring under the ERA, it provided a handy concrete application of what could often seem like an abstract theory.<sup>148</sup> Further, the “absolute” nature of the Massachusetts preference enabled proponents to distinguish the program from other veterans’ preference schemes less burdensome to women. But the specificity of the Massachusetts example did not succeed in deflecting difficult questions about the reach of the disparate impact theory to other benefits for veterans and to the provision of government benefits and services more generally.

ERA proponents approached disparate impact analysis of government benefit provisions cautiously. For one thing, the issue was entangled with the complicated and politically fraught questions surrounding the exclusion of pregnancy from disability benefit coverage and the denial of Medicaid funding for abortion.<sup>149</sup> For another, feminists were wary of defining actionable disparate impact too narrowly. Still, charges from veterans’ groups that disparate impact analysis ultimately would threaten all kinds of government support for veterans<sup>150</sup> led ERA proponents to distinguish employment preferences from other policies benefiting veterans. NOW LDEF attorney Phyllis Segal began her Senate testimony on veterans’ programs by drawing a distinction between benefits “funded from the public treasury [that] do not impose any direct costs on individuals,” on the one hand, and civil service employment preferences, whose “burden[s] fall[] directly on those individuals who are denied jobs or promotions because they do not have veteran status.”<sup>151</sup>

The flip side of the question—the denial of social services, such as welfare benefits, that disproportionately impacted women—also proved tricky. As University of North Carolina law professor Judith Welch Wegner put it in her Senate testimony, how to view the disparate impact caused by “[d]ecisions to deny certain types or levels of social services” was “perhaps the most troublesome” question facing theorists of disparate impact discrimination.<sup>152</sup> In the end, Wegner fell back on the Supreme Court’s jurisprudence in race cases in an effort to assuage concerns that the ERA would subject legislative funding decisions to endless constitutional scru-

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<sup>148</sup> See *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976), *question certified* by *Massachusetts v. Feeney*, 429 U.S. 66 (1976), *vacated*, *Massachusetts v. Feeney*, 434 U.S. 884 (1977), *re-manded to Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978), *rev’d*, *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979).

<sup>149</sup> For more on the abortion controversy, see *infra* Part II.D.

<sup>150</sup> See, e.g., Letter from A. Leo Anderson, Washington, DC Liaison Officer, National Association of State Directors of Veterans Affairs to Rep. F. James Sensenbrenner, Jr. (Oct. 17, 1983), *reprinted in Senate Hearings, Part I, supra* note 83, at 762.

<sup>151</sup> *Senate Hearings, Part I, supra* note 83, at 765–66 (statement on the impact of the Equal Rights Amendment on veterans programs by Phyllis N. Segal).

<sup>152</sup> *Id.* at 890 (statement of Judith Welch Wegner, Professor, University of North Carolina School of Law).

tiny. She cited decisions like *NAACP v. Medical Center, Inc.*, in which the Third Circuit upheld a medical center's decision to relocate to the suburbs notwithstanding its adverse impact on inner-city minority communities, surmising that courts would "demonstrate sensitivity to legislative resource-allocation decisions" under the ERA as well.<sup>153</sup>

*d. Disparate impact and military employment: Title VII as a limiting principle.*—If equal protection jurisprudence helped to limit the reach of disparate impact analysis in the realm of social services cuts, when it came to military employment, feminists imported principles from Title VII cases to assure skeptics that the ERA would not upend military preparedness. In the military context, where the invalidity of explicit sex-based classifications was a hard enough pill to swallow, a disparate impact analysis suggested to some ERA skeptics that the amendment would effectively require women to make up fifty percent of draftees and even combat soldiers. Delaware Law School professor William A. Stanmeyer declared that disparate impact analysis would "require that one-half the eligible married women be drafted, while their husbands stay home, and in many cases take care of the baby."<sup>154</sup> Less dramatically and perhaps more credibly, other witnesses predicted that the ERA would precipitate a lowering of physical standards when such standards were found disproportionately to exclude women from certain positions. The effects of such a lowering of standards on military readiness could be devastating, a number of witnesses suggested.<sup>155</sup>

These arguments placed ERA proponents in something of a bind. Military service was not, in fact, one of the areas in which disparate impact analysis was most necessary—in the military, explicit sex-based classifications remained prevalent, and their removal would be revolutionary enough. Proponents stressed that their goal was not to lower standards; in fact, they emphasized, judging individuals based upon their actual abilities rather than their sex would actually enhance merit-based decisionmaking. As one internal memo stated the proponents' position, "What ERA would establish is a policy by which men and women are assigned to positions based upon their individual abilities rather than upon a sex-based classification."<sup>156</sup> Military servicewomen testified in the congressional hearings that eradicated

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<sup>153</sup> *Id.* at 891 (citing *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981); *Jennings v. Alexander*, 715 F.2d 1036 (6th Cir. 1983)). Note that these were Title VI and Rehabilitation Act cases, respectively.

<sup>154</sup> *House Hearings*, *supra* note 79, at 653 (testimony of Professor William A. Stanmeyer on the impact of the ERA on the military).

<sup>155</sup> *See, e.g., id.* at 649–64 (testimony of William A. Stanmeyer on the impact of the ERA on the military); *id.* at 668–70 (statement of Brigadier General Elizabeth P. Hoisington (USA, Ret.)); *id.* at 671–81 (statement of Mary Lawlor).

<sup>156</sup> Memorandum from Ethan Naftalin to Sana Shtasel (June 8, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31).

ing explicit sex-based discrimination would enable the armed forces to fulfill their personnel needs more efficiently and effectively, because they could draw from a larger pool of potential service members. ERA proponents wished to make clear that they were not seeking lower standards, but simply bare-bones equal opportunity. They needed, therefore, to place some limit on the reach of disparate impact analysis in the military context. As Women's Equity Action League (WEAL) attorney Jeanne Atkins put it in a preparatory memo to pro-ERA witness and former Undersecretary of the Air Force Antonia Chayes, "[A]s the hearings move along it becomes clearer that the constitutional law must be made clear."<sup>157</sup>

The antihierarchical or "amelioration of discrimination" approach was less useful as a limiting principle when it came to the military. Although women's exclusion from the draft and combat could have been interpreted as benign, ERA advocates had long ago decided to frame those exclusions as discriminatory.<sup>158</sup> Once explicit sex-based distinctions were removed, presumably facially sex-neutral physical requirements could effectively exclude many if not most women from certain positions. This seemed a classic instance of disparate impact discrimination that perpetuated old sex classifications in the guise of gender neutrality. Because they could not rely on the antihierarchy principle to cabin the reach of disparate impact analysis in the military context, feminists agreed that heightened scrutiny would apply to physical requirements that disproportionately excluded willing women from positions in the service, but argued that the means-ends test itself left room for truly necessary physical standards and requirements.

Strict scrutiny, on this account, would not be fatal in fact but rather would bear a striking resemblance to Title VII's job-relatedness requirement. Jeanne Paquette Atkins, staff attorney at WEAL and project associate at the National Information Center on Women and the Military, told the House subcommittee in October 1983,

[T]o the extent that such gender-neutral criteria might disproportionately exclude women from participation, those criteria would be subject to rigorous examination. Congress would be obligated to assure that such standards were indeed job-related, that is, that the qualities measured were necessary to the efficient performance of the military role in question.<sup>159</sup>

Representative Patricia Schroeder (D-CO) attempted to translate Atkins's testimony into a recognizable legal standard: "[What] you are saying is that the Equal Rights Amendment does not eliminate job-related qualifications

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<sup>157</sup> Letter from Jeanne Atkins to Antonia Chayes (Sept. 21, 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).

<sup>158</sup> See Jane Mansbridge, *Who's in Charge Here? Decision by Accretion and Gatekeeping in the Struggle for the ERA*, 13 POL. & SOC'Y 343 (1984).

<sup>159</sup> *House Hearings*, *supra* note 79, at 566 (statement of Jeanne Paquette Atkins, Staff Attorney, Women's Equity Action League, and Project Associate, the National Information Center on Women and the Military).

... like under standards set forth in the [Griggs v.] Duke Power case and other cases that have established the law in this area.”<sup>160</sup> At a Senate hearing several days later, Chayes indicated in her testimony that ERA proponents were willing to accept that many physical requirements in the military were in fact job-related. Questioned pointedly by Senator Hatch about the cryptic reference to disparate impact in the 1971 Yale ERA Article, which seemed to him to suggest the invalidation of most military physical standards, Chayes replied, “There has been a long history of disparate impact [analysis] since Professor Emerson wrote. I think we have got to accept the consequences of the job relatedness of the requirements. I am prepared to accept it as I think most ERA proponents are.”<sup>161</sup> This was a significant concession, given that presumably it would not be difficult to assert the job-relatedness of virtually all physical requirements in the military.<sup>162</sup>

*e. The remedial dilemma.*—The controversial nature of disparate impact analysis did not only concern how disparate impact would be defined or what standard of review would apply. ERA skeptics also pushed proponents to articulate how laws and policies exerting a disparate impact would have to be revised to remedy their discriminatory effects. For instance, in the veterans’ preference context, proponents could refer to the *Feeney* dissent, which left room for less discriminatory alternatives, including less extreme or “absolute” employment preferences for veterans. Moreover, because states other than Massachusetts had veterans’ preference programs that ERA proponents claimed would withstand constitutional scrutiny, concrete examples of solutions to the disparate impact problem were available. However, in other areas of the law, less discriminatory alternatives were more elusive, difficult to define, or politically fraught.

The debate over disparate impact’s application to Social Security illustrates this problem. ERA proponents’ critique of the Social Security system highlighted the ways in which assumptions that men would be family breadwinners and women dependent homemakers—or at most secondary wage-earners—disadvantaged women by perpetuating their dependence upon men, and in some cases, threatening them with destitution in the event of divorce or a husband’s premature death. ERA opponents disputed every aspect of feminists’ analysis, arguing that, if anything, Social Security rules benefited women more than men.<sup>163</sup> Perhaps the most difficult questions were those about how Congress could bring the Social Security system into

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<sup>160</sup> *Id.* at 593 (statement of Representative Patricia Schroeder).

<sup>161</sup> *Senate Hearings, Part I, supra* note 83, at 360–61 (statement of Antonia Handler Chayes).

<sup>162</sup> Proponents did not introduce into the debate the concept of “business necessity,” an important component of Title VII disparate impact doctrine.

<sup>163</sup> *See, e.g., Senate Hearings, Part I, supra* note 83, at 811–75. Though the details are complicated, the dispute essentially boiled down to how the witnesses were defining advantage and disadvantage, and which women were the objects of concern. The Social Security system arguably disadvantaged two-earner households as compared to single-earner households, thereby incentivizing homemaking.



compliance with the ERA. Moreover, when pressed for specifics, proponents faced a choice between proposing very controversial solutions—such as a homemaker’s tax or “earnings sharing”<sup>164</sup>—or declining to specify what solution Congress should adopt. For the most part, proponents chose the latter option, insisting that Congress would have discretion to choose whichever less discriminatory alternative legislators thought best.<sup>165</sup>

ERA skeptics were concerned that remedying disparate impact discrimination might require overhauling or bankrupting the Social Security system, but they were even more disturbed by the association between disparate impact and affirmative action, and by extension, “quotas” and other controversial racial policies like “forced busing” and voting rights remedies. These associations made even congressional supporters of the new ERA wary of disparate impact’s political implications. The ERA Legislative History Project’s coordinator Sally Burns wrote to her colleagues in early October 1983, “Pro senators still resist the effects test and keep trying to persuade us that a foreseeable consequences test achieves the same result.”<sup>166</sup> The senators’ lack of responsiveness to feminists’ argument that the “foreseeability” standard did not go far enough led Burns to believe that “they are more concerned with the political objections to the effects test.”<sup>167</sup> She noted, “The senators with whom we have so [far] met predict that effects [analysis] will conjure forced busing and no at large voting districts.”<sup>168</sup> As Burns saw it, feminists were caught in something of a Catch-22: “[A]s a reason to reject the effects test we are faced with racism on the one hand and with the equation that our no intent standard means that we seek a standard higher than race on the other.”<sup>169</sup> As the next section describes, the amendment’s friends and foes battled over the ERA’s relationship to affirmative action on the familiar but fraught terrain of race.

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<sup>164</sup> Both of these proposals were attempts to resolve what feminists perceived as the Social Security system’s bias against two-earner households. Earnings sharing “would allocate half of a couple’s combined earnings during marriage to each spouse for purposes of calculating Social Security benefits.” Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 3. A homemaker’s tax could presumably have taken a variety of forms, but its purpose was apparently to place a monetary value on homemaking work so that married women working outside the home would not be subject to greater income tax burdens than homemakers.

<sup>165</sup> See, e.g., Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 4 (“Would ERA require a homemaker’s tax for Social Security? Without stating specifically what ERA might require, it does seem clear that the disparate effect which our present social security system has on the economic status and rights of women would require some congressional reform of that system.”).

<sup>166</sup> Memorandum from Sarah E. Burns, ERA Legislative History Project, to ERA Attorneys 1 (Oct. 4 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

3. *“Trying to Have Your Cake and Eat It Too”*: *Affirmative Action*.—Just as proponents quickly realized that they would need to tackle the subject of disparate impact discrimination in congressional hearings on ERA II, they understood early on that the amendment’s relationship to affirmative action required clarification. When women’s rights advocates consulted Tom Emerson about their strategy for the new ERA hearings, he emphasized the heightened importance of this issue, which had received little attention during the hearings in 1971 and 1972.<sup>170</sup> The potential effect of the ERA on affirmative action remained somewhat obscure during the ratification period.<sup>171</sup> Proponents often avoided questions about affirmative action, and when they did answer them, they frequently vacillated between declaring that the ERA banned all sex classifications regardless of intent, and alluding vaguely to Title VII as a model for analyzing affirmative action under the amendment. At the same time, in litigation under the Equal Protection Clause of the Fourteenth Amendment, feminists were attempting to distinguish between the sorts of “benign” or “protective” classifications that they believed were the product of sex stereotypes and assumptions about women’s and men’s proper roles, and “genuine affirmative action” designed to achieve equality between men and women.<sup>172</sup> This dilemma persisted in debates over ERA II, as members of Congress sought clarification of proponents’ position on the definition of “equality of rights” under the amendment.

But whereas in the first congressional ERA campaign opponents focused on the amendment’s potential to eviscerate “protective” or “benign” laws, in this second round that objection was far less frequent than its inverse: that the ERA would effectively require affirmative action, or “quotas.” In the first ERA debate, opponents emphasized the amendment’s alleged rigidity—its absolute commitment to equality that made no allowances for benignly intended protections; now they complained that the ERA would mandate not merely equality of opportunity, but equality of results. At the same time that opponents expressed doubt about the clarity of proponents’ distinction between “benign classifications,” which the ERA would prohibit, and permissible “affirmative action,” opponents tacitly acknowledged the difference between them by tolerating the first—even mourning their demise—while opposing the second.

ERA proponents identified affirmative action as one of several areas “for further research” in March 1983 as they prepared for new congressional hearings. In a memorandum to her colleagues, Phyllis Segal made

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<sup>170</sup> Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA and Working Groups for the ERA (July 19, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31).

<sup>171</sup> See MAYERI, *supra* note 120.

<sup>172</sup> See *id.*; Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1797–99 (2008).

clear that the validity of at least some form of affirmative action under the ERA was beyond question. “Obviously,” she wrote, “applying the ‘absolute prohibition’ concept of scrutiny in such situations would elevate ‘equality in theory’ over ‘equality in fact.’ Where differential treatment is targeted to achieve equality it should survive scrutiny under the ERA.”<sup>173</sup> She explained that the ERA’s original legislative history, federal equal protection jurisprudence, and state ERA caselaw were all consistent with this view, but that several points needed to be “clarified and stressed” in the second round of hearings. First, Segal wrote, proponents needed to clarify that the definition of affirmative action included efforts “designed to bring about *equality* (not as compensation, but as agent for change).”<sup>174</sup> This, she emphasized, entailed not just the goal of “more participation” by women, “but also efforts to modify policies that appear neutral but are not. This is the flip side of the disparate impact memo discussion—another way to accomplish a broader view of equality.”<sup>175</sup> Affirmative action was an important legal tool for remedying not only facial discrimination, but also more subtle forms of bias and structural inequality.

While ERA proponents still faced the old challenge of distinguishing between allegedly compensatory classifications that in fact reinforced stereotypical views of women as dependents and truly remedial policies, changes in the legal and political climate since 1972 also required them to respond to charges that affirmative action for women unfairly discriminated against men and undermined meritocratic ideals.<sup>176</sup> Segal hoped that “reinforcing and clarifying the treatment of affirmative action under the ERA might avoid the protracted reverse discrimination challenges that [were] being litigated in race cases under the [Equal Protection Clause].”<sup>177</sup> She requested “[a]dditional analysis . . . to develop the points which would be helpful in this regard.”<sup>178</sup>

As they had begun to do during the ratification struggle, ERA opponents seized every opportunity to suggest that the amendment would lead down a slippery slope to not merely encouraging, but requiring equal outcomes for men and women, even in contexts where most Americans believed sex differences were, if not immutable, enduring and perhaps even desirable. Opponents immediately grasped the connection between disparate impact analysis and affirmative action, grouping both under the rubric

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<sup>173</sup> Memorandum from Phyllis Segal to ERA Legislative History Project, *supra* note 109, at 1.

<sup>174</sup> *Id.* at 2–3 (emphasis added).

<sup>175</sup> *Id.* at 3 n.\*.

<sup>176</sup> While those arguments were beginning to surface in other contexts in the early 1970s, they had not played a significant role in early ERA debates. On growing opposition to affirmative action in the early 1970s, see NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE (2006).

<sup>177</sup> Memorandum from Phyllis Segal to ERA Legislative History Project, *supra* note 109, at 3.

<sup>178</sup> *Id.*

of “equal results.”<sup>179</sup> They frequently raised the specter of “quotas” as the likely if not inevitable result of the ERA, especially in light of developments in the race context. Professor Wardle warned that the concept of quotas would creep even into family law:

Thirty years ago, when the Supreme Court decided *Brown v. Board of Education*, no one would have believed you if you had said that in order to achieve racial equality you would set up racial quotas. Thirty years from now we may look back and be saying the same sort of things about sexual equality in family relations, custody, alimony.<sup>180</sup>

The case of *United Steelworkers v. Weber*<sup>181</sup> was the opponents’ favorite example of unintended consequences in this regard. The congressional sponsors of Title VII had not envisioned that the statute would permit affirmative action by employers, yet the Court had validated just such practices in *Weber*.<sup>182</sup> As Professor Rees put it in one of the later Senate hearings on ERA II, “in the famous example of the *Weber* case and other cases, the [C]ourt has simply explained away one part of the legislative history . . . .”<sup>183</sup> For the most part, ERA skeptics did not even bother to explain why such developments were undesirable; merely raising the specter of quotas and referring to experience with affirmative action under the Equal Protection Clause and Title VII was, for them, a case of *res ipsa loquitur*.

While to opponents the race cases served as a cautionary tale of courts run amok, ERA proponents embraced them—but not because the race pre-

<sup>179</sup> In the first hearing on ERA II, Senator Hatch seized on the suggestion in the 1971 Yale ERA Article that admissions qualifications for the military would have to be structured so that they did not exclude more women than men, remarking, “It seems to me that [this] concept of equal opportunity is straight affirmative action analysis.” *Senate Hearings, Part I, supra* note 83, at 67 (testimony of Senator Orrin G. Hatch). In explicating the “six different Equal Rights Amendments” he asserted could result from the amendment, Grover Rees III “lump[ed] together . . . for convenience of discussion” the “equal protection principles that have been labeled the ‘equal outcomes model,’ the ‘equal respect model,’ and the ‘affirmative action model,’” arguing that “[t]he shift in focus from a prohibition of purposeful discrimination to differential impact” implicated all of these consequences. *House Hearings, supra* note 79, at 27, 29 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law). Rees argued that proponents’ promotion of an “effects test,” would make the ERA “an affirmative action amendment, not just an individual rights amendment.” *Id.* at 25. Anti-ERA witness Edward Erler, called by Hatch to testify at a hearing devoted to “defining discrimination” agreed. “[T]he argument about ERA is no longer an argument about equal rights, but an argument about equal results. Under ERA, proportionality will necessarily be the test of gender discrimination.” *Senate Hearings, Part I, supra* note 83, at 877, 895 (statement of Edward J. Erler, Professor, National Endowment for the Humanities).

<sup>180</sup> *Senate Hearings, Part II, supra* note 79, at 78 (testimony of Lynn D. Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University).

<sup>181</sup> 443 U.S. 193 (1979).

<sup>182</sup> For a discussion of congressional intent with respect to affirmative action and Title VII, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 328–32 (1990).

<sup>183</sup> *Senate Hearings, Part II, supra* note 79, at 187 (testimony of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).

cedents provided a particularly expansive template for affirmative action for women. Indeed, to proponents, cases like *Bakke*<sup>184</sup> stood for the limits on, rather than the possibilities of, affirmative action. Strict scrutiny was a more stringent standard than that which applied to sex-based classifications, including those arguably designed to promote sex equality. Liberal Justices and advocates frequently argued for applying a lower standard of scrutiny to racial classifications designed to promote equality.<sup>185</sup> For feminists, strict scrutiny was a mixed blessing: on the positive side, it might prevent courts from taking at face value claims that “benign” sex classifications were motivated by a desire to ameliorate discrimination; on the negative side, it could curtail efforts at “genuine” affirmative action. Thus when ERA proponents cited race cases as precedent for the ERA’s treatment of affirmative action, they were in fact making something of a concession to opponents at the same time that they were leaving the door open to proactive efforts at achieving equality through sex classifications.

Amendment advocates turned to the race precedents almost automatically when Senator Hatch raised the affirmative action issue in the first hearing on ERA II. In a memorandum to women’s organizations written immediately after the first Senate hearing in May, Marsha Levick recorded the feminist litigators’ responses to Hatch’s questions about the status of a hypothetical ten percent set-aside for women in government contracting. She wrote:

Presumably, such affirmative sex-conscious “remedies” would be no more or less unconstitutional than the comparable race-conscious programs addressed in *Regents of the University of California v. Bakke*<sup>186</sup> and *Fullilove v. Klutznick*:<sup>187</sup> if an “institutionally competent actor” makes a finding of past discrimination vis-à-vis that institution, industry, etc., sex-conscious programs could be implemented.<sup>188</sup>

The “etc.” in Levick’s sentence masked a key question: whether general, society-wide discrimination was an adequate justification for sex-based affirmative action. The Court had suggested that it was in *Califano v. Webster*,<sup>189</sup> but that same question was the subject of sometimes bitter struggle

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<sup>184</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>185</sup> Indeed, as I explore elsewhere, some feminists argued in the late 1970s that sex equality precedents allowing legislatures to take societal discrimination into account when designing compensatory policies for women provided a good template for race-based affirmative action jurisprudence. See Mayeri, *supra* note 172.

<sup>186</sup> 438 U.S. 265.

<sup>187</sup> 448 U.S. 448 (1980).

<sup>188</sup> Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 7 (footnotes added).

<sup>189</sup> 430 U.S. 313, 317 (1977) (per curiam) (noting that the purpose of the statute in question was “redressing our society’s longstanding disparate treatment of women” (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977)) (internal quotation mark omitted)).

in the context of race.<sup>190</sup> When making the case to pro-ERA legislators, ERA proponents framed congressional power to enact remedial legislation in more expansive terms:

Where a qualified legislative or executive institution has found as a factual predicate that a *racial* minority has suffered from past societal discrimination, it may pass remedial legislation . . . . By equating a sexual classification with a racial classification, the ERA would permit such legislation in favor of women.<sup>191</sup>

As the hearings progressed, it became clear that the analogy to race-based affirmative action was attractive in large part because it undermined opponents' charges that the ERA would mandate "equality of results" in all circumstances. For instance, when opponents warned of the potential for fifty percent quotas for women in the military, proponents could point to the desegregation of the armed forces as belying this concern.<sup>192</sup> Similarly, in the Senate hearings on the ERA's impact on the military, Hatch asked pro-ERA witness Chayes whether the ERA would permit or require affirmative action for women. She carefully replied that "where you are dealing with affirmative action issues, where the policies are designed to correct inequities of the past, just as in race cases, they will be very carefully scrutinized by the courts, if, indeed, they ever get to the courts."<sup>193</sup>

In this sense, the race-based affirmative action precedents served as an additional limiting principle to confine the reach of disparate impact analysis. As we saw earlier, proponents stressed that the application of disparate

<sup>190</sup> See Mayeri, *supra* note 172 (describing feminists' attempts during the 1970s to convince the Court to apply the more lenient standard developed in sex equality cases to race-based affirmative action).

<sup>191</sup> ERA Q's and A's (Kennedy) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 30).

<sup>192</sup> For example, when Delaware law professor Stanmeyer proclaimed that the ERA would require fifty percent quotas for women in the military, including in combat roles, Columbia law professor Henry Monaghan could allude to the desegregation of the armed forces to respond, "That's plainly insupportable. . . . I mean, the race analogy is perfect . . . . There just is no basis for reading the Equal Rights Amendment as imposing quotas on the military." *House Hearings, supra* note 79, at 685 (statement of Henry Paul Monaghan, Professor of Law, Columbia University).

<sup>193</sup> *Senate Hearings, Part I, supra* note 83, at 341–42 (testimony of Antonia Handler Chayes). Hatch had asked Chayes about the ramifications of the ERA for a 1975 Court decision upholding a promotion scheme that allowed servicewomen additional time to achieve promotion before the military's up-or-out policy would apply. See *Schlesinger v. Ballard*, 419 U.S. 498 (1975). After further back-and-forth, she added, "I do not see any problem with affirmative action. We have dealt, I think, very nicely with these problems in the title VII experience, and also under the equal protection clause." *Senate Hearings, Part I, supra* note 83, at 342. When Hatch pressed her further on whether the ERA would mandate affirmative action for women in the service academies, Chayes again relied on the race cases, saying, "I do not particularly see vastly greater numbers of women being admitted to service schools, as compensation for past discrimination, particularly after the *Bakke* case . . ." *Id.* at 352. Though she did not elaborate, Chayes presumably was referring to *Bakke's* failure to endorse a compensatory rationale for affirmative action in the university context. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.34, 307–10 (1978).

impact analysis to the Social Security system would not mandate any particular remedy, but rather would leave remediation to the discretion of Congress. Similarly, they emphasized that, in the words of Levick's memorandum, "[t]he Equal Rights Amendment must be seen for what it is: A prohibition against how laws are made, or how they are implemented, and not a guarantee of affirmative protection *requiring* particular action by Congress or State legislatures."<sup>194</sup>

Proponents also used an affirmative action rationale to limit the "absolute" nature of the prohibition on sex classifications in the context of single-sex education. They argued that while public single-sex schools and colleges would generally be unconstitutional under the ERA, there would be an exception for all-female institutions designed to overcome the effects of past discrimination and foster greater equality between women and men. This position was the product of a compromise among feminists. Some would have preferred to insert into the ERA's legislative history an exception for single-sex colleges generally; others would have eschewed all exceptions to the coeducational rule.<sup>195</sup> Conveniently, this compromise was also the standard articulated in the 1982 Supreme Court decision in *Mississippi University for Women v. Hogan*,<sup>196</sup> the first high-profile opinion authored by the first female Justice, Reagan-appointed Sandra Day O'Connor. *Hogan*, as proponents often reminded their audience, had enshrined just the distinction they wished to make: "Just as under present law, under the ERA some schools or programs for women could continue affirmative admissions policies and compensatory aid for women if their single-sex nature is evaluated as making a positive contribution to overcoming the effects of discrimination and promoting sex equality."<sup>197</sup> Again, proponents relied on equal protection jurisprudence to limit the ERA's reach on one dimension, even as they reached beyond the Fourteenth Amendment in defining the ERA's meaning on other dimensions.

As the head of a formerly all-female public women's school, Hunter College President Donna Shalala seemed the perfect witness to explain the pro-ERA position on single-sex institutions. "The effect of the Equal

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<sup>194</sup> Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 1. Opponents warned that these assurances were empty: Harvard government professor Eliot Cohen, for instance, predicted that even in the absence of a legal mandate for affirmative action, political pressure would force such policies on the government, including the military. *Senate Hearings, Part I, supra* note 83, at 305 (statement of Eliot A. Cohen, Professor, Department of Government, Harvard University).

<sup>195</sup> See, e.g., Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 5 (noting in handwritten text: "Put into legis history ERA not intended to affect single sex private schools.").

<sup>196</sup> 458 U.S. 718 (1982).

<sup>197</sup> Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA and Working Groups for the ERA, Re: Answers to Hatch Questions and Meeting with Hill Staff (July 19, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 29) (citing *Hogan* as precedent).

Rights Amendment on education is simple,” she wrote in her prepared testimony. “The choice of whether to discriminate on account of sex in education will no longer be an option. This means that unless educational policies are justified by principles of affirmative action, schools must treat males and females the same.”<sup>198</sup> “Simplicity” notwithstanding, Shalala found herself unexpectedly under attack from both sides. Senator Howard Metzenbaum (D-OH), the only pro-ERA senator on hand that day, happened to enter the room while Shalala was explaining the affirmative action exception to the ban on public single-sex colleges. As ERA Legislative History Project coordinator Sally Burns described, “[w]ithout pausing, Metzenbaum took issue with Shalala, stating that he would not favor an ERA that permitted such a thing. He left without asking the helpful questions that he had come to pose.”<sup>199</sup> Metzenbaum supported affirmative action generally, but objected to the exception as applied to women’s colleges, and “he [was] not alone.”<sup>200</sup> Meanwhile, Shalala was also under fire from Hatch and from Jeremy Rabkin, a government professor from Cornell. Rabkin challenged Shalala on the affirmative action exception as well, noting the absence of such a qualification in the race context:

Neither the Department of Education, the Justice Department, nor any court, so far as I am aware, has ever said, “If you want to be an all-black institution for affirmative action reasons, that is all right, and you can exclude white applicants.” . . . Since racial segregation is not allowed even for affirmative action reasons, I cannot understand what justification there could be for saying, “Well, we will allow it in the case of sex discrimination, because some women think it is good for them.” That seems to me to be trying to have your cake and eat it too.<sup>201</sup>

In redefining the meaning of “equal rights under the law,” ERA proponents were engaged, simultaneously, in a number of delicate balancing acts. For ERA II to be a worthwhile endeavor, the amendment had to move feminists beyond existing equal protection jurisprudence. By 1983, heightened scrutiny had vanquished many, though not all, explicit sex-based legal distinctions, and the Court had established a very restrictive approach to constitutional disparate impact cases. Without a robust interpretation of the ERA’s applicability to sex-neutral laws, the amendment would not much improve women’s legal status. Nevertheless, political realities dictated that

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<sup>198</sup> *Senate Hearings, Part I, supra* note 83, at 129 (statement of Donna E. Shalala, President, Hunter College of the City University of New York).

<sup>199</sup> Memorandum from Sarah E. Burns to ERA Attorneys (Oct. 4, 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).

<sup>200</sup> *Id.* at 3. Burns continued, “The crisis has blown over and the coalition survives. A meeting with Metzenbaum is planned this week. We may want to consider what acceptable qualifying detail should be submitted with the Shalala testimony to address this point.” *Id.*

<sup>201</sup> *Senate Hearings, Part I, supra* note 83, at 135 (testimony of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).



proponents must establish some limiting principles to check the reach of disparate impact analysis. Feminists steadfastly resisted pro-ERA legislators' attempts to endorse a "foreseeable consequences" test, but they did find other ways to limit disparate impact analysis. They assured skeptics that principles from equal protection and Title VII jurisprudence could prevent the ERA from overreaching, even if the need to depart from the *Davis-Feeney* line of cases remained a central premise of the amendment's definition of equality. As the next two sections describe, the ERA II hearings led feminists to make similar compromises with respect to other aspects of the amendment's meaning.

C. *"Too Much Baggage for the ERA to Carry": Private Conduct and the State Action Requirement*

Like disparate impact and affirmative action, the ERA's effect on private conduct was on proponents' agenda as an issue for further research. However, feminist lawyers disagreed on how expansively they should characterize the ERA's reach into the "private conduct" of individuals and corporations. Some believed that proponents should minimize the extent to which the ERA would directly or indirectly affect private conduct. They argued for incorporating the Fourteenth Amendment's state action requirement into the ERA and against expanding the amendment's reach beyond that authorized by the original legislative history of 1971 and 1972. This more conservative approach bore a strong resemblance to proponents' position on affirmative action, described in the preceding section, in that it relied on existing jurisprudence to delimit the ERA's impact. Some proponents even suggested incorporating into the ERA's legislative history an intent to exempt private single-sex schools from the ERA's reach. Other feminist lawyers took a more aggressive approach, arguing for an interpretation that would—like the disparate impact analysis described above—extend the ERA's reach beyond the strictures of existing state action doctrine under the Fourteenth Amendment. As opponents charged that the ERA would authorize or even mandate sweeping incursions into the private sector, broadly defined, the amendment's defenders ultimately settled upon an intermediate strategy designed to deflect skeptics' concerns while leaving open possibilities for more expansive interpretations.

As soon as the hearings began, ERA opponents, led by Senator Hatch, focused upon the ERA's impact on private educational and religious institutions as the principal example of the amendment's incursions into the private sphere, with the Supreme Court's recent decision in *Bob Jones University v. United States* as the central cautionary tale. In *Bob Jones*, decided just three days before the first hearing on ERA II, the Court had upheld a decision by the Internal Revenue Service to revoke a tax exemption to Bob Jones University, a conservative evangelical institution that prohib-

ited interracial dating among students.<sup>202</sup> Read expansively, *Bob Jones* did not bode well for private single-sex schools or other entities that differentiated between males and females and relied on federal assistance, either in the form of funding or exemption from taxation. Read narrowly, the decision provided several bases for limiting its impact on such institutions.

Many feminists' initial inclination was not only to read *Bob Jones* expansively, but also to define the ERA as exerting significant impact on private conduct. At a May 1983 meeting immediately following the first Senate hearing, proponents strategized about how to respond to Hatch's questions, which included queries about the effects of the ERA on private and religious schools and other entities. The feminist lawyers concluded that "after *Bob Jones*, it seems that [private single-sex schools] must begin to accept the limits of their continued existence as single-sex schools."<sup>203</sup> Long-time women's rights advocate and ERA activist Catherine East dissented from this view, suggesting that proponents put in the legislative history a clear indication that the ERA was not intended to apply to private single-sex schools.<sup>204</sup> Advocates for a more expansive ERA interpretation continued to flesh out their view; in a July 1983 memo, ERA Legislative History Project coordinator Sally Burns recorded their assertion that

[t]he reach of the ERA with respect to private education would depend on the extent of state involvement. A private institution whose sex segregation policies could not be justified on the grounds of affirmative action might lose government funds. Similarly, a private tax-exempt institution could lose its tax exemption . . . if its policies of sex discrimination were found to offend public policy.<sup>205</sup>

This reference to public policy was a partial concession to the limits of the *Bob Jones* decision, which was predicated upon the unanimous consensus among the three branches of government regarding the abhorrent nature of race discrimination. However, it emphasized the possibilities of using *Bob Jones* as a precedent for expansive interpretations of the ERA, rather than stressing the decision's limitations.

The debate among feminist lawyers over the ERA's scope continued over the next several months. East described the contending positions in an internal memo in October 1983: "The feminist legal community is attempting to secure legislative history that would require withdrawal of tax exemption not only from private schools but from other single-sex private organizations unless 'sex segregation is one part of a plan of affirmative ac-

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<sup>202</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–85 (1983).

<sup>203</sup> Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 5.

<sup>204</sup> *Id.* at 5 (urging in handwritten notes that the ERA is "not intended to affect single sex private schools").

<sup>205</sup> Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA and Working Groups for the ERA, *supra* note 197.

tion to overcome the past effects of discrimination' against women."<sup>206</sup> This approach, she noted, had the support of NOW leaders Eleanor Smeal and Judy Goldsmith. "My view," wrote East, "is that this is too much baggage for the ERA to carry . . . . I would like to see the legislative history clearly indicate that the ERA would apply only where 'State action' as defined in Supreme Court decisions is involved."<sup>207</sup> In suggesting this alternative strategy, East harkened back to the first ERA debates of the early 1970s: "The original ERA was not intended to apply to private schools, girl scouts, boy scouts, women's hospitals, or women's organizations, even if they received some government funding."<sup>208</sup> To ask for more seemed to East strategically unwise, although she expressed wholehearted agreement with her colleagues' substantive goals.

Meanwhile, ERA opponents seized on *Bob Jones* to highlight the amendment's potential to disrupt not only the educational autonomy of private schools, but also the integrity of churches, seminaries, and other religious institutions. The testimony of Cornell professor Rabkin was perhaps the most damning from the point of view of ERA skeptics: Rabkin contended that the ERA would prohibit direct federal or state funding of single-sex institutions, any federal and state subsidization of equipment for schools that differentiated between the sexes, and all tax exemptions for private institutions that treated men and women differently.<sup>209</sup> Each of these outcomes, Rabkin argued, followed logically from the ERA's constitutionalization of an equivalence between race and sex discrimination. This equivalence, Rabkin submitted, was fundamentally misguided:

Now we have done all this to private schools that persist in racial discrimination precisely to express an unyielding abhorrence to racist practices. The question again is whether we want to oppose all aspects of sexual separation or differentiation with equally uncompromising condemnation, imposing the same financial penalties and the same moral stigma. My own view is that there is something terribly wrong with a constitution that puts the sexual exclusion of a Catholic seminary or a traditional women's college on the same plane with the racial bigotry of a white supremacist 'segregation academy'.<sup>210</sup>

Rabkin's implicit acceptance of the *Bob Jones* decision as correct rendered more credible his objections to extending the principle to cover sex discrimination.

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<sup>206</sup> Memorandum from Catherine East, ERA—Major Issues 3–4 (Oct. 11, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 47).

<sup>207</sup> *Id.* at 4.

<sup>208</sup> *Id.* at 3.

<sup>209</sup> *Senate Hearings, Part I, supra* note 83, at 99–100 (statement of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).

<sup>210</sup> *Id.* at 110.

Rabkin's testimony prompted ERA proponents to refine their position on private organizations and the relationship of the amendment to private conduct generally. In a memorandum circulated to proponents a few weeks after Rabkin's appearance before the Senate subcommittee, Sally Burns wrote to her compatriots of the need for clarification: "Rabkin drew a picture of sweeping state intervention into the private sphere and it was difficult to make a clear counter-record on his parade of horrors in oral testimony."<sup>211</sup> Burns's memo suggested a subtle shift in the feminist lawyers' approach: now the task was "to have scholarly legal materials on the state action and tax exempt status issues on the record to demonstrate just how unlikely based on past court decisions Rabkin's predicted sweep is."<sup>212</sup> The perceived need to limit the ERA's reach into the private sphere was driven home by Hatch's summary of Donna Shalala's testimony in the same hearing, which starkly portrayed her position as unremittingly hostile to sex differentiation in private as well as public education except where such differentiation furthered affirmative action goals.<sup>213</sup>

In an attempt at damage control, Senator Dennis DeConcini (D-AZ), an ERA supporter, submitted questions to Shalala after the hearing that would enable proponents to clarify the ERA's relationship to private conduct and existing state action doctrine. Consultation with feminist lawyers Wendy Webster Williams and Ann Freedman produced a written statement from Shalala that "absent additional legislative or executive action, private institutions will rarely be subject to the requirements of the ERA just as private institutions are now rarely subject to the 14th Amendment requirements."<sup>214</sup> As in the affirmative action context, existing Fourteenth Amendment jurisprudence provided the limiting principle. Further, on occasion proponents emphasized that state action doctrine had evolved since the early 1970s to make private entities much less susceptible to lawsuits charging equal protection or other constitutional violations than they had been a decade earlier.<sup>215</sup>

The feminist lawyers also offered a much narrower reading of *Bob Jones* than they had previously contemplated: they emphasized that *Bob*

<sup>211</sup> Memorandum from Sarah E. Burns to ERA Attorneys, *supra* note 199, at 3.

<sup>212</sup> *Id.*

<sup>213</sup> Impact of the ERA Upon Private and Parochial Education (circulated by Sen. Hatch) (Oct. 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31) ("Private Schools—The ERA required the integration of all single-sex private schools and colleges receiving any form of direct or indirect public funds, including tax exemptions, except for those all-women institutions based upon principles of 'affirmative action.' (Shalala: 'I do not know of any institution in the country in which there is not public involvement.')").

<sup>214</sup> *Senate Hearings, Part I, supra* note 83, at 169 (statement of Donna E. Shalala, President, Hunter College of the City University of New York, in response to questions of Senator Dennis DeConcini).

<sup>215</sup> See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 & n.10 (1985) ("There is no doubt that the Burger Court has tightened substantially the state action requirement, showing far less willingness to apply the Constitution's protections against private conduct.").

*Jones* was based on statutory rather than constitutional authority, and that the decision *permitted*, but did not require, the IRS to withhold tax-exempt status from racially discriminatory private organizations. ERA proponents assured the subcommittees that Congress retained full discretion to grant tax exemptions to private organizations; failure to grant such exemptions could only occur if a robust public policy against sexual differentiation comparable to that against race discrimination were established. In other words, sex-differentiating private entities could rest assured that the ERA would not affect their tax status unless a societal consensus developed that their policies were as abhorrent as racial discrimination. Because opponents were fond of emphasizing that no such consensus yet existed, the danger of sex-differentiating institutions becoming “embittered,” “isolated,” or downright bankrupt as a result of the withdrawal of tax-exempt status was minimal. Proponents also contended that the First Amendment would protect purely religious activities from the ERA’s reach under any circumstances, although the line between religious and secular activities remained notoriously difficult to draw.

In the end, proponents’ position on the ERA’s impact on private entities and its relationship to existing state action doctrine occupied a middle ground between the cautious approach advised by East and the more expansive interpretation advanced by other feminist lawyers. Proponents’ treatment of what was perhaps the most politically hazardous topic of the ERA II hearings, abortion, was also the product of an uneasy compromise among feminist lawyers and other ERA proponents.

D. “An Untenable Position”: Abortion, Pregnancy, and the  
New ERA

The “abortion-ERA connection” had been a centerpiece of Phyllis Schlafly’s STOP ERA campaign. Opponents’ unremitting efforts to derail the amendment on this basis drove many proponents to elide or even deny the connection despite their firm conviction that reproductive freedom and sex equality were inextricably intertwined.<sup>216</sup> During the ERA’s pendency, proponents engaged in a behind-the-scenes campaign of their own to keep feminist litigators from raising sex-based equal protection arguments against abortion restrictions in cases brought under the Fourteenth Amendment.<sup>217</sup> The lawyers who argued *Harris v. McRae*,<sup>218</sup> the 1980 federal abor-

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<sup>216</sup> MANSBRIDGE, *supra* note 7, at 124–25; Siegel, *supra* note 8, at 1397 (“As countermobilization against ERA and *Roe* converged, leadership of the women’s movement struggled to defend ERA and *Roe* by separating them, over time engaging in ever more strenuous efforts of self-censorship.”).

<sup>217</sup> MANSBRIDGE, *supra* note 7 at 125; see also Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985–87 (1984).

<sup>218</sup> 448 U.S. 297 (1980). For an overview of equality-based arguments for abortion rights, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007). Siegel notes, “Appeals to sex equality as a legal basis for

tion funding case, refrained from making a sex-based equal protection argument, believing that *Geduldig* left them little chance of success.<sup>219</sup> But even before, and especially after, the Court upheld the Hyde Amendment,<sup>220</sup> litigators at the state level could not justify withholding one of their best potential weapons against abortion funding restrictions—state ERAs.<sup>221</sup> As the prospect for the ERA’s ratification grew increasingly dim, maintaining a strict ERA-abortion separation no longer seemed to be worth pragmatism’s price.<sup>222</sup>

When the ERA was reintroduced in 1983, proponents faced a potentially fateful choice: they could continue to deny that the ERA would have any impact on abortion rights, or they could acknowledge the relationship between abortion and sex equality as a constitutional as well as a political and moral reality. As the hearings and feminists’ internal deliberations went on, it became clear that neither of these dichotomous alternatives was politically viable. To be candid about feminists’ hopes for the ERA and abortion rights would augur certain doom. On the other hand, the way in which proponents denied or downplayed the “ERA-abortion connection”<sup>223</sup>—the reasoning they used, the doctrinal arguments upon which they relied—had significant ramifications not only for the abortion issue, but for other crucial aspects of the ERA’s new constitutional meaning and for future battles over women’s legal status.

Given the abortion issue’s prominence in the ratification struggle, feminists were well aware that the hearings on ERA II would be a test of their ability to strike the right balance between candor and circumspection, boldness and caution. Exactly what that balance should be was a matter of considerable dispute, however. Feminists had disagreed over how best to handle the relationship between the ERA and reproductive rights in the dec-

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the abortion right disappeared [in the years following *Roe*] for both doctrinal and political reasons.” *Id.* at 826.

<sup>219</sup> Rhonda Copelon & Sylvia A. Law, *Medicaid Funding for Abortion: The Story of Harris v. McRae* [working title], in *WOMEN AND THE LAW STORIES* (Elizabeth M. Schneider & Stephanie M. Wildman eds., forthcoming 2010). Mansbridge reports, based on a 1985 interview with Ruth Bader Ginsburg, that “[t]he eventual ACLU decision to stress autonomous decisionmaking free from state intervention rather than sex discrimination in the federal abortion funding case was . . . made on the basis of ‘what argument was most likely to win . . . . The ERA was not a consideration in how that case was argued—not at all.’” MANSBRIDGE, *supra* note 7, at 287 n.4.

<sup>220</sup> The Hyde Amendment, first passed in 1976, barred the use of federal funds to pay for abortion services for low-income women. Pub. L. No. 94-439, 90 Stat. 1418, 1434 (1976).

<sup>221</sup> MANSBRIDGE, *supra* note 7, at 126, 287 n.7 (citing *From the Executive Director’s Desk*, DOCKET (newsletter of the Civil Liberties Union of Massachusetts), Aug. 1980, reprinted in *Senate Hearings, Part I*, *supra* note 83, at 657 (submitted for the record)).

<sup>222</sup> Siegel, *supra* note 8, at 1399–1400.

<sup>223</sup> Opponents popularized the term “ERA-abortion connection” during the ratification debates of the 1970s, and continued to use it in reference to ERA II. See, e.g., *The E.R.A.-Abortion Connection*, PHYLLIS SCHLAFLY REP., June 1983, § 2, at 1 (on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

ade since *Roe v. Wade* catapulted the issue onto a national stage, but by and large they suppressed their differences to preserve a unified front. Now the reintroduction of the amendment offered a second bite at the apple. Attorney Rhonda Copelon, who had argued the abortion funding case *Harris v. McRae* before the Supreme Court, expressed the views of many feminists in a *Ms. Magazine* article in October 1983: “The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation.”<sup>224</sup> Feminists should embrace the ERA-abortion connection, Copelon suggested—if not with pride, then at least with grim determination. Copelon’s analysis—frequently referenced by ERA opponents as evidence of feminists’ true intentions for the ERA—eschewed sharp boundaries between privacy and equality.<sup>225</sup>

As ERA proponents prepared for the hearings in the spring of 1983, they considered a range of approaches to the abortion question. A memo circulated by Marsha Levick to the ERA Legislative History Committee members in April laid out three alternative responses to the question, “Is a woman’s right to voluntarily choose to undergo an abortion enhanced, sustained or diminished by a federal equal rights amendment?”<sup>226</sup> As the boldest option, Levick articulated a vision of the abortion right “as an aspect of the right *shared by men and women equally* to control their reproductive capacity, and to retain for themselves the right to decide when and under what circumstances they wish to become a parent.”<sup>227</sup> This vision of equality unashamedly linked abortion with both equal rights and privacy, and conceptualized reproductive freedom as a good that should be available to both men and women, rather than characterizing pregnancy as a “unique physical characteristic” subject to a different mode of analysis.

The two other responses Levick outlined sacrificed this expansiveness at the altar of pragmatism. One possibility was to say that the abortion right “is unaffected. A woman’s right to choose to terminate her pregnancy by abortion is a fundamental right which derives from her general right to privacy granted by the Constitution . . . articulated and recognized by *Roe v. Wade*,” so strict scrutiny should continue to apply to “all laws and regulations impacting on a woman’s right to undergo an abortion.”<sup>228</sup> The final alternative was to treat abortion regulations as laws concerning “unique

<sup>224</sup> Rhonda Copelon, *Abortion Rights: Where Do We Go from Here?*, MS., Oct. 1983, at 146.

<sup>225</sup> It would not be long before Sylvia Law critiqued the separation of reproductive rights and sex equality in print. See Law, *supra* note 217. Ruth Bader Ginsburg also publicly lamented the fact that *Roe v. Wade* had not addressed abortion as an issue of sex equality as well as privacy. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382 (1985) (delivered as the William T. Joyner Lecture on Constitutional Law on April 6, 1984).

<sup>226</sup> Memorandum from Marsha Levick to NOW/NOW LDEF ERA Legislative History Committee 1 (Apr. 11, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 29).

<sup>227</sup> *Id.* at 3.

<sup>228</sup> *Id.* at 1.

physical characteristics,” subject to strict scrutiny under the ERA.<sup>229</sup> On this view, discrimination against women on the basis of their ability to become pregnant clearly constituted sex discrimination, repudiating the Supreme Court’s contrary decision in *Geduldig v. Aiello*.<sup>230</sup> Levick recognized the need “to make the scope of [the ERA’s] coverage of [pregnancy-based discrimination] clear through legislative history,” because *Geduldig* had severed the link between pregnancy and sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>231</sup>

But, as Levick also recognized, it was difficult if not impossible to deny a connection between the ERA and abortion while maintaining that the amendment addressed discrimination based on pregnancy. As Levick put it, “If pregnancy-based discrimination is sex discrimination, it is difficult to substantiate the position that disparate or discriminatory treatment of women wishing to undergo abortion is *not* sex discrimination since abortion, like pregnancy, can only be experienced by women, and is clearly ‘pregnancy-related.’”<sup>232</sup> Not only would such a position produce logical dissonance, but, Levick argued, it would also compromise an important feminist principle: “To accept that abortion is *unlike* pregnancy would seem to suggest an acceptance of the right to life position, i.e., abortion is different because it involves another life (fetus) and other interests (spouse/father). This seems to be an untenable position for the women’s movement to endorse, and a major step backwards.”<sup>233</sup> The challenge for feminists was to find a way “[t]o ensure that pregnancy is subsumed in the definition of sex discrimination at the same time that we strive to maintain a low profile on abortion.”<sup>234</sup> In order to accomplish these objectives simultaneously, Levick wrote, “a combination of responses #1 and #2 would have to be put forward.”<sup>235</sup>

Easier said than done. As Levick’s memo suggested, feminists’ new definition of the ERA’s legal meaning put the pro-choice ERA advocates between a rock (pregnancy discrimination) and a hard place (disparate impact analysis). Denying the ERA’s impact on abortion rights risked excising pregnancy discrimination from the amendment’s definition of equality: if the ERA required strict scrutiny for laws relating to women’s unique physical characteristics (UPC), then it was difficult to see how the UPC category could include pregnancy but exclude abortion. At the same time, applying disparate impact analysis to laws regulating abortion produced a clear logical result—irrespective of one’s views on the morality of terminating a pregnancy, no one could dispute that restricting abortion, or funding

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<sup>229</sup> *Id.* at 1–2.

<sup>230</sup> 417 U.S. 484 (1974).

<sup>231</sup> Levick, *supra* note 226, at 2.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*



for abortion, had a disproportionate effect on women.<sup>236</sup> Further, whichever box abortion was in—UPC or disparate impact—strict scrutiny would apply. If the ERA was meant to elevate the level of scrutiny for sex discrimination to the same level as, if not a higher level than, that accorded to race discrimination, it was difficult to see how any restrictions on abortion would be valid under the ERA unless they served a compelling government interest. And pro-choice advocates certainly were loath to concede that the protection of fetal life constituted such a compelling interest.

Abortion had played only a minor role in the pre-*Roe* discussion of the ERA; during the ratification debates the discourse about the relationship between abortion and the ERA was largely heated rhetoric rather than intricate doctrinal parsing. But in the hearings on ERA II, proponents could not evade pointed legal questions from a well-prepared and often sophisticated opposition. In the first Senate hearing, pro-ERA witnesses attempted to skirt these questions. Tsongas responded to Hatch's questions about the amendment's impact on abortion funding with his standard response that the issue would be decided by the courts.<sup>237</sup> Marna Tucker demurred, saying she did not know enough about the issue to answer.<sup>238</sup> Then Hatch called on Representative Henry Hyde (R-IL), author of the law prohibiting Medicaid funding for abortions, to testify about the ERA's impact on the Hyde Amendment's constitutionality. Hyde invoked an analogy that anti-ERA witnesses and legislators would repeat again and again through the hearings: "If sex discrimination were treated like race discrimination, Government refusal to fund abortions would be treated like a refusal to fund medical procedures that affect members of minority races."<sup>239</sup> Opponents' favorite example was sickle-cell anemia. As Grover Rees argued in the first House hearing, "[A] legislative program that funds other operations' but not abortion would be constitutionally identical to a program that funded cures for every disease except sickle-cell anemia, to which only blacks are susceptible."<sup>240</sup> Representative DeWine proceeded to ask nearly every witness who came before the House about the validity of the sickle-cell anemia analogy, which proved difficult to refute. Washington University professor Jules Gerard stated it in a later hearing,

I find it remarkable, since [proponents] talk[] about the potential of ERA to overturn statutes which have a disparate impact on women, for them to conclude that the classical statute which must have a disparate impact on women

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<sup>236</sup> Proponents' own disparate impact analysis included biology as a constitutionally suspect basis for laws exerting a disproportionately negative effect on women. See Memorandum from Phyllis Segal to ERA Legislative History Project, *supra* note 109, at 3.

<sup>237</sup> *Senate Hearings, Part I*, *supra* note 83, at 24 (testimony of Senator Paul E. Tsongas).

<sup>238</sup> *Id.* at 72 (testimony of Marna S. Tucker, Attorney).

<sup>239</sup> *Id.* at 84 (statement of Representative Henry J. Hyde).

<sup>240</sup> *House Hearings*, *supra* note 79, at 28 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).

. . . would be unaffected. All of a sudden, disparate impact is some irrelevant consideration. I don't understand their logic.<sup>241</sup>

By the second House hearing, it had become clear that witnesses were susceptible to abortion-related questions regardless of their area of expertise. Feminist attorneys carefully briefed the pro-ERA witnesses on how to respond to these questions. The strategy, in essence, was to state that abortion rights were protected by privacy jurisprudence under the Fourteenth Amendment, implying that the ERA was redundant rather than revolutionary while leaving the door open to a legislative history free of unequivocal statements about the ERA's irrelevance to reproductive rights. Striking this delicate balance—difficult even in theory—proved very nearly impossible in the hearing room. When DeWine asked the witnesses about the ERA's impact on the Hyde Amendment, long-time women's rights advocate Bernice Sandler deftly replied that while she was not a legal expert, she wanted to “reiterate . . . that the Supreme Court has not viewed abortion under the Equal Protection Clause as a civil rights issue. They have always viewed it in terms of due process and privacy, and that is where the Court has been coming from all along.”<sup>242</sup> So far, so good, but DeWine pressed further—“Is [the] panel's opinion . . . that the passage of the ERA would not in any way affect the right to an abortion or any legislation that might follow?”—prompting Tish Sommers of the Older Women's League and Diana Pearce of Catholic University's Center for National Policy Review to declare, that the ERA would have “no relationship” to abortion.<sup>243</sup>

The feminist lawyers responsible for coordinating proponents' testimony were dismayed. Burns wrote to her colleagues in early October, “All the September 14 House witnesses were briefed on the abortion answer. Still some went too far and said ‘no relation,’” an understanding subsequently memorialized by House counsel in a summary interpretation to be used by members of Congress in their own testimony.<sup>244</sup> “Obviously,” Burns wrote, “legislative history to that effect is troubling to pro-choice concerns.”<sup>245</sup> Meanwhile, congressional proponents of the amendment regularly labeled the issue a “red herring.” They had a point—as Senator Packwood told Hatch, “[M]y hunch would be if you put the strongest anti-abortion rider on this amendment that you could dream up, it would not change a single antiabortion vote toward the amendment.”<sup>246</sup> But remarks like Representative Charles Schumer's (D-NY) compounded the problem:

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<sup>241</sup> *Id.* at 803 (testimony of Jules Gerard, Professor of Law, Washington University Law School). Schlafly also used this example. See, e.g., *The E.R.A.-Abortion Connection*, *supra* note 223, at 1–2.

<sup>242</sup> *Id.* at 164 (testimony of Bernice Sandler, Executive Director, Project on the Status of Women, Association of American Colleges).

<sup>243</sup> *Id.* at 165 (testimony of Tish Sommers, Older Women's League).

<sup>244</sup> Memorandum from Sarah E. Burns to ERA Attorneys, *supra* note 199, at 2.

<sup>245</sup> *Id.*

<sup>246</sup> *Senate Hearings, Part I*, *supra* note 83, at 264 (testimony of Senator Bob Packwood).

[A]bortion has nothing to do with discrimination between men and women, period, until the time when a man can have an abortion or become pregnant, and then maybe it will have something to do with it. But until that point we ought to just abandon that argument and throw it out. . . . It is just ridiculous, I have to say that.<sup>247</sup>

Moreover, proponents continued to argue about how to respond to questions about public funding for abortion. Catherine East recorded in October that Rutgers law professor Ann Freedman “believe[d] the ratification of the ERA [would] not affect Supreme Court decisions on Medicaid funding,” while others, including Marcia Greenberger and Judy Lichtman “[thought] that it [would] (or hope[d] that it [would]) if we don’t have in the legislative history any statement that it won’t have any effect or that ERA had ‘no relation’ to abortion.”<sup>248</sup> Greenberger and Lichtman counseled Freedman “to ‘stonewall’ if Congressman DeWine presse[d] her with questions and not to state her legal reasoning for thinking it [would] have no impact.”<sup>249</sup> East agreed with Freedman, and suggested that in order to ward off the inclusion of an antiabortion rider to the ERA, proponents offer “a clear unequivocal statement in the House Committee report that it is not the intent of the Congress that the ERA have any impact on abortion.”<sup>250</sup> In the final House hearing on ERA II, Freedman and Emerson reiterated the argument that courts would continue to decide abortion cases under the right to privacy, regardless of the ERA’s fate. While feminist lawyers were scrupulously careful not to disavow all connection between the new ERA and abortion, their strategy of circumvention fell far short of many feminists’ aspirations for the ERA.

#### *E. The Dual Strategy Revisited*

As ERA I’s official expiration date neared, Senator Slade Gorton, a moderate Republican from Washington State, conferred with the eminent constitutional scholar Gerald Gunther about an alternative strategy for achieving “equality of rights under the law.” Why not legislate the substance of the ERA with a bill designed to achieve the amendment’s aims without submitting to Article V’s requirement of state approval, Gorton wondered? Gunther’s reaction was positive. “I continue to believe that this is a notion worth pursuing,” the Stanford law professor wrote to Gorton in a letter dated July 1, 1982, the day after the ratification deadline.<sup>251</sup> He noted

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<sup>247</sup> *House Hearings*, *supra* note 79, at 237 (testimony of Representative Charles E. Schumer).

<sup>248</sup> Memorandum from Catherine East, *supra* note 206, at 1.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> Letter from Gerald Gunther, William Nelson Cromwell Professor of Law, Stanford Law School, to Sen. Slade Gorton, (July 1, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9) (indicating that the two men had had a recent telephone conversation).

that such a bill would expand the definition of equality beyond that authorized by the Court's equal protection jurisprudence, but concluded, "[S]urely you have a sufficiently substantial legal ground to warrant going ahead with a clear constitutional conscience. The politics of it . . . may be another matter, but you are a far better judge of that than I."<sup>252</sup>

Just as they had spurned well-meaning attempts to substitute a "women's equal protection clause" for an ERA a dozen years earlier,<sup>253</sup> women's organizations rejected Gorton's proposed "Equal Rights Bill." They understood the bill to be "a well-intentioned effort."<sup>254</sup> However, after inviting feedback from dozens of groups and individuals concerned with women's rights, the coalition's response was decidedly negative. Feminists had many quibbles with the details of the particular bill Gorton drafted, but most of their objections would have applied to virtually any piece of legislation designed to accomplish the ERA's goals without amending the Constitution. The Gorton bill essentially proposed to extend the Equal Protection Clause's most robust protections, formerly accorded only against racial discrimination, to women. According to a NOW LDEF memo summarizing the reactions of feminist advocates to the proposal, this approach had several fatal flaws. First, critics noted the obvious fact that as a statute, the provision would be "vulnerable to amendment or repeal."<sup>255</sup> Second, feminists worried that the Court would not sustain such legislation as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment because opponents could persuasively "claim that Congress is seeking to invalidate laws that the Supreme Court, left to its own devices, would uphold."<sup>256</sup> Third, the advocates worried that any bill seeking to alter judicial interpretation of the Equal Protection Clause would lend legitimacy to the "Human Life bill," an attempt by antiabortion lawmakers to change the definition of "persons" under the Fourteenth Amendment.<sup>257</sup>

Finally, and perhaps most fatally, the Gorton bill risked perpetuating the very flaws in equal protection jurisprudence that the ERA was meant to transcend. As the memo put it, "The Equal Protection Clause itself carries some very unfortunate baggage," including the requirement that "men and women must be similarly situated in order for discrimination to exist," and the fact that "proof of intent has been required even in 'disparate impact' cases."<sup>258</sup> Further, there was "no guarantee that even a command that courts employ 'strict scrutiny' will overcome the tendency, particularly of the Su-

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<sup>252</sup> *Id.*

<sup>253</sup> I discuss these efforts in detail in Mayeri, *supra* note 16.

<sup>254</sup> Memorandum from Phyllis Segal & Anne Simon to Feminist Attorneys (July 22, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9).

<sup>255</sup> *Id.* at 1.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 2.

preme Court, to take a narrow view of ‘equal protection’ for women.”<sup>259</sup> These shortcomings made feminists determined to pursue their goals through constitutional amendment rather than legislation, despite their poignant recognition that passage and ratification was likely to take “another ten years.”<sup>260</sup>

Gorton’s aides tried to assure the women’s coalition that the equal rights bill was designed to “complement a renewed [ERA] ratification effort, not to supplant it.”<sup>261</sup> But just as many feminists had been wary of distracting state ERA campaigns in the final years of ERA I’s ratification battle, they knew they lacked the resources and political capital to fight on multiple fronts in Congress. The coalition decided to oppose the Gorton bill and “put[] all our energies into the Equal Rights Amendment.”<sup>262</sup> This decision hardly put to rest the dilemmas associated with pursuing legal and constitutional change through multiple avenues.

As I have explored elsewhere, in the 1960s, legal feminists surmounted internal divisions within the women’s movement to coalesce around a “dual strategy” for constitutional change.<sup>263</sup> After decades of division over the strategy and substance of achieving constitutional equality for women, legal feminists—led by pragmatic strategists like Pauli Murray and Mary Eastwood—determined to pursue litigation under the Fourteenth Amendment and advocate for an ERA simultaneously. The dual strategy enabled feminists to transcend their longstanding differences over the proper constitutional home for women’s rights, and allowed them to pursue their goals on multiple fronts. But as the ERA ratification debate dragged on for over a decade, the logistical complexities of the dual strategy mounted. Successfully arguing that the Equal Protection Clause guaranteed the very rights feminists sought from an ERA undermined the need for a new amendment, while continuing to press for a new amendment implied that the Fourteenth Amendment was wanting even as litigators argued the opposite in court.

The dilemmas of the dual strategy did not disappear when the states failed to ratify the ERA, but they transmogrified. By 1982, the Court had resolved, for better or for worse, many of the equal protection questions that feminists had litigated during the 1970s—the status of laws that assumed women’s economic dependency, pregnancy discrimination, disparate im-

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<sup>259</sup> *Id.* at 1.

<sup>260</sup> Memorandum from Ellen to Ellie [Smeal] (July 12, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9).

<sup>261</sup> Memorandum from Marianne McGettigan to Ellen (July 9, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9); *see also* Equal Rights Statute Proposed by Senator Gorton, (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9) (attached to memo dated July 22, 1982) (“I have no intention of undermining the continued effort for ratification.”).

<sup>262</sup> Memorandum from Phyllis Segal & Anne Simon to Feminist Attorneys, *supra* note 254, at 1.

<sup>263</sup> Mayeri, *supra* note 16.

pact, the military draft. Cases like *Geduldig*,<sup>264</sup> *Feeney*,<sup>265</sup> and *Rostker*<sup>266</sup> had defined the limits of the Fourteenth Amendment, closing off possibilities that had remained open in the early 1970s. On the other hand, the *Reed-Frontiero* line of cases had established that many laws that classified men and women on the basis of sex would be subjected to heightened scrutiny, and often struck down as perpetuating stereotypical sex roles.<sup>267</sup> When the ERA was reintroduced in 1983, feminists had the luxury of knowing how the contours of equal protection jurisprudence had developed, an advantage they lacked in 1972. In areas where equal protection had fallen short—pregnancy discrimination, disparate impact, and military equality among them—feminists did not have to worry as much about how their arguments about the ERA would affect their fortunes in Fourteenth Amendment litigation. Nor, by definition, did they have to fear that progress achieved under the Fourteenth Amendment would undermine their arguments for an ERA.

Some of the old dilemmas of the dual strategy remained, however. Since long before congressional passage of the original ERA, opponents of the amendment—who once upon a time had included many women’s rights advocates—had argued that the Fourteenth Amendment’s Equal Protection Clause could provide the salutary aspects of an ERA without its alleged rigidity. In the debates over ERA II, opponents continued to press this line of argument, with a great deal of additional ammunition. Since the Court’s Fourteenth Amendment jurisprudence had evolved, opponents contended that the only further changes an ERA would bring were, at best, contrary to public opinion, and at worst, disastrous. Anti-ERA witness Grover Rees, for instance, emphasized that any legislative revisions that the amendment would require or inspire were “superfluous, because that can be done under the equal protection clause.”<sup>268</sup>

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<sup>264</sup> *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974) (holding that discrimination based on pregnancy does not necessarily violate the Equal Protection Clause).

<sup>265</sup> *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the foreseeably disparate impact of state action is insufficient to demonstrate discrimination under the Equal Protection Clause and that the action must be performed “‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group”).

<sup>266</sup> *Rostker v. Goldberg*, 453 U.S. 57, 77, 79 (1981) (holding that exempting women from registering under the Military Selective Service Act is constitutional because women and men are not similarly situated since women are excluded from combat positions in the military).

<sup>267</sup> See cases cited *supra* note 61.

<sup>268</sup> *House Hearings*, *supra* note 79, at 33 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law). Said former Representative Charles Wiggins, “I concluded thirteen years ago that . . . our present constitution, particularly the Fourteenth Amendment, was fully adequate to the legitimate needs of all our people for fair treatment. Nothing has occurred in the interim to alter my conclusion, and indeed recent decisions of the Supreme Court interpreting the Fourteenth Amendment have fortified that conclusion.” *Id.* at 357 (statement of Charles Wiggins). As Reva Siegel has demonstrated, during the ratification debates ERA opponents largely accepted the Court’s reinterpretation of the Equal Protection Clause, characterizing these changes as acceptable, in contrast to the havoc that an ERA would wreak. Siegel, *supra* note 8, at 1403.

Changes brought about under Title VII further fortified this argument. However, ERA proponents emphasized the continuing disparities between women's and men's earnings to justify the ongoing need for an ERA. But, the problem with proponents' reasoning was that it was difficult to see how an ERA would affect wage inequality in light of existing laws mandating equal pay for equal work.<sup>269</sup> As they had been during the ratification campaign, ERA opponents were quick to counter assertions that the amendment would narrow the wage gap by pointing out that unlike Title VII, the ERA would not cover private employers. Rees declared in the first House hearing on ERA II that while proponents often emphasized that the ERA would affect state action only, "we hear that the equal rights amendment is going to solve . . . the 59-cents-on-the-dollar-problem. You cannot have it both ways. Overwhelmingly, the discriminating employers are private employers."<sup>270</sup> Some took the argument a step further, suggesting that if existing antidiscrimination laws had not successfully eliminated the wage gap, then differences between men's and women's incomes must be attributable to factors other than discrimination. Statistician Carl Hoffman noted that

advocates of the ERA state specifically that an amendment is required in order for women to achieve the same changes as blacks have achieved . . . . The results of much of my work argue rather that the mechanisms causing the differences in income between men and women are of a different type than those that caused the differences between blacks and whites.<sup>271</sup>

For instance, "women have been less aggressive in seeking promotions and this is true even in companies that have encouraged them equally," and women were disproportionately burdened by their family responsibilities, a disparity that the ERA would not touch.<sup>272</sup>

While feminist advocates like Donna Shalala and Bernice Sandler argued that the ERA was necessary to "eliminate the gaps in coverage under existing laws,"<sup>273</sup> opponents responded that these "gaps" were not the unfortunate result of shortsighted policymaking, but rather of purposeful, sensible line-drawing by judges and legislators. As Professor Rabkin put it, referring to the differences between Title IX's coverage and the ERA's mandate, "These are not gaps. They were deliberate decisions to set up the law one way, rather than another way. They are an expression of legislative judgment; they are an expression of concern to be flexible and to be reason-

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<sup>269</sup> MANSBRIDGE, *supra* note 7, at 38–40.

<sup>270</sup> *House Hearings*, *supra* note 79, at 25 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).

<sup>271</sup> *Id.* at 497–98 (testimony of Carl C. Hoffmann, Ph.D., Hoffmann Research Associates).

<sup>272</sup> *Id.* at 488.

<sup>273</sup> *Id.* at 107 (statement of Bernice Sandler, Executive Director, Project on the Status of Women, Association of American Colleges).

able . . . .”<sup>274</sup> Others suggested that the ERA’s other effects imposed too high a price to pay for the amendment’s limited effects on women’s economic equality. Schlafly made this point in particularly colorful terms. She argued that, given the changes precipitated by Title VII, Title IX, and the Equal Protection Clause, the ERA’s sole effect on women’s employment opportunities would be to eliminate the bona fide occupational qualification exception for public jobs. Schlafly declared:

For this, we are asked to constitutionalize taxpayer-funding of abortions and homosexual marriages, allow our daughters to be drafted and sent into combat just like our sons, forfeit veterans’ preference and tax exemption of religious schools, sacrifice traditional rights of wives, abandon our right to have single-sex schools and extra-curricular activities, pay greatly increased insurance premiums, and transfer enormous new powers from the states to the federal courts.<sup>275</sup>

Neither had the old dilemma that arguing for a new amendment had the potential to undermine favorable judicial interpretations of existing provisions disappeared. For instance, proponents’ assertion that the ERA would provide a firmer basis for congressional legislation designed to prevent or ameliorate sex discrimination risked suggesting that Section 5 of the Fourteenth Amendment did not already authorize such action. But what produced the most troublesome tension between ERA advocacy and other constitutional and statutory provisions were the arguments feminist litigators had advanced under the Equal Protection Clause, Title VII, and the state ERAs with respect to pregnancy discrimination and abortion funding. Feminist lawyers had vigorously pursued an expansive definition of sex discrimination in earlier pregnancy discrimination cases, a definition they now hoped to incorporate into the new ERA. Opponents regularly noted that laws concerning pregnancy—a “unique physical characteristic” just like abortion—very much came within the ambit of sex equality, according to the same ERA proponents who now sought to dissociate the amendment from abortion. Moreover, they regularly emphasized that pro-choice advocates had cited state ERAs to support their contention that state constitutions required public funding of abortions. Opponents’ favorite smoking gun was a 1980 newsletter item from the Civil Liberties Union of Massachusetts:

The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. . . . Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal

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<sup>274</sup> *Senate Hearings, Part I, supra* note 83, at 157 (statement of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).

<sup>275</sup> *House Hearings, supra* note 79, at 393 (statement of Phyllis Schlafly, Eagle Forum).



Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in [*Harris v. McRae*] was the last straw. We now have no recourse but to turn to the State Constitution for the legal hook to save Medicaid funding for abortions.<sup>276</sup>

Pro-choice advocates in Hawaii, Pennsylvania, and other states had made similar calculations. ERA skeptics not unreasonably wondered why, if feminists argued that the sex equality guaranteed by state ERA encompassed government funding for abortion, the federal ERA would not be impressed into the service of the pro-choice cause.

Proponents' attempts to distance themselves from pro-abortion funding arguments made under state ERAs were also in some tension with their position on gay rights. Whereas feminists hoped to draw attention away from the state ERA experience when it came to abortion, the Washington ERA case *Singer v. Hara*<sup>277</sup> served as the centerpiece of proponents' case for the federal ERA's inapplicability to matters of sexual preference. Proponents regularly cited *Singer* as proof that the federal ERA would not mandate same-sex marriage or other rights for homosexuals.<sup>278</sup>

At the same time, feminists did not necessarily want the emerging jurisprudence under state ERAs wholly to define the federal ERA's meaning. State ERAs had produced a variety of results, and not all of them had fulfilled feminist hopes. Nor did feminists wish to leave the impression that state ERAs were sufficient replacements for a federal amendment. Feminist leaders also worried that campaigns for new state ERAs would divert energy and resources away from the federal ERA campaign. After considerable friction with state organizations, leading national women's groups had called for a moratorium on advocacy for new state constitutional amendments in 1980.<sup>279</sup>

Pursuing legal change on multiple fronts continued to complicate feminists' constitutional amendment advocacy. The old dilemmas of the dual strategy were in some ways muted by caselaw development under the Fourteenth Amendment and by the opportunity, now that the first ERA had gone down to defeat, to redefine the amendment and distinguish its meaning from existing sex equality jurisprudence. But if the old dual strategy di-

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<sup>276</sup> MANSBRIDGE, *supra* note 7, at 126, 287 n.7 (citing *From the Executive Director's Desk*, *supra* note 221); see also *The E.R.A.-Abortion Connection*, *supra* note 223, at 2.

<sup>277</sup> 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting petition to marry from same-sex couple).

<sup>278</sup> In contrast to their diverse positions on issues like disparate impact, abortion, and private conduct, where more expansive conceptions of equality were on the table, those who worked on the ERA Legislative History Project do not appear to have considered redefining the ERA to cover discrimination against gay and lesbian individuals or to affect prohibitions on same-sex marriage. Presumably they believed that to do so would be political suicide. That, of course, did not stop opponents from predicting the extension of the equality principle to gay rights.

<sup>279</sup> See Memorandum from Nancy M. Lazerow & Johanna S.R. Mendelson, AAUW, to ERA Committee, Re: ERA Update (Dec. 16, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Mary Jean Collins Papers, Box 9, Folder 10).

lemmas had largely, though not completely, receded into the background, new strategic puzzles had emerged. Most prominently, attempts to pin reproductive rights to sex equality under state ERAs, the federal Constitution, and statutory provisions, undermined federal ERA proponents' efforts to deflect attention from the "abortion-ERA connection." Feminists, already profoundly ambivalent about the strategic separation of reproductive rights from the ERA, found themselves compelled to compromise once again.

### III. THE LEGACIES OF ERA II

In the end, proponents' strategic compromises proved insufficient to save ERA II. Despite the best efforts of feminists and their congressional allies, ERA II's potency as a political weapon ultimately proved of limited utility. Nevertheless, the debate over ERA II was of lasting significance to the history of legal feminism. The hearings pushed proponents to hone new doctrinal proposals that balanced feminists' aspirations with concerns about judicial manageability and practicality. They also drove home the limitations of constitutional amendment advocacy as a means to the ends legal feminists sought. And for scholars, the debates over ERA II provide an invaluable picture of how the legal and political landscape changed and failed to change over one of the most transformative decades in women's legal history.

#### A. *"We Have to Have a Vote, Win or Lose": ERA II's Career as a Political Weapon*

NOW and NWPC officials and House leaders agreed in November 1983 that supporters would bring the ERA to a floor vote with a closed rule that would prohibit amendments, forcing members to vote yes or no. "We have to have a vote, win or lose," declared Judy Goldsmith, as feminists promised to campaign against ERA opponents in the 1984 elections.<sup>280</sup> An *L.A. Times* editorial warned that "a failure to stand up for equality this time could affect political careers more than standing up for it did in 1972. Women are far more politically active now than they were then."<sup>281</sup> As Mary Frances Berry recounts, feminist strategists believed the ERA had a chance of passing the House, in which case they could concentrate on winning Senate support.<sup>282</sup> If the amendment failed to pass, or passed the Senate with crippling exemptions, they could make conservative opposition a campaign issue.<sup>283</sup>

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<sup>280</sup> Associated Press, *Rights Amendment Stressed as a Major 1984 Election Issue*, N.Y. TIMES, Nov. 13, 1983, at 75.

<sup>281</sup> Editorial, *Second Round for the ERA*, L.A. TIMES, Nov. 14, 1983, at C4.

<sup>282</sup> For an account of the floor debates over ERA II, see BERRY, *supra* note 7, at 103–06.

<sup>283</sup> *Id.* at 102–03.

Forcing the vote and stifling attempts to amend infuriated many Republicans, with Representative Larry Craig (R-ID) chastising Speaker O'Neill, "Shame on you, Mr. Speaker, shame on you."<sup>284</sup> House Minority Leader Robert Michel (R-IL) complained, "The majority is engaging in an abuse of power that would bring a blush to the cheeks of the most absolute despot of antiquity."<sup>285</sup> The ERA fell six votes short of the two-thirds majority needed for passage, 278-147.<sup>286</sup> Representative Hamilton Fish (R-NY), a cosponsor of the ERA, said that Democrats' procedural move was nothing more than "partisan politics in search of a campaign issue."<sup>287</sup> But Republican feminist Kathy Wilson, chair of the National Women's Political Caucus, warned, "We now know the truth about our representatives' commitment to equality, and those who voted against us will soon learn the consequences of the gender gap."<sup>288</sup> The *New York Times* quoted a Democratic aide as saying that "his party's leaders doubted they would win the vote . . . but that with the roster of Republican 'nays,' Democratic campaign strategists were 'licking their chops.'"<sup>289</sup> The *Times* disapproved of this unseemly politicking, opining the next day that the vote against the ERA "had less to do with the substance of the amendment than with exploiting the 'gender gap' and targeting E.R.A. opponents for defeat in next year's elections."<sup>290</sup> This "cynical gambit," the editorial writers wagered, "may have done the E.R.A. . . . more harm than good."<sup>291</sup> ERA champion Representative Patricia Schroeder defended proponents' decision in a *Wall Street Journal* op-ed a few weeks later, noting that suspending normal rules of debate had been integral to the passage of other bills, including important civil rights legislation.<sup>292</sup>

Whatever the merits of this last-ditch parliamentary maneuver, it highlighted the role that constitutional amendment advocacy now played for the women's movement and for partisan politics. Fighting for the ERA had become a potent political weapon in an increasingly polarized and partisan atmosphere. Many of the ERA's congressional allies apparently saw the amendment primarily in those terms: Senator Tsongas's avoidance of specifics in the first hearing on ERA II was less a reflection of his lack of preparation and more of a desire to view the amendment in symbolic, political terms. For lawmakers like Tsongas, the ERA was less a bundle of intricate

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<sup>284</sup> United Press Int'l, *House Deals ERA Swift Defeat*, L.A. TIMES, Nov. 15, 1983, at A1.

<sup>285</sup> William E. Farrell, *U.S. Amendment on Equal Rights Beaten in House*, N.Y. TIMES, Nov. 16, 1983, at A1.

<sup>286</sup> *Id.*

<sup>287</sup> Karen Tumulty, *House Swiftly Kills Bid to Revive ERA*, L.A. TIMES, Nov. 16, 1983, at OC1.

<sup>288</sup> *Id.*

<sup>289</sup> Farrell, *supra* note 285.

<sup>290</sup> Editorial, *Was This E.R.A. Defeat Necessary?*, N.Y. TIMES, Nov. 17, 1983, at A26.

<sup>291</sup> *Id.*

<sup>292</sup> Patricia Schroeder, *Parliamentary Push for ERA Wasn't So Shocking*, WALL ST. J., Dec. 13, 1983, at 30.

legal doctrines than a referendum on conservative legal and political positions on civil rights. The early House hearings in particular were replete with references by pro-ERA witnesses to the failures of the Reagan Administration to vigorously enforce civil rights laws, with an emphasis on the weakness of the Executive Branch's commitment to women's rights. The Administration's deficiencies in this regard demonstrated the need for a constitutional amendment, proponents argued, because the important business of equality clearly could not be left to the vagaries of bureaucratic whim. When the Administration protested that it truly was committed to women's rights, just not to a constitutional amendment, feminists dismissed its desultory proposals as "band-aid" solutions to a gaping constitutional wound. The President and his allies would pay for their opposition to the ERA, proponents warned again and again.<sup>293</sup>

Facing growing criticism from within the Administration as well as without, the White House proposed eliminating sex-biased language from a number of federal laws. But even the head of the DOJ's Civil Rights Division admitted that the changes were mostly "cosmetic."<sup>294</sup> ERA supporters seized on Justice Department attorney Barbara Honegger's high-profile resignation to highlight stark assessments of the Reagan Administration's women's rights record. Honegger professed to have had faith in Reagan's commitment to eradicate sex discriminatory laws as a substitute for supporting the ERA, but, she reported, "not a single law has been changed."<sup>295</sup> Of Reagan, Honegger told the *Washington Post*, "He doesn't deserve loyalty because he has betrayed us."<sup>296</sup> Editorialists used Honegger's resignation to renew their call for "ERA II."<sup>297</sup> Meanwhile, Democratic presidential candidates tripped over each other in their eagerness to claim their reverence for the amendment and their commitment to its passage. To the chagrin of many moderate ERA proponents, several went so far as to threaten to withhold money for federal programs and projects from states whose legislatures would not ratify.<sup>298</sup>

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<sup>293</sup> See, e.g., Associated Press, *Rights Amendment Stressed as Major 1984 Election Issue*, N.Y. TIMES, Nov. 13, 1983, at 75; Editorial, *Second Round for the ERA*, L.A. TIMES, Nov. 14, 1983, at C4.

<sup>294</sup> Marjorie Hunter, *Reagan Proposes Sex Bias Changes*, N.Y. TIMES, Sept. 9, 1983, at A20.

<sup>295</sup> United Press Int'l, *Justice Dept. Aide Quits After Calling Sex Bias Policy a Sham*, L.A. TIMES, Aug. 23, 1983, at B6.

<sup>296</sup> *Id.*

<sup>297</sup> Editorial, *No Alternative to E.R.A.*, N.Y. TIMES, Aug. 24, 1983, at A22.

<sup>298</sup> Howell Raines, *Democrats Line Up on Feminist Issues*, N.Y. TIMES, July 11, 1983, at A1 (describing promise of Senators Gary Hart (D-CO) and Alan Cranston (D-CA) to this effect, as well as allusions to such a move by Walter Mondale, the eventual Democratic presidential nominee, and Senator Ernest F. Hollings (D-SC)). For a critical view from a professed ERA supporter, see David S. Broder, *Foot-in-Mouth Syndrome Has Democrats Courting Disaster*, L.A. TIMES, July 17, 1983, at E5. See also Eleanor Randolph, *Mondale Calls Reagan 'Khomeini-Like' in His Women's Rights Policy*, L.A. TIMES, Jan. 20, 1984, at B9.

For feminists, scoring political points was clearly a second-best outcome, and the opportunity proved short-lived and ultimately futile. For a time, prospects for a women's renaissance looked somewhat promising. The *Los Angeles Times* heralded NOW's emergence as a "mainstream force," noting that the organization's annual convention had become an obligatory stop for serious Democratic presidential hopefuls.<sup>299</sup> Feminists rallied around the first female vice-presidential nominee, Geraldine Ferraro,<sup>300</sup> and hoped to abort the Reagan Revolution with a 1984 election victory.<sup>301</sup> Of course, it was not to be, and the Reagan landslide was accompanied by a gain for the President's party of sixteen seats in the House and only minor losses in the Senate. The much-touted gender gap had done feminists little electoral good.<sup>302</sup> Many pundits and politicians were beginning to conclude that the gender gap was less about women's chagrin over the Reagan Administration's failure to support the ERA and abortion rights, and more about women's concern about the ballooning defense budget and draconian spending cuts on social and economic programs.<sup>303</sup> Moderates lamented the conservative takeover of the GOP, epitomized by, among other things, the rejection of a proposal to include support for the ERA in the 1984 Republican platform.<sup>304</sup> Pro-ERA members of Reagan's cabinet, like Transportation Secretary Elizabeth Dole, suspended their ERA advocacy in deference to the President's position.<sup>305</sup> The heady excitement generated by Geraldine

<sup>299</sup> Beverly Beyette, *NOW Flexing New Political Muscle*, L.A. TIMES, Oct. 6, 1983, at 12.

<sup>300</sup> See, e.g., David E. Rosenbaum, *Democrats Praise Selection; Many Feminists Are Elated*, N.Y. TIMES, July 13, 1984, at A8.

<sup>301</sup> Republican feminists shared this hope. See Howell Raines, *President Is Assailed by Women's Leader; 2d Term Is Opposed*, N.Y. TIMES, July 10, 1983, at 1.

<sup>302</sup> Media coverage of the ERA was replete with warnings to the Reagan Administration about the "gender gap" and potential political fall-out among female voters. See, e.g., Editorial, *The Gender Gap*, L.A. TIMES, July 18, 1983, at C4.

<sup>303</sup> For early examples of such assessments, see Robert Shogan, *Prosperity, Risk of War Key Issues of 'Gender Gap'*, L.A. TIMES, Sept. 26, 1983 at B1 ("[T]he policy gender gap does not appear to stem mainly from what are generally considered to be areas of special female concern, such as the right to have an abortion and the equal rights amendment, because support for these issues is stronger among men than among women."); Steven R. Weisman, *Facing the 'Gender Gap' with Conflicting Advice*, N.Y. TIMES, Aug. 16, 1983, at A20 ("At the White House, there is a feeling that neither abortion nor the proposed [ERA] are factors in Mr. Reagan's problems. But there is also widespread agreement that Administration efforts to deal with women have been fitful at best."). By the time of Reagan's 1984 landslide, this had become the conventional wisdom. See, e.g., MaryLouise Oates, *Gender Gap: Which Definition Gets Your Vote?*, L.A. TIMES, Nov. 2, 1984, at G1 ("The statistics say . . . that there is a gender gap, but that it has little to do with issues of women's rights.")

<sup>304</sup> Steven V. Roberts, *Panel of G.O.P. Concludes Draft of '84 Platform*, N.Y. TIMES, Aug. 17, 1984, at A1 ("With conservatives in full control of the debate, the Republican platform committee today crushed an attempt to endorse the proposed Federal equal rights amendment."); see also John Balzar & William Endicott, *Dallas Proving to Be No Place for Party's Moderates*, L.A. TIMES, Aug. 22, 1984, at A4 (discussing the shift to the right at the 1984 Republican National Convention); David Shribman & Dennis Farney, *Survival Strategy Plotted*, WALL ST. J., Aug. 22, 1984, at 50 (same).

<sup>305</sup> Associated Press, *Elizabeth Dole Suspends Push for Rights Measure*, N.Y. TIMES, Sept. 28, 1984, at A22.

Ferraro's vice-presidential candidacy was short-lived.<sup>306</sup> The brief career of the ERA as political weapon seemed over for good.

However, ERA II arguably epitomized and reinforced a trend toward the introduction and promotion of constitutional amendments primarily for symbolic political purposes, with little or no expectation of ultimate passage and ratification. After the ERA's defeat, conventional wisdom held that Article V's prescribed process was no longer a viable path to constitutional change, except perhaps for very specific, technical alterations.<sup>307</sup> But bids to amend the Constitution hardly ceased; rather, they continued to provide opportunities to make a dramatic statement of dissatisfaction with existing constitutional provisions or their interpretation by courts, to force others to take uncomfortable political stances, and to provide a forum for debating issues of principle without committing to any concrete changes in the law.<sup>308</sup> Though the ERA's career seemed over for the time being, the concept of proposed constitutional amendment as political weapon emerged very much alive.

### *B. ERA II and the Reconstitution of Feminism*

By the mid-1980s, most feminists agreed that the ERA's time had come and gone. Former NOW ERA activist Mary Jean Collins wrote in 1987 that proposals to reintroduce the amendment "ignore[] the lessons of the past and [are] the pursuit of predictable failure . . . . Rather than rushing into a costly and premature effort to change the Constitution, the women's movement needs to address the hard task of creating a true consensus for equality."<sup>309</sup> Catharine MacKinnon's assessment was much harsher: she questioned not the wisdom of seeking transformative change or doing so through a constitutional amendment, but rather whether the ERA as conceived by most of its supporters would have changed much of anything important. In an impassioned 1987 book review, she castigated feminists for what she characterized as their impoverished conception of sex equality,

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<sup>306</sup> For a contemporaneous election-eve account, see Maureen Dowd, *Political Outlook Dims for Women After Hopes Raised by Ferraro's Bid*, N.Y. TIMES, Nov. 1, 1984, at D29.

<sup>307</sup> There is, of course, an extensive literature on the positive and normative limitations of the Article V process in the modern era. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995); JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* (1992); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TULANE L. REV. 247 (2002).

<sup>308</sup> To varying extents, the "human life," "balanced budget," "flag burning," and "federal marriage" amendments might be crudely so categorized. Recent attempts to revive the ERA arguably also fall under this rubric.

<sup>309</sup> Mary Jean Collins, *Book Notes*, 244 NATION 692 (1987) (reviewing MANSBRIDGE, *supra* note 7, and BERRY, *supra* note 7).

nourished by their deliberate underestimation of the inequality and injustice facing women. She lamented their failure to fight for a meaningful constitutional amendment that would move beyond a focus on sex-based legal classifications to attack the root causes of male domination.<sup>310</sup> “[T]he ERA’s legal impact,” MacKinnon asserted, “need not have been confined to being the women’s auxiliary of the equal protection clause.”<sup>311</sup> Whether they believed the quest for ERA I was too ambitious or not ambitious enough, renewing that quest in earnest was on almost no one’s agenda in the aftermath of ERA II’s defeat.

Proponents’ failure to effectively use the ERA for electoral gain and feminists’ despair of the prospects for reintroduction should not obscure the legacies of ERA II as an important turning point in feminist legal history. First, the debates over ERA II provided a forum for feminists to consider what kind of legal and constitutional change they wanted to achieve and pushed them to translate an abstract equality principle into specific doctrine. Second, the ERA II struggle drove home for feminists the limitations of constitutional amendment as a vehicle for achieving their aspirations. Finally, the ERA II episode marked a crucial transition point in feminists’ definition of legal equality. 1983 was hardly the first time that feminists had struggled with the tension between seeking formal equality of treatment and a more substantive version of equal rights under law, but ERA I’s demise provided an opportunity to acknowledge publicly the shortcomings of a focus on the eradication of sex-based legal classifications and to develop a more expansive vision of equality. As such, ERA II was not merely a reiteration of ERA I, not simply a postscript to a failed ratification campaign, but a revealing moment in the evolution of legal feminist thought and strategy.

Of course, feminists had grappled with doctrinal questions concerning the proper constitutional standard of review for laws exerting a disproportionately negative impact on women before 1983. They had faced the question head-on as they challenged veterans’ preference laws, culminating in the unfavorable 1979 Supreme Court decision in *Personnel Administrator v. Feeney*. As we have seen, though, several factors limited their ability fully to theorize constitutional disparate impact in the context of the *Feeney* case. First and foremost, in *Feeney*, feminists were operating within the confines of an equal protection jurisprudence that had enshrined discriminatory intent as the sine qua non for determining when a facially neutral law violated equal protection. Accordingly, the appellee in *Feeney* closely ad-

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<sup>310</sup> Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 764 (1987) (reviewing MANSBRIDGE, *supra* note 7) (“[T]he continual revisions of the public image of what the ERA ‘would do,’ equivocations designed to win over the opposition by reassurance, *did* effectively vitiate the potentially explosive organizing effect the ERA might have had on those who had the world to gain from actual sex equality.”).

<sup>311</sup> *Id.* at 765.

hered to the intent requirement, arguing that all circumstantial evidence pointed to a legislative intent to discriminate against women. Feminist organizations took the argument a step further, advocating for what was, in practice, a substantial relaxation of the intent requirement, but they did so in large part on the ground that the veterans' preference's disproportionate effect on women was due almost entirely to longstanding de jure discrimination against women by the government—restrictions on women's participation in the military. Women's groups argued that a stringent intent requirement made little sense in the context of sex discrimination, where "benign" assumptions about women's "place" in society, rather than overt hostility, often animated laws with a negative impact on women's opportunities. But they worked within the *Washington v. Davis* framework and within the parameters set out by the district court opinion striking down the Massachusetts statute, which, like most cases, did not invite imaginative, expansive theories about constitutional doctrine.

After the *Feeney* decision dashed feminists' hopes for a more expansive reading of the Equal Protection Clause, they increasingly turned to the ERA as a repository for their hope that the Constitution would vanquish laws exerting a disparate impact on women. As such, feminists projected that the ERA would, if ratified, attack facially neutral as well as explicitly discriminatory laws. But, as discussed earlier, neither the climate of the ratification battle nor the political costs of specificity invited careful consideration of particular doctrinal ramifications. It was easy for feminists to say they wanted something better than *Feeney*, but it was more difficult and strategically risky to articulate exactly what. Leftover strategic reluctance persisted in the early ERA II hearings, especially given opponents' tendency to depict disparate impact analysis as a euphemism for "quotas." But when opponents probed beneath the surface, proponents were compelled to provide a much more specific account of ERA disparate impact doctrine, as we saw in Part II.

The products of these deliberations had a life beyond the ERA II hearings and embodied the shifting orientation of post-ERA feminist jurisprudence. Phyllis Segal, whose memos had informed congressional testimony about the details of disparate impact doctrine under ERA II, published a more detailed version of her theory in the *Buffalo Law Review* in 1984.<sup>312</sup> Citing Ann Freedman's ERA II testimony before Congress, Segal considered and rejected proposals to enact a less stringent intent test and instead endorsed the "limiting principle[s]" developed during the hearings.<sup>313</sup> Relying on these limiting principles, she situated feminists' new disparate impact analysis in the context of previous attempts to improve on the *Davis/Feeney* framework. The renaissance of disparate impact analysis was

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<sup>312</sup> Phyllis N. Segal, *Sexual Equality, the Equal Protection Clause, and the ERA*, 33 *BUFF. L. REV.* 85 (1984).

<sup>313</sup> *Id.* at 136–37.



not confined to participants in the ERA II campaign. Then-law student Reva Siegel published a note in the *Yale Law Journal* advocating a disparate impact reading of the Pregnancy Discrimination Act in March 1985.<sup>314</sup> Without such an analysis, she argued, the PDA would be a weak weapon against sex inequality in the workplace.

The renewed enthusiasm for disparate impact analysis was also evident in an influential article authored by Wendy Williams and Nadine Taub in the same year.<sup>315</sup> In a widely cited 1982 article, Williams had grappled with the question of how to reconcile sex differences with the equal treatment model of sex equality analysis that dominated 1970s feminist litigation.<sup>316</sup> The “crisis” she described stemmed from an intense and sometimes bitter dispute among feminists over whether to support legislation that gave pregnant women special benefits not available to other persons temporarily unable to work. In that piece, Williams framed what is often called the “equal treatment versus special treatment” debate in rather stark terms, arguing that “[i]f we can’t have it both ways, we need to think carefully about which way we want to have it.”<sup>317</sup> In her view, “for all of its problems, the equality approach is the better one.”<sup>318</sup>

But two years later, Williams and Taub suggested that perhaps feminists need not choose between the Scylla of assimilation/formal equality/individual treatment and the Charybdis of accommodation/real equality/group treatment after all.<sup>319</sup> Instead, like Segal and Siegel, they suggested revitalizing disparate impact analysis: “In short, our hope is that by stressing the common origin of facial discrimination and neutral rules with disparate impact we can revive a commitment to eliminating real barriers to women’s full societal participation.”<sup>320</sup> They also hoped to transcend the conflict between “equal treatment” and “special treatment” feminists by framing the question in terms of effects: employers would be forbidden to create a special category for pregnancy, but any employment policy would be suspect if it had a disparate impact on women. Thus, if a neutral disability benefits policy protected women to a lesser degree than men by, for example, providing disability leave for all employees insufficient to accommodate pregnancy, it would be susceptible to challenge.

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<sup>314</sup> Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 *YALE L.J.* 929, 929 (1985).

<sup>315</sup> Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 *RUTGERS L. REV.* 825 (1985).

<sup>316</sup> Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN’S RTS. L. REP.* 175 (1982).

<sup>317</sup> *Id.* at 196.

<sup>318</sup> *Id.*

<sup>319</sup> The article, Taub & Williams, *supra* note 315, derived from a conference paper delivered at 1984: Twenty Years After the 1964 Civil Rights Act: What Needs to Be Done to Achieve the Civil Rights Goals of the 1980’s, Rutgers University School of Law-Newark, Nov. 16–17, 1984.

<sup>320</sup> Taub & Williams, *supra* note 315, at 839.

Williams and Taub recognized the formidable “practical and political” obstacles in the way of a full-blown assault on laws and policies with a disparate effect on women. This “resistance,” they believed, derived from “three related concerns: the absence of a requirement that ‘intent’ be proved as an element of discrimination, the costs that may result, and the lack of immediately apparent limits on the doctrine’s sweep.”<sup>321</sup> Thus, though they wished to preserve the *Griggs* concept “intact . . . as a secondary approach,” they “would seek to overcome this concern by identifying acceptable limits.”<sup>322</sup> The limits they identified were virtually the same limits developed in the course of the ERA II hearings: “At a minimum . . . those neutral rules which are traceable to, build on, reproduce or perpetuate the old notions and hierarchies must be justified by a business necessity.”<sup>323</sup> Indeed, Williams and Taub cited the testimony of Segal and Freedman from the 1983 hearings to support their analysis.

Two years later, Ann Freedman and Sylvia Law challenged the argument advanced by political scientist Jane Mansbridge that the ERA, by the time of its demise, would have had little practical effect on the law. On the contrary, they asserted, “The ERA would have had a profoundly important impact on laws and policies that discriminate in fact, but not in words.”<sup>324</sup> Whether ERA I would have had such an effect is unknowable, but feminists had certainly done all they could to ensure such a meaning for ERA II. Although they had frequently relied on the Equal Protection Clause for limiting principles in the ERA II hearings, disparate impact analysis was a crucial area in which proponents made clear how the amendment would depart, rather dramatically, from existing equal protection jurisprudence.

If the life of disparate impact analysis illustrates how the ERA II debates helped to redefine the meaning of “equality of rights under the law,” the compromises proponents made during the hearings highlight the limitations of the ERA as a means for accomplishing the ends feminists sought. The paradox of the legal feminist position after the demise of ERA I is striking. For the first time in over a decade, feminists were in a position to shed the constraints of the ratification process and reconsider the scope of their aspirations for legal and constitutional change. On the other hand, the defeat of ERA I reflected the increasingly conservative political climate in which feminists operated. The reintroduction of ERA II meant that feminists had the opportunity to create a new legislative history for the amendment, one that reflected their current aspirations. But attempting to achieve these changes through the same constitutional amendment that had proven so controversial even before conservative domination of the Executive

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<sup>321</sup> *Id.* at 838.

<sup>322</sup> *Id.* at 841.

<sup>323</sup> *Id.*

<sup>324</sup> Ann E. Freedman & Sylvia A. Law, *Thomas I. Emerson: A Pioneer for Women’s Equality*, 38 CASE W. RES. L. REV. 539, 551 (1988).

Branch and the Senate placed severe political constraints on feminists' attempts to reconfigure and expand the ERA's meaning. After the disappointments of ERA I and II, feminists could understandably conclude that, as Mary Jean Collins put it in 1987, "constitutional amendments serve to ratify the present rather than paving the way for the future."<sup>325</sup>

The ERA II experience highlighted the Catch-22 in which feminists found themselves: every victory they won in incorporating their more expansive visions of equality into the amendment's legislative history would cost them votes, if not in Congress, then in the state legislatures. Feminists were already cognizant that constitutional amendment might not be the best vehicle through which to achieve their goals—hence their ambivalence about the ERA's reintroduction in the first place. The ERA II experience could only have reinforced those doubts.

Indeed, doubts about the wisdom of seeking change through constitutional amendment went beyond the practical political difficulties of ratification in the absence of consensus; it also entailed significant strategic drawbacks. Keeping the federal ERA in play constrained the arguments feminists felt they could make in litigation under the Fourteenth Amendment and under state ERAs. Whereas the ERA campaign, at its height, had arguably strengthened feminists' case for constitutional change through judicial reinterpretation of the Equal Protection Clause, continuing to press for the amendment in the face of determined and successful opposition tended to highlight the distance between feminists' aspirations and the extent of popular agreement. Further, proponents would always be subject to accusations of duplicity so long as they claimed that a clear legislative history would constrain the ERA's future application when they not-so-secretly hoped that future electoral victories would produce more sympathetic judges who would interpret the ERA's abstract wording more expansively.

Though it would be easy to overlook them given the more prominent political constraints on the ERA's meaning, the ERA II debates also revealed certain stubborn substantive limitations that proved less than amenable to reinvention. It was particularly difficult for proponents to dispel the notion, which the amendment's original legislative history had itself promoted, that the ERA embodied essentially a singular principle of absolute equal treatment. That notion, useful in the early debates over ERA I because of proponents' desire to rid the law books of explicit sex-based classifications, bred confusion about the impact of the ERA on affirmative action and other policies that did not fall into this category. By the time of ERA II, feminists hoped the amendment would promulgate an antihierarchy principle of sorts in the form of disparate impact analysis. But as the debates over ERA II and the subsequent controversy over pregnancy benefits revealed, feminists struggled to agree on what such an antihierarchy principle

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<sup>325</sup> Collins, *supra* note 309, at 694.

would look like in practice. Seeking change through a constitutional amendment begged not only for internal consensus on what means were best suited to the ends of antisubordination, but also a singular principle that would be applicable across various circumstances and areas of the law.

Indeed, in this respect, feminists had come full circle. Whereas feminist ERA skeptics of the pre-1970s era had bemoaned the ERA's "rigidity" and lack of "flexibility" because it might endanger protective labor legislation, proponents of ERA I steadfastly insisted on an equality principle of virtually universal applicability. Along these lines, the authors of the 1971 Yale ERA Article wrote, "the interrelated character of a system of legal equality for the sexes makes a rule of universal application imperative. No one exception, resulting in unequal treatment for women, can be confined in its impact to one area alone. Equal rights for women, as for races, is a unity."<sup>326</sup> Now some feminists again began to question the feasibility of applying a universal principle to a complicated and diverse array of problems. Some younger feminist scholars, examining the ERA ratification battle from an academic perspective, wondered whether continuing a polarizing struggle was the best way to unite women whose interests were far more harmonious than the rancor of ERA rhetoric would suggest. Deborah Rhode, a young Stanford Law School professor, suggested that the women to whom Schlafly's movement had appealed were reachable, but that "feminists might do well to pause in the pursuit of an increasingly divisive constitutional symbol and focus on more concrete responses to structural inequities."<sup>327</sup>

Feminists had also become more cognizant of the limitations of a constitutional amendment that did not reach private action. Even proponents' wildest imaginations could not transform the ERA into an affirmative duty on the part of the government to take active steps to remedy inequality in the absence of a proven constitutional violation. As proponents acknowledged—and emphasized to skeptics—the ERA was a limitation on state action and a license to legislate, but not an unavoidable imperative to remedy inequality.

More generally, proponents recognized, constitutional adjudication had its limits as a tool for pursuing legal change. Williams said as much in her influential critique of 1970s Supreme Court sex equality jurisprudence: "To say that courts are not and never have been the source of radical social change is an understatement."<sup>328</sup> Legislation would be the means of achieving feminists' ultimate goal of redefining the meaning of equality itself. "[T]o the extent that the law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from leg-

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<sup>326</sup> Yale ERA Article, *supra* note 54, at 892.

<sup>327</sup> Deborah L. Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQ. 1, 72 (1983).

<sup>328</sup> Williams, *supra* note 316, at 175.

islatures rather than the courts,” Williams wrote.<sup>329</sup> Section 2 of the ERA provided a basis for such legislation, but as we saw in Part II, ERA proponents had to tread carefully in claiming a role for section 2 beyond that of Section 5 of the Fourteenth Amendment.<sup>330</sup> While the Court had decided many Fourteenth Amendment questions unfavorably during ERA I’s pendency, the expansive reading of Congress’s Section 5 enforcement power remained largely undisturbed, and feminists certainly did not wish to imply that a narrower reading was appropriate.

At the same time, the Court’s increasingly conservative race jurisprudence not only made it less advantageous for feminists to analogize the ERA’s impact to the treatment of race discrimination under the Equal Protection Clause, it also threatened—or at least complicated—coalitions between racial justice and feminist organizations. As Freedman and Law recalled in 1987, “[ERA] proponents had no desire to urge that women were entitled to a greater measure of constitutional protection than black people. Rather, most ERA proponents sought common cause between those who struggled against racism and sexism.”<sup>331</sup> ERA supporters hoped and believed that “the ERA’s stronger protection against laws that were sexist in impact would have a spillover effect extending stronger protection to blacks injured by laws that were racist in impact. But it was difficult to use the actual words of the ERA to support this pragmatic belief.”<sup>332</sup> No doubt it was also politically inexpedient to highlight this “spillover effect,” because it played into the hands of opponents who forecasted dire consequences for the ERA beyond the realm of sex equality.

Significantly, the internal debates among feminists over ERA II’s relationship to abortion and reproductive rights, and the uneasy compromise presented in the hearings, drove home many feminists’ increasing unwillingness to divorce constitutional sex equality from reproductive freedom. Advocates like Rhonda Copelon called explicitly for a reunification of sex equality and abortion rights in 1983. Other prominent feminist lawyers soon followed suit. Sylvia Law’s *Rethinking Sex and the Constitution* and Ruth Bader Ginsburg’s *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade* were two of the more prominent published expressions of this view. Ginsburg, by then a judge on the U.S. Court of Appeals for the D.C. Circuit, acknowledged “the view that for political reasons the reproductive autonomy controversy should be isolated from the general de-

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<sup>329</sup> *Id.*

<sup>330</sup> Proponents had clarified in the ERA I debates that section 2 of the ERA was meant to have more or less exactly the same scope as the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. Each of these provisions gave Congress the power to enforce the substantive sections of the amendment through “appropriate legislation.”

<sup>331</sup> Freedman & Law, *supra* note 324, at 554.

<sup>332</sup> *Id.*

bate on equal rights, responsibilities, and opportunities for women and men,” but ultimately rejected that view.<sup>333</sup> Law similarly acknowledged that

[t]o assert that the fourteenth amendment or a state ERA mandates a concept of sex equality that encompasses a woman’s interest in controlling reproductive capacity would inescapably affect the effort to enact a federal ERA. Nevertheless, it is important to explore the political and legal separation of sex equality and reproductive freedom and to evaluate the value of a more integrated approach.<sup>334</sup>

Others were less circumspect about suggesting a change of course. In a brief but influential essay written in 1983, MacKinnon offered a searing critique of feminists’ earlier decision to rest the campaign for abortion rights on privacy grounds, rather than on a rationale based in equality or freedom.<sup>335</sup> By 1991, NOW activist Twiss Butler joined MacKinnon in excoriating the ERA campaign for asking too little of constitutional equality, especially in the context of abortion and pregnancy, and cited the 1983 ERA II hearings as her primary example.<sup>336</sup> In her own retrospective questioning of feminist strategy, MacKinnon suggested that she had held her tongue while the ERA was still in play, but once the amendment appeared dead once and for all, “[t]here seemed little to lose, even from the truth.”<sup>337</sup>

Whether one was sympathetic or impatient with feminists’ concessions to the political exigencies of the ERA debates, it was clear that feminists would fight the battles of the 1980s and 1990s on new terrain. Without a constitutional amendment hanging in the balance, feminists were free to draw connections between areas of law formerly considered taboo. Unconstrained by what they now perceived as the strictures of “formal equality,” they explored new frontiers of legal intervention like disparate impact analysis and comparable worth, legislation to enact economic rights for women, and an embrace of reproductive rights and eventually sexual freedom as essential components of sex equality. From the debates over ERA II, femi-

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<sup>333</sup> Ginsburg, *supra* note 225, at 386.

<sup>334</sup> Law, *supra* note 217, at 987.

<sup>335</sup> CATHARINE A. MACKINNON, *Privacy Versus Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 93–103 (1987).

<sup>336</sup> Twiss Butler, *Abortion Law: ‘Unique Problem for Women’ or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133 (1991). She wrote:

Suppose that [ERA supporters] had responded to the accusation that the ERA would mean abortion on demand by agreeing enthusiastically, adding that the ERA would not only prohibit legal barriers to abortion and public funding of abortion, but would also protect women from such other forms of pregnancy discrimination as forced sterilization of minority women, denial or surcharging of pregnancy coverage on private medical expense and disability income insurance, punitive treatment of maternity leave, and suppression of contraceptive information in public school curricula.

*Id.* at 138.

<sup>337</sup> Catharine A. MacKinnon, *Excerpts from MacKinnon/Schlafly Debate*, 1 LAW & INEQ. 341, 341 (1983).

nists emerged intent on pursuing not merely “equality in theory,” but “equality in fact.”

#### CONCLUSION

The story of ERA II sheds light on themes important both to historians and to scholars of social movements and constitutional change. The ERA II campaign confirms the imperative to look beyond courts and litigation as sites of constitutional conflict. The process whereby proponents of constitutional change attempted to create new legislative history for an already controversial and much-debated amendment provides an intriguing example of the extrajudicial creation of constitutional meaning. It proved to be one in which dialogue with opponents was virtually unavoidable. This dialogic process included not only feminist and antifeminist movement activists, but also congressional combatants—lawmakers with various stakes in the debate over ERA II. In part because the debate took place in the context of congressional consideration of the amendment—rather than, say, in the course of litigation or of a ratification campaign directed at state legislatures—ERA II’s trajectory highlighted the potential of proposed amendments to serve as partisan political battering rams.

The debate over ERA II also proved a formative one for the social movement that somewhat reluctantly sponsored its reintroduction, yielding substantive and strategic reassessments on the part of advocates at a transitional moment in the history of legal feminism. Thus the story of ERA II highlights the significance of even failed attempts to amend the Constitution, not only to the extent that they influence judicial reinterpretation of existing constitutional provisions—as the ERA I campaign arguably did—but also in their role as a vehicle for social movement agenda-setting.

From an historical standpoint, the ERA II debates underscore the scope and limitations of the legal and political changes feminists and their opponents achieved between the introduction and passage of ERA I in the early 1970s, and ERA II’s ultimate defeat in Congress in 1983 and 1984. An amendment with broad-based bipartisan support had become a partisan weapon deployed by politicians and advocates across the political spectrum. Moreover, because feminists had achieved much of the agenda set out in the original ERA I hearings but still faced a determined and well-organized opposition to their residual goals, by the early 1980s the amendment had acquired new legal meanings. A decade of political struggle over the ERA, reproductive freedom, and civil rights more generally made a new set of issues salient: facially neutral laws exerting a disproportionate impact on women replaced overt sex-classifications as the primary target of feminist legal strategy, while resurgent conservatism placed battles over abortion, state action, homosexuality, and the military at the center of the struggle.

But the ratification debates had proven more conducive to histrionics, innuendo, and outrage than to sustained doctrinal parsing. Feminists were

understandably ambivalent about defending ERA II so soon after ERA I's demise, but recognized that for better or worse, they had to decide exactly what they could ask of the amendment, legally and politically. Opponents asked difficult and probing questions about the amendment's specific legal ramifications, compelling a response from supporters. Proponents' internal debates and the public testimony they produced revealed both creative thinking about doctrinal possibilities and a sense of painfully acquired *realpolitik*. Some of the positions feminists took in the ERA II hearings, such as the development of a more sophisticated disparate impact analysis, laid a promising foundation for future advocacy; others, such as the pained machinations surrounding the relationship between the ERA and reproductive rights, revealed the limitations of amendment advocacy as a means to the ends feminists sought.

The introduction, consideration, and defeat of ERA II marked a pivotal moment in the history of legal feminism. Far more than a mere postscript to the battle over ERA I, the debate over ERA II helped to redefine both the strategy and the substance of the feminist legal agenda. Substantively, the ERA II debate solidified an emerging shift from formal equality to a concern with disparate impact and combating hierarchy. Moreover, the debate forced feminists to grapple with the specific doctrinal dilemmas entailed by this shift. Strategically, ERA II enabled feminists to explore the possibilities of using a proposed constitutional amendment as a partisan political weapon and embodied a new electoral turn in movement politics. Ultimately, ERA II drove home the limitations of constitutional amendment as the means to feminist ends, but the process of constructing a new meaning for the amendment had important and lasting effects on the legal feminism that emerged, reconstituted, from the ashes of defeat.



