

HOW THE MOST IMPORTANT U.S. CIVIL RIGHTS LAW CAME TO INCLUDE WOMEN

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As anyone involved in legislative process can tell you, drafters often have multiple goals beyond a desire for legal changes. Bills can serve electoral purposes when votes for or against provide fodder for campaign ads; they can be a fundraising tool, providing a sop to certain donors; or they can build national support for a politician when the topic has popular appeal or when the bill is endorsed by elite media or leading thinkers. But there is another less well-known aspect of legislative “sausage-making”: sometimes legislation tells the story of a fortuitous opening and, indeed, much legislative success comes from opportunism. That is the story of Title VII of the Civil Rights Act of 1964 (“Title VII”), the addition of “sex” to its protected categories, and the Equal Rights Amendment (“ERA”).

Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin,¹ while the ERA would amend the Constitution to ensure equal legal rights for all. The two iconic laws are deeply intertwined, with each having strengthened the other’s chances for enactment. The addition of “sex” to Title VII, a classic story of opportunism, was only possible due to a long history of advocacy, and many congressional votes, in favor of the ERA. And the success of the ERA, which came so close to being adopted, was helped significantly by the prior passage of Title VII, which had ensured that sex discrimination in employment would not be considered a lesser evil than other forms of discrimination.

I. HISTORY OF SEX IN TITLE VII

In the wake of the civil rights movement amid demands for racial justice, President John F. Kennedy sent Congress a draft of the Civil Rights Act of 1964, including titles banning discrimination in housing, education and public accommodations.² That bill, delivered on June 19, 1963, was the product of an enormous and consequential social movement to demand the enforcement of constitutional rights for Black people who had been denied the benefits of the Reconstruction Amendments that had been designed to advance the right to vote and

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¹ 42 U.S.C. § 2000e *et seq.*

² Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, WE WILL BE HEARD: WOMEN’S STRUGGLES FOR POLITICAL POWER IN THE UNITED STATES 143 (2004), <https://www.jofreeman.com/lawandpolicy/titlevii.htm> [<https://perma.cc/5959-XYUG>].

equal protection at the conclusion of the Civil War as well as full constitutional protections due to all Americans.

The Kennedy administration's original drafts of the bill that would become the Civil Rights Act did not include an employment title at all.³ Fearing even greater backlash for interfering in private relationships and perhaps the loss of some votes, President Kennedy preferred to avoid touching such an inflammatory subject, focusing rather on education and public accommodations.⁴ But after pressure from unions, which were already subject to the bill's provisions, he agreed to support a fair employment title.⁵

The assassination of President Kennedy gave added momentum to the legislative effort and President Lyndon Johnson made its passage a priority.⁶ Fearing any changes would jeopardize passage, supporters agreed to limit any alterations of the bill's text. But on February 8, 1964, a committed segregationist and opponent of the bill, Representative Howard W. Smith of Virginia, offered an amendment to add "sex" to the text. Smith's amendment passed.⁷ And ultimately so did Title VII, with "sex" included.

Many commentators subsequently described Smith's efforts as a "poison pill," or an effort to kill the bill by destroying the majority support for its passage.⁸ But a much more persuasive reading of the history places credit for the success of the addition of "sex" with the National Woman's Party (NWP) and its efforts to pass an ERA. Indeed, activist, lawyer, and feminist scholar Jo Freeman writes,

Although the prohibition of sex discrimination in employment became law without the usual lengthy proceedings of major legislation, it was not as thoughtless, or as devious, as has previously been assumed. Instead it was the product of a small but dedicated group of women, in and out of Congress, who knew how to take advantage of the momentum generated by a larger social movement to promote their own goals, and a larger group of Congressmen willing to make an affirmative statement in favor of women's rights.⁹

Freeman directly refutes the charge that Smith's amendment was a joke, an assumption some have made simply because the mostly male legislators laughed when Smith offered it.¹⁰ Nonetheless, Smith's amendment had to overcome a

³ Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Policy*, 9 LAW & INEQ. 163, 173 (1991).

⁴ Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, DUQUESNE L. REV. 19, 453, 454–55 (1999).

⁵ *Id.* at 456.

⁶ Freeman, *supra* note 2, at 149.

⁷ *Id.* at 143.

⁸ Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), <https://slate.com/news-and-politics/2014/02/the-50th-anniversary-of-title-vii-of-the-civil-rights-act-and-the-southern-segregationist-who-made-sure-it-protected-women.html> [<https://perma.cc/KS8S-VCZW>]; John Feehery, *The Poison Pill*, HILL (Oct. 28, 2009), <https://thehill.com/blogs/pundits-blog/lawmaker-news/65239-the-poison-pill> [<https://perma.cc/TN2C-HPYR>].

⁹ Freeman, *supra* note 2, at 154.

¹⁰ Freeman, *supra* note 3, at 183.

significant challenge from legislators who supported the Civil Rights Act, many of whom were skeptical or opposed to the addition of “sex.” Why, one might ask, would those Senators and Representatives, otherwise in favor of advancing racial justice, oppose adding women to the bill’s protections? Many of the Northern Democrats who had worked to advance the bill were allied with labor unions, some of which were firmly opposed to expanding the bill’s language to include women.¹¹ Partly, the opposition was based on fear that a fragile coalition might dissolve, but it was also due to a worry that special protections for women in employment would no longer be permitted.¹² That was also the reason that some other sources of opposition to such legislation were women’s groups themselves. Certain very powerful women’s groups did not support the ERA when it was initially introduced in 1923—they did not want to eliminate labor laws that shielded women from “dangerous” jobs.¹³

But that Smith’s amendment did pass with many Members of Congress on the record in support of the constitutional change, testifies to the NWP’s long history of lobbying in favor of the ERA.¹⁴ Indeed, Representative Howard Smith himself had long been an ally of NWP and had worked with its lead lobbyist and board chair, Alice Paul.¹⁵ Representative Martha Griffiths, a member of the House Judiciary Committee, who had been a fervent supporter of equal rights for women, argued in committee that any civil rights bill should include sex as well as race.¹⁶ Moreover, the ERA was so widely supported at that time that it had been included in both the Democratic and Republican Party platforms two decades prior.¹⁷ While Smith’s motives can be endlessly debated—indeed, one of his main arguments in favor of the amendment (and a reason some suspect his intention was to kill the bill) was to ensure that white women would not suffer a worse fate in seeking work than black women, who had the advantage of an anti-discrimination law on the basis of race to bolster their chances¹⁸—the fact of the matter is that there was a long history that preceded the amendment’s adoption that explains its passage.

It also bears remembering that, before Smith’s amendment, Congress had just passed the Equal Pay Act in 1963 and had held many votes on the ERA.¹⁹ The Senate voted on the ERA in 1946, 1950, and 1953, and while few thought there was any chance for imminent passage of the constitutional amendment by Congress, the NWP kept up its lobbying year after year.²⁰ With its regular collection of cards from members of Congress pledging to support the ERA, and its successful solicitation

¹¹ *Id.* at 182.

¹² *Id.* at 165.

¹³ *Id.* at 165.

¹⁴ Jo Freeman, *What’s In a Name? Does It Matter How the Equal Rights Amendment Is Worded?*, JOFREEMAN.COM, <https://www.jofreeman.com/lawandpolicy/eraname.htm> [https://perma.cc/4W78-KXVM] (last visited Apr. 17, 2019).

¹⁵ See Freeman, *supra* note 3, at 171.

¹⁶ *Martha Wright Griffiths*, UNITED STATES HOUSE OF REPRESENTATIVES HISTORY ART AND ARCHIVES, <https://history.house.gov/People/Detail/14160> [https://perma.cc/HCR2-3LYE] (last visited Apr. 17, 2019).

¹⁷ Freeman, *supra* note 3, at 166.

¹⁸ Risen, *supra* note 8.

¹⁹ Freeman, *supra* note 3, at 168.

²⁰ *Id.* at 182.

and publication of sponsor lists, many Senators and House members were familiar with and had expressed support for—indeed, may have voted in favor of—the NWP draft amendment.²¹ The NWP lobbyists had a web of relationships on Capitol Hill they could use to the benefit of their legislative objectives, including, decisively, the “sex” amendment.²²

In the end, the fight to keep “sex” in the bill led by Representative Martha Griffiths of Michigan was ultimately successful, and “sex” remained in the list of protected classes.²³ The House voted twice on the amendment, passing it both times, and the Civil Rights Act was signed into law, with its ban on sex discrimination included.²⁴

II. THE TITLE VII “BUMP” AND THE ERA

There is certainly evidence that the ERA helped make it easier to include “sex” in Title VII by getting Members of Congress on the record in favor of women’s rights. The NWP’s consistent presence in the halls of Congress, and the ERA’s place in both party’s platforms made it hard to explain an effort to strip “sex” out of the bill. But how did Title VII help the ERA?

First, it’s important to note that even after the bill’s passage with the new language, some policymakers were still treating employment protections for women as a joke.²⁵ For example, the Equal Employment Opportunities Commission (“EEOC”), established by the legislation, refused to consider job notices that specifically called for only male or female applicants a violation of the law.²⁶ But the EEOC’s obtuseness was in some ways a blessing in disguise. Once “sex” was in the bill, women’s groups and labor unions that were previously opposed got on board with the call for enforcement, and these efforts led to the founding of a new organization for a new era of the women’s movement: The National Organization for Women (“NOW”).²⁷

NOW, a more aggressive and affirmatively feminist organization than most women’s groups of that time, built on its successful drive for EEOC action on discriminatory ads by challenging discriminatory practices around the country, from male-only clubs to corporate hiring practices.²⁸ NOW also pursued legislative progress, and played a role in the successful passage of the Education Amendments of 1972, which includes Title IX, a guarantee of equal educational opportunities in higher education as well as participation in sports.²⁹

²¹ *Id.*

²² Freeman, *supra* note 2, at 149–50.

²³ *Id.*

²⁴ *Id.* at 152.

²⁵ Freeman, *supra* note 3, at 163–64.

²⁶ *See id.*

²⁷ *Highlights*, NAT’L ORG. FOR WOMEN, <https://now.org/about/history/highlights/> [https://perma.cc/99KU-23T3] (last visited Mar. 14, 2019).

²⁸ *Id.*

²⁹ *Id.*

That same year, Congress passed the ERA.³⁰ The passage of Title IX, the EEOC's commitment to enforcing the prohibition on sex discrimination in employment, as well as laws providing childcare and fair treatment of women in medical school reflected a growing feminist movement—that, in turn, was strengthened and symbolized by the presence of more women in Congress.³¹ Some women who had been in Congress for several years had the requisite legislative skills to move the ERA through the complex process for a constitutional amendment. Representative Martha Griffiths had been a critical player in preserving the “sex” amendment in Title VII.³² She also was an essential part of the passage of the ERA through Congress.³³

Twice passing the House, in 1970 and 1971, the ERA got stuck in the Senate over concerns about the military draft.³⁴ But on March 22, 1972, by 84-8, the Senate passed the ERA.³⁵ With President Nixon's statement of support, the ratification effort took off with 30 states adopting the amendment by the end of 1973.³⁶ Only the support of eight additional states was needed to give the ERA its official place in the U.S. Constitution.³⁷

While progress largely stalled on the ERA after 1973, the historic advancement of women's rights has continued. These efforts are situated particularly in Title VII, as well as in the flood of laws pushed by an empowered women's movement from equal education to protections against domestic violence. Almost half the states have amended their own constitutions to include an Equal Rights Amendment,³⁸ and Nevada and Illinois just adopted the federal amendment, renewing a push for the ERA in the U.S. Constitution.³⁹

With Virginia coming ever closer to adopting the ERA, women may finally achieve constitutional parity—just because it did not pass in the 2019 session does not signal an end to the effort as the 2019 legislative races will focus on the issue; when the statehouse flips to the Democrats, the ERA will come to Virginia.⁴⁰ But as shown through the symbiotic nature of reforms generated by the ERA and Title VII,

³⁰ See 118 Cong. Rec. 9598 (Mar. 22, 1972).

³¹ Kimberly A. Hamlin, *Are Women People? The Equal Rights Amendment Then and Now*, ORIGINS (July 2017), <http://origins.osu.edu/article/are-women-people-equal-rights-amendment-then-and-now> [https://perma.cc/CQP4-9WXU].

³² *Martha Wright Griffiths*, *supra* note 16; Gold, *supra* note 4.

³³ Hamlin, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L. J. 1201, 1202 (2005).

³⁹ *Ratification Info by State*, EQUALRIGHTSAMENDMENT.ORG, <https://www.equalrightsamendment.org/era-ratification-map> [https://perma.cc/32CV-RLJE] (last visited Apr. 17, 2019).

⁴⁰ Patricia Sullivan, *Virginia's Hopes of ERA Ratification Go Down in Flames This Year*, WASH. POST (Feb. 9, 2018), https://www.washingtonpost.com/local/virginia-politics/virginias-hopes-of-era-ratification-go-down-in-flames-this-year/2018/02/09/7acfbf80-0dab-11e8-8890-372e2047c935_story.html [https://perma.cc/V8RY-DB92]; *Bid to Revive Equal Rights Amendment in Virginia fails by 1 vote*, WHSV (Jan. 10 2019), <https://www.wHSV.com/content/news/Virginia-Senate-panel-passes-Equal-Rights-Amendment-504158291.html> [https://perma.cc/NPM7-CJPP].

even if the ERA adoption effort continues to stall, other advances and new legislation and state constitutional provisions will grow out of the fertile ground tilled by ERA activists and women leaders.