

The Policy That Never Was: The Equal Rights Amendment

by Scott Smith

Abstract

This article chronicles the history of the Equal Rights Amendment, and evaluates the need for the ratification of the amendment. The ERA was first introduced into Congress in 1923 by suffragist Alice Paul. The amendment was designed to insure that women, who had just been granted the right to vote, would be treated equally to men. Opponents of the ERA have argued that the amendment is redundant because of the 14th Amendment, and that a precedent would be established that would not consider women's biological differences. The author argues that the amendment is necessary because women, who constitute the majority of the population of this country, continue to be at high risk for poverty and are victims of discriminatory practices and other forms of oppression.

Introduction

Ever since King George received the letter declaring that the thirteen colonies in the New World would no longer be denied certain basic rights, a premise of human equality has been inserted into the fabric of our nation's existence. Our national history, however, speaks a different tale. Equality in our nation only applies to those who are male and of European descent. One group consistently experiencing discrimination and prejudice on a large scale is women. And since the female gender can include various races, the term "women" is essentially an inclusive term for inequality.

Until 1920, women did not possess the right to vote, and to this day, many of the rights extended to citizens as a whole are abridged on the basis of gender. Alice Paul, a leader in women's suffrage, saw this future. Shortly after the 19th Amendment (women's suffrage) was enacted, she proposed another amendment, the Equal Rights Amendment (ERA). The amendment has three articles:

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. The 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 (Equal Rights Amendment, 2000).

The language of this policy certainly does not seem extreme, militant, or threatening to any population's essential liberty. However, since the ERA was first introduced in 1923, it has been consistently overturned as a policy. This article will examine the arguments and social conditions working against the passage of an amendment that guarantees equality for women, and will make a case for its ratification.

Women: The Minor Majority

According to the U.S. Census Bureau (2000), women constitute 50.9% of the population. In a country born on the ideologies of liberty and democracy, there is a tragic irony in the fact that the majority of this country is abridged of the same basic freedoms cited as the reasons for our country's formation. Historically, women have been treated as less than equals. The root of this inequality originates in a philosophy called "natural order," a Social-Darwinistic attempt to claim that, since men and women are different (and men are typically physiologically stronger), women are secondary in function and value (Baker, 1999; Denning, 2000). While this concept of women as the "weaker sex" seems absurd to an educated 21st century mind, one needs to consider the environment in which the Constitution was originally framed to understand why there were not guarantees of equality for women¹.

In an agrarian society, the social context of our country until the mid-1800's, women's roles were clearly defined and their value understood – they prepared the meals, worked in the fields, made clothes, and kept the home clean. Women were viewed as essential, and while this perception constituted a form of sexism, its ramifications were less pronounced and less severe than the sexism women began to face in an increasingly industrial society. Indeed, as the evolu-

¹ This author wishes to clarify at this point that women were among many outgroups that did not receive constitutional protection. This paper is not designed in any way to minimize the hardships that were faced and still are faced, by many other groups. Rather, this paper seeks to focus attention on one group in the hope of social change.

tion to an industrial society occurred, women were deemed unfit for the work conditions of factories and relegated to household duties – duties perceived to be easier by modernization. It seems that this shift in roles fundamentally created the perception that men did the “real” work, while women just took care of the home and children (Karger & Stoez, 2002).

Social perceptions are problematic, however, social perceptions can and do change. The more vexing issue was that women were not legal equals under the Constitution. In the United States, where rights are offered and guaranteed via written laws, the absence of such a law is the absence of rights. Moreover, laws that sought to protect women, such as those developed during the industrial revolution to protect women from the harsh environments in factories, created a legal precedent for the notion that women are weaker than men (Karger & Stoez, 2002).

Progressive women were not content to accept this label, and voraciously fought to be considered equal. They had a victory in the 19th Amendment, and were ready to go one step beyond, a step to another amendment guaranteeing that they would be equal under the law to men. But the fight for equal rights under the law, which began in 1923, continues today.

History of the ERA

To understand the complexity of the ERA, it is essential to understand its history – a history girded in close calls and vigilant fights (National Organization for Women, 2002). In 1923, Senator Curtis and Representative Anthony (nephew of suffragist Susan B. Anthony), both Republicans, introduced the ERA. Alice Paul, who led the suffrage campaign and was head of the National Women’s Party, authored the original bill which received very little attention at the time.

Through Paul’s persistence, however, the amendment was reintroduced into each session of Congress from 1923 until 1946, when it had its first close call and missed passage in the Senate by only three votes. In 1950, the Senate actually approved the amendment, but a rider nullified every equal protection aspect of the bill, essentially making it void. Very little movement occurred until 1967 when the National Organization for Women (NOW), a newly founded feminist group, vowed to fight assiduously for the ratification of the ERA. Three years later, NOW’s actions, as well as the actions of other women’s groups, would finally start to be noticed.

In February of 1970, twenty NOW leaders disrupted hearings of the Senate Subcommittee on Constitutional Amendments and demanded that the ERA

be heard by the full Congress. Three months later, the Subcommittee began hearings on the ERA under the direction of Senator Birch Bayh (D-IN). The next month, the ERA finally left the House Judiciary Committee due to a discharge petition filed by Representative Martha Griffiths (D-MI). In 1971, it looked like the ERA would finally have its day when the House, by a 354-24 margin, approved the bill without amendments. The bill also received the support of the National Educational Association (NEA) and the United Auto Workers (UAW), both of whom voted at their annual conventions to endorse the ERA (National Organization for Women, 2002).

On March 22, 1972, the full Senate approved the Equal Rights Amendment without changes in an 84-8 vote. Senator Sam Ervin (D-NC) and Representative Emanuel Celler (D-NY) succeeded in setting the customary time limit of seven years for ratification. More organizations blossomed and offered their support for the ERA, including the National Conference for Puerto Rican Women and the League of Women Voters (a group that previously resisted the ERA). The ERA, now possessing the necessary two-thirds vote from Congress, and in accordance with the Constitution’s amendment procedure, was sent to state legislatures, where three-fourths (38) of them would have to ratify it before it became law (National Organization for Women, 2002).

The initial prognosis for the ERA was good: of the thirty-two state legislatures in session in 1972, over twenty ratified the amendment. The proximity of victory sparked the beginning of a campaign by Phyllis Schlafly, perhaps the most visible and vocal opponent of the ERA, to exterminate the bill. The Illinois Republican lawyer, columnist, and author waged a ten-year battle to defeat the ERA (D’Agostino, 2001). In 1973, this nemesis to the ERA came up against a formidable protagonist in the AFL-CIO, which brought with it the Democratic Party’s support base. This gave momentum to the ERA movement at the state level. Pressure from right wing, anti-ERA groups began to surface in state legislatures, but by the 1979 deadline, thirty-five of the requisite thirty-eight states had ratified the bill (Denning, 2000).

Only three states short of ratification, ERA proponents convinced Congress to extend the deadline for ratification to 1982 (with the argument that the Constitution imposes no time limit for ratification of amendments). By then, however, even ardent supporters were exhausted. ERA opponents, on the other hand, were just warming up to the fight. To make matters worse for supporters, five states rescinded

their earlier ratifications. Subsequently, ERA opponents launched all-out attacks, attempting to pass rescission bills in at least a dozen states. Before the validity of those rescissions could be hashed out in the courts, the new deadline passed and ERA's opponents declared victory. Meanwhile, ERA proponents were left to advance women's rights using the Equal Protection Clause and the Civil Rights Act's prohibition of sex discrimination (Denning, 2000).

The ERA received yet another blow in 1980 when the Republican Party reversed its 40-year history of support for ERA. Presidential candidate Ronald Reagan and newly elected right-wing party officials actively opposed the amendment, while the Democratic Party reaffirmed its support for the ERA. The election in November revealed, for the first time ever recorded, that men and women vote quite differently in elections (National Organization for Women, 2002). Women who voted against Reagan cited his opposition to the ERA as their reason, but even without their support, Reagan won the election and became the first President to oppose the ERA.

By mid-1981, women's groups were rallying again to extend the ERA deadline, set for June 1982. This move was almost extinguished at the end of 1981 when Judge Callister² ruled the ERA extension illegal and rescission of the amendment legal. This opinion marked the first time in this country's history that a federal court declared an Act of Congress relating to the amending process as unconstitutional (National Organization for Women, 2002). Although the Supreme Court subsequently overturned Callister's ruling, the victory was short-lived; on June 30th, 1982, the bill was stopped three states short of ratification. The blame for failure this time was spread evenly between Republican desertion of the ERA and weak Democratic support derived from the racial and gender imbalance in Congress (National Organization for Women, 2002).

For a bill so troubled by close calls, it is difficult to imagine any particular junction would be more angst-ridden than another, but 1983 was just such a time. The vote in the House that year failed six votes shy of the two-thirds majority needed for ratification. The most troubling aspect of this vote was that fourteen co-sponsors voted it down, and three co-sponsors did not vote at all (National Organization for Women, 2002).

Why the ERA Lost

Although the Equal Rights Amendment has never received the support necessary for passage, a 1995 Harris poll commissioned by the Feminist Majority Foundation found that 86% of adults favor the ERA (Baker, 1999). So why did the ERA lose? One opposing argument in this nearly century-old debate is that women simply do not need an amendment guaranteeing equality. Indeed, opponents of the ERA suggest that women possess a greater degree of equality now than when Alice Paul wrote the ERA, making the need for such a bill a moot point. Significant social fears have been also cited as reasons for the failure to enact the ERA. Opponents argue that the equality afforded by the ERA would result in including issues such as women in military combat positions, abortion, and homosexual marriage (D'Agostino, 2001). Schlafly and other opponents convinced women that the ERA would actually detract from their quality of life. She argued, "The Equal Rights Amendment would force us to pretend there are no differences between men and women at any time, anywhere... [so] the first thing that would happen would be registration for the draft" (D'Agostino, 2001, p. 12). Schlafly's statement reflects the underlying issue that fuels the ERA debate - the question of how women's roles are defined in our society (Scott, 1985).

Surprisingly, there were opponents who favored the sentiment of Constitutional protection of equality, but disliked the amendment. Arguing that the bill would not possess judicial authority, these feminists proposed there were other options to secure women's rights and did not join the fight (National Organization for Women, 2002). While conservatives like Schlafly, as well as other opponents, can easily be blamed for the defeat of the ERA, NOW and other groups point to the financial agendas of corporate America as a major deterrent, proposing that because of their "[concern...about underwriting costs], a silent lobby of insurance and big business interests... used their influence to kill the ERA..." (Baker, 1999, p. 56).

14th Amendment Woes

Those who oppose the ERA frequently appeal to the 14th Amendment as the basis for equal treatment of all people in this country. They argue that the 14th Amendment provides ample protection for everyone, and that failures of the 14th Amendment to provide

² At the time the litigation began, Judge Callister held the high office of Regional Representative in the hierarchy of the Church of Jesus Christ of Latter-day Saints (Mormon Church), an institution that officially opposed the ERA.

equality would only be weakened with the addition of an amendment specifically protecting women. Ironically, the very same opponents who make the argument that the 14th Amendment is sufficient to protect women's rights are often the dissenting voices for interpretations of the 14th Amendment that actually guard the rights of women. For example, in a discussion about the Supreme Court's decision to admit women into the Virginia Military Academy based on the 14th Amendment, Steve Forbes asserted:

The High Court's rigid, one-size-fits-all approach to public education misreads the 14th Amendment's equal protection clause. That principle doesn't mean that every school has to be the same. It means that students must have equal access to a publicly financed education from kindergarten through high school, as well as equal opportunity to receive advanced education from a state-supported college or university (Forbes, 1986, p. 26).

Another argument against the ERA in light of the 14th Amendment is that there is no assurance that justices who adhere to sexual stereotypes will apply the ERA more thoroughly than they apply the 14th Amendment. Author Wendy Kaminer argues: "[Justices] can always find that some discriminatory laws merely reflect the natural order, which [the] law is presumably powerless to challenge. [For example,] the Supreme Court once held that prohibitions on female lawyers were only natural" (Kaminer, 2001). The question her point raises is whether the 14th Amendment is specific enough to protect women against shifts in public morality. In a legal system where rulings get overturned and justices leave their positions, without more specificity in the Constitution, the rights a woman enjoys today may be removed tomorrow.

In considering the issue of the 14th Amendment versus the ERA, it is important to emphasize that social and economic conditions are more favorable for women today than at any other point in American history. Thus, the question arises, "Is the ERA obsolete?"

Is the ERA Obsolete?

In 1977, when it looked like the ERA was going to pass, opponents warned that certain laws, such as divorce, child custody and child support, would be impacted (Myricks, 1977). For example, Myricks proposed that in divorce proceedings, customary maintenance payments to women would be deemed unconstitutional because either sex would have the right to

maintenance. He also predicted that child support would be the equal responsibility of both husband and wife, and that child custody would be open to both parents. Additionally, he asserted that property ownership would be affected because women's non-monetary contributions to the home would bear more weight, and property division would be based on all marriage acquisitions fully belonging to both parties. Women would also gain rights of consortium, he argued, and could sue for the loss of the love/affection on a civil level as men had already been allowed. In instances of divorce where desertion is declared because the woman no longer chooses to live in the same domicile as her husband, Myricks said that the ERA would invalidate the desertion argument because a woman is not bound to her husband. Moreover, he suggested that states with more archaic laws that gendered roles and responsibilities would lose power to enforce their laws (Myricks, 1977).

The point to be argued here is that the laws identified as vulnerable to alteration with the passage of the amendment, have changed even without the passage of the ERA. Additionally, women today are serving in the armed forces in more specialized and combat roles, as well as holding more public offices and high-ranking positions in corporate America (Myricks, 1977). Furthermore, Congress has acted on behalf of women without the ERA, as evidenced in 1964 when Title VII of the Civil Rights Act barred private job bias by race and sex. Indeed, the Supreme Court has been interpreting the Constitution in favor of women for several decades now without the ERA. In 1971, the Court first cited the 14th Amendment to overturn sex-biased law. Additionally, the 1973 *Roe vs. Wade* decision legalizing abortion has been maintained, workplace sexual harassment was declared illegal in 1986, and the Virginia Military Academy was ordered to admit a woman for the first time in 1996 (Baker, 1999). These cases lend credibility to claims that the Supreme Court has enacted a *de facto* ERA and convince some people that we do not need the ERA (Baker, 1999).

Why We Need the ERA

There is a façade of equality in our society today that leads individuals to believe that gains in pay equity and employment opportunities for women means there is no need for the ERA. The myth is, essentially, that women are just fine now. The reality is starkly different. In fact, women are the victims of severe inequality in three specific areas – economic disparity, discriminatory practices, and personal liberty.

Economic Disparity

According to the Institute for Women's Policy Research (2001), women earn \$.76 for every dollar a man earns, resulting in an average loss of \$4,205 per year for married women and their families, not to mention the increased hardships for single mothers. Five myths are used to justify women earning less than men:

Myth 1 – A working mother's wages are not necessary for her family's survival.

Myth 2 – A working mother is unreliable.

Myth 3 – Large numbers of working women leave the workforce to return home to raise their children.

Myth 4 – The cost to business of providing benefits to working mothers is prohibitive.

Myth 5 – Women are doing better economically (Karger & Stoesz, 2002).

It was startling to discover that in our own field of social work, a profession committed to equality, males still earn substantially more than their female counterparts (Gibelman, 1995). This unfortunate reality reinforces the fact that pay equity is a widespread problem with far-reaching financial consequences for women. Poverty among women is compounded by the lack of economic parity. The U.S. Census Bureau (1998) claims that 22.6% of women live in poverty, and the number increases to 29.9% in female-headed single-parent homes. Lower earnings over a lifetime both prohibit the acquisition of wealth during working years and lower women's retirement income because it is based on past earnings. The statistics speak loud and clear: Nearly one in every seven women aged 75 and older is poor, and the overall poverty rate in our country is nearly twice as high for women as men (U.S. Census Bureau, 1998).

Discriminatory Practices

Ruth Ginsburg, while a Columbia law professor, made a case for the ERA by arguing that there is no incentive to overhaul laws that discriminate on the basis of sex without it (Baker, 1999). This applies to more than just job discrimination; a study on housing discrimination showed that of the approximately 12,000 cases filed annually, the majority were women and single mothers (Smith, 2000).

Within the broader category of discrimination is the practice of "window dressing," where women are appointed or positioned into roles of equality to hide broader discrimination (Karger & Stoez, 2002). This factor has to be considered when interpreting statis-

tics that show an improvement in women's occupations, but does not detract from the appropriateness of the women who hold such positions.

Personal Liberty

The women's movement has always been associated with a demarcation from social norms, and as such, has been controversial. What we know from history is that times change. We would no longer dare justify slavery, though there were moments in our past where emancipation was considered to be a ridiculous notion.

Freedoms offered to women via legal cases such as *Roe vs. Wade* do not necessarily indicate women will always be afforded these liberties. Supreme Court cases can be reviewed and overturned, and the rights a woman has today may not be rights tomorrow. A constitutional amendment would help ensure that this instability of rights would not happen. In this sense, the ERA is not only a determiner of future rights, but also the guarantor of existing rights.

The Next Step

Presently, the ERA is introduced every session to Congress and finds itself buried in committee. The bill, although technically expired as of 1982, can still be implemented based on the precedent set by the court's acceptance of the re-introduction of another amendment, the 27th Amendment for congressional pay raises. Many proponents of the ERA are calling for changes in the language of the bill that would reflect the current state of affairs. For example, NOW did not push to include abortion and gay rights in the bill originally, but would like to see these issues included in future revisions. They argue that expanding the issues included in the amendment will lend itself to acquiring a broader base of supporters (Baker, 1999). Others argue that to enhance the chances of the ERA passing, its best to maintain the language of the original legislation, and that the addition of issues such as abortion and gay rights will only complicate the matter and insure that it will not pass (Baker, 1999).

Conclusion

The ERA is a policy that seeks to protect the majority of this country from economic disparity, discriminatory practices, and threats to their personal liberty. The amendment would help insure the exercise of individual freedom, and for this reason it is essential that social workers become a part of the fight. The principles underlying the ERA, self-determination and

the innate worth of the individual, are bedrock values of social work, further requiring us to respond. To be silent on this issue is to be complicit in the unequal treatment of the majority of this country, and to betray the essence of who we are professionally.

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