THE ERA, THE MILITARY, AND THE MAKING OF CONSTITUTIONAL MEANING

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The Equal Rights Amendment (ERA), originally sent by Congress to the states in 1972, is now one state away from reaching the thirty-eight-state supermajority required for ratification. Should another state ratify the ERA, a major constitutional battle will commence over the legitimacy of the Amendment's ratification, in part because the deadline for ratification passed nearly forty years ago.[1]

But the ERA's opponents are hoping it won't come to that. In a recent column, entitled "The ERA is Dead. It Should Stay That Way," George Will urges readers to reject growing efforts to secure a thirty-eighth vote for ratification.[2] Will argues that ratification of the ERA would be disastrous because its text—"[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"[3]—has no clear meaning and would thus "arm liberal judges with language into which they could pour whatever content they wanted."[4] The ERA would be a "license for unconstrained judicial improvising,"[5] he argues. Judges could make its nonspecific equality guarantee mean whatever they want it to mean. They could use the ERA to impose on the American people an unpopular set of feminist rules and values—rules and values bad for women and violative of privacy and family life.

Will is not the only ERA opponent making this argument. The Family Foundation recently sent a letter to Republican lawmakers in Virginia describing the ERA as a "Trojan Horse"—suggesting that the Amendment's innocuous wording masks its radical feminist implications.[6] In fact, the claim that the Amendment would give judges a platform from which to remake American society along radical feminist lines has long been central to anti-ERA activism. This essay

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[1] *See* Scott Bomboy, *Can a Dormant Proposed Constitutional Amendment Come Back to Life?*, NAT'L CONST. CTR.: CONST. DAILY (May 31, 2018), https://constitutioncenter.org/blog/can-a-dormant-proposed-constitutional-amendment-come-back-to-life [https://perma.cc/ZEC3-C733].

[2] George F. Will, *The ERA is Dead. It Should Stay That Way*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/opinions/the-equal-rights-amendment-is-a-farce-thats-ended-in-tragedy/2018/06/13/322cb18e-6e77-11e8-bf86-a2351b5ece99_story.html?utm_term=.3dd946e65778 [https://perma.cc/MH36-3TME].

[3] H.R.J. Res. 208, 92d Cong. (1971); *see also* S.J. Res. 8, 92d Cong. (1971).

[4] Will, *supra* note 2.

[5] *Id.*

[6] Letter from Virginia Cobb, President, The Family Foundation of Virginia, to Virginia Legislators, *The "Equal Rights Amendment" (ERA) is About Abortion* (Aug. 30, 2018), https://varatifyera.org/wp-content/uploads/2018/11/Family-Foundation-ERA-Letter-to-Legislators.pdf [https://perma.cc/G334-2J3K].

reflects on this longstanding claim by taking a brief look at the modern history of the ERA, and, in particular, at the ERA's relationship to the issue of women in the military.

Although the ERA was originally introduced in Congress in the early 1920s, there was a renewed push for the Amendment in the late 1960s and early 1970s. In August of 1970, Michigan Representative Martha Griffiths brought the Amendment to the House floor, where it quickly passed.[7] That same month, tens of thousands of protestors in cities throughout the United States participated in the Women's Strike for Equality, the largest demonstration on behalf of women since the campaign for women's suffrage.[8] In fact, the Women's Strike was held on the fiftieth anniversary of the Nineteenth Amendment's passage, self-consciously invoking that earlier fight to end women's second-class citizenship.[9] The strikers argued that to ensure women's equal citizenship in the late twentieth century, women needed more than the vote.[10] They made a range of demands related to education, employment, childcare, and reproductive rights[11]—and they also demanded ratification of the ERA.[12] Strikers throughout the country collected signatures on pro-ERA petitions. In Washington, D.C., they lobbied leading Senators for passage of the Amendment.[13]

By this point, in 1970, Congress was quite sympathetic to the idea of the ERA. But one of the major topics of discussion and debate in both houses of Congress was the effect the ERA would have on the role of women in the military.[14] The Vietnam War was still raging at the start of the 1970s and men were being drafted and sent overseas, some of them to their deaths, so the stakes surrounding this question were high. The ERA's chief supporters argued that the Amendment would greatly increase women's opportunities for service in the armed forces and bolster their standing as full and equal citizens.[15] On the day the ERA was introduced in the House, Representative Shirley Chisholm, the first African American woman elected to Congress, made a speech on the House floor

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[7] *See* Richard L. Lyons, *Women Gain in Hill Vote: House Passes Guarantee of Equal Rights*, WASH. POST, TIMES-HERALD, Aug. 11, 1970, at A1.

[8] *Women on the March*, TIME, Sept. 7, 1970, at 20, http://content.time.com/time/subscriber/printout/0,8816,902696,00.html# [https://perma.cc/UH9A-PML4].

[9] For more on the Women's Strike, see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1373–76 (2006); Linda Charlton, *Women's Liberation Unit Gives Details of Its Nationwide Protest*, N.Y. TIMES, Aug. 19, 1970, at 43.

[10] *See* Judy Klemesrud, *A Herstory-Making Event*, N.Y. TIMES MAG., Aug. 23, 1970, at 6.

[11] For more on the strikers' demands, see Siegel, *supra* note 9, at 1375–76; Klemesrud, *supra* note 10, at 6, 14.

[12] Linda Charlton, *Women March Down Fifth in Equality Drive*, N.Y. TIMES, Aug. 27, 1970, at 1, 30.

[13] *Id.* at 30.

[14] JANE J. MANSBRIDGE, WHY WE LOST THE ERA 10–12 (1986).

[15] *See, e.g.*, Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 967–79 (1971). Thomas Emerson, the distinguished Yale Law School professor who authored this landmark article with three of his students, advised pro-ERA women's groups during the early battles over the ERA in the House and Senate, and the views articulated in this article were highly influential in this formative period of the Amendment's history.

that focused, among other things, on women's exclusion from the military—in particular, the fact that the selective service law required men but not women to register for the draft.[16] Other supporters of the ERA echoed Chisholm's understanding that women's exclusion from draft registration reflected and reinforced their unequal citizenship status, and that the ERA would end that exclusion.[17] Indeed, pro-ERA legislators in both houses defeated numerous attempts over the course of 1970 and 1971 to add provisions to the ERA exempting women from the draft.[18]

Advocacy around sex equality in the military began to bring about real change in these years, even though the ERA had not yet been ratified. For instance, in September 1970, a few weeks after the House voted in favor of the ERA, a judge advocate in the Air Force named Tommie Sue Smith brought a lawsuit challenging the constitutionality of a policy that required the discharge of any woman whose minor child lived with her for more than thirty days a year.[19] Smith initially dealt with this policy by placing her son in a boarding school from the time he was four—a "choice" that other mothers in the service were forced to make as well. But when Smith was transferred to the Philippines, boarding her son was no longer an option and she decided to sue.[20] The day after Smith filed her suit, the Air Force revoked the challenged policy, explicitly citing "the recent emphasis on women's rights" as the reason for its decision.[21]

Smith was far from the only female service member to file a sex discrimination suit in this period.[22] Not long after Smith's victory, the Supreme Court granted certiorari in a case brought by Captain Susan Struck, whose pregnancy—and whose refusal on religious grounds to have an abortion—subjected her to automatic discharge from the Air Force.[23] *Struck v. Secretary of Defense* was rendered moot by a last-minute change in Air Force policy prior to

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[16] 116 Cong. Rec. 28028–29 (1970) (statement of Rep. Chisholm), https://www.govinfo.gov/content/pkg/GPO-CRECB-1970-pt21/pdf/GPO-CRECB-1970-pt21-1-2.pdf [https://perma.cc/K5MB-MTDB].

[17] *See* MANSBRIDGE, *supra* note 14, at 68–86. Scholars writing about the ERA in these years echoed and amplified the view that the ERA would render the male-only draft unconstitutional. *See, e.g.*, Brown, Emerson, Falk, & Freedman, *supra* note 15, at 969; Mariclaire Hale & Leo Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199, 201 (1971).

[18] MANSBRIDGE, *supra* note 14, at 10–12.

[19] *See* JUDITH HICKS STIEHM, ARMS AND THE ENLISTED WOMAN 116 (1989); Hale & Kanowitz, *supra* note 17, at 213.

[20] VICTORIA SHERROW, WOMEN IN THE MILITARY 93–94 (2007); STIEHM, *supra* note 19, at 116.

[21] *Air Force, in Shift, to Permit Women to Adopt Children*, N.Y. TIMES, Sept. 30, 1970, at 87 (reporting that, in response to Smith's suit, the Air Force rescinded "its rule forbidding women to adopt or have custody of minor children while in the service").

[22] *See* JEAN EBBERT & MARIE-BETH HALL, CROSSED CURRENTS: NAVY WOMEN IN A CENTURY OF CHANGE 195–99 (1999); STIEHM, *supra* note 19, at 115–18.

[23] 409 U.S. 947 (1972). For more on *Struck*, see Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (discussing Ruth Bader Ginsburg's framing of pregnancy discrimination as sex discrimination in her brief in *Struck*, and discussing the influence of this argument on the subsequent development of sex-based Fourteenth Amendment law).

oral argument.[24] But soon thereafter, the Court heard *Frontiero v. Richardson*, another case brought by a female service member (and her husband), which challenged the constitutionality of a policy that provided male service members with family-related benefits on more generous terms than their female counterparts.[25] The Court in *Frontiero* famously invalidated the policy as a violation of equal protection—explicitly citing Congress's recent passage of the ERA in support of its holding that sex discrimination violates constitutional equality norms.[26]

A few years later, a federal district court in Washington, D.C. echoed this understanding in a decision striking down a law that barred the assignment of women to duty aboard Navy vessels.[27] The court decided the case under the equal protection clause, but it cited as relevant and influential the fact that the ERA "did not contain an exception for military affairs," despite concerted efforts by anti-ERA legislators to introduce such an exception.[28] Another district court in this period held that limiting draft registration to men violated equal protection.[29] The court drew on advocacy around the ERA to reach this conclusion, echoing the point made by ERA proponents that discriminatory treatment in the military was linked with discriminatory treatment elsewhere.[30] The court also drew on ERA advocacy to explain that excluding women from the draft deprived them of equal citizenship and reflected "ingrown societal repulsion to the suggestion of women abandoning their stereotyped roles."[31]

In these and other ways, pro-ERA advocacy shaped how courts understood sex discrimination and interpreted the Constitution's existing equality provisions. But ERA proponents were not the only advocates who influenced the development of sex discrimination law in this period.[32] In 1972, the remarkable conservative activist Phyllis Schlafly founded an organization called "STOP ERA," which did precisely what it said it would do.[33] Schlafly and other STOP ERA campaigners

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[24] 409 U.S. 1071 (1972); Siegel & Siegel, *supra* note 23, at 776–78.
[25] 411 U.S. 677 (1973).
[26] *Id.* at 687–88 (stating that the recent passage of the ERA demonstrated that "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration").
[27] *See* Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978).
[28] *Id.* at 297. Indeed, the court pointed out that a proposed exception of this sort had been "defeated by a wide margin." *Id.*
[29] *See* United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975).
[30] *See id.* at 1062 ("Discriminatory treatment in one area of the law is bound to be reflected in other areas. Indeed, the drafting of women into the military has been the worst of the 'parade of horribles' utilized as grounds for denial of sexual equality in considering the proposed Equal Rights Amendment.").
[31] *Id*. at 1069; *id.* at 1062, 1064, 1069 n.13 (citing Brown, Emerson, Falk & Freedman, *supra* note 15).
[32] For more on how pro- and anti-ERA advocacy shaped the development of constitutional sex discrimination law in the 1970s and over the ensuing decades, see Siegel, *supra* note 9.
[33] For more on Schlafly's STOP ERA campaign, see DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 212–51 (2005).

attacked the ERA as anti-woman and anti-family.[34] They argued that these tendencies were nowhere more apparent than in ERA proponents' desire to subject girls and women to the draft and to require them to engage in combat.[35] Forcing mothers to become soldiers and potentially die on the battlefield was no way to protect American women, Schlafly and her colleagues argued. Requiring women to take up arms like men was not "equality."

The STOP ERA campaign—and its arguments about women in the military in particular—had tremendous influence in the states. In Illinois, in 1978, when the state legislature held hearings on the ERA, proponents of the Amendment recruited prominent business and union leaders, lawyers, ministers, nuns, and rabbis to testify in its favor.[36] Opponents simply sent in a procession of teenage girls, one from each district in the state, to inform legislators that they did not want to be drafted and sent into combat.[37] That display, coming so soon after the carnage of the Vietnam War, spelled the end of the ERA in Illinois (until last year, when it was finally ratified).[38]

The STOP ERA campaign, and the dramatic drop in support for the ERA it triggered, also helped to influence the development of constitutional sex equality law. In 1976, the Ninth Circuit overruled the district court decision referenced above—the one that held the exclusion of women from the draft unconstitutional.[39] When the issue reached the Supreme Court in 1981, in *Rostker v. Goldberg*, it too declined to hold that women's exclusion from the draft violated constitutional sex equality guarantees.[40] Not coincidentally, one year later, almost to the day, the deadline for ratifying the ERA expired and the Amendment failed.[41]

This essay opened with the claim, made by George Will and others, that the ERA is a license for unrestrained judicial activism and that it would provide liberal judges with a platform to impose all kinds of radical dictates on American society in the name of sex equality. But what the history of the ERA actually shows is a striking degree of responsiveness on the part of courts to social movement activism—at first in a progressive direction, but then overwhelmingly in a conservative direction as the New Right came to power, oversaw the appointment of conservative judges to the federal bench, and convinced large

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[34] For an iconic statement of Schlafly's arguments, see Phyllis Schlafly, *What's Wrong with "Equal Rights" for Women?*, PHYLLIS SCHLAFLY REP., Feb. 1972, at 1–4, https://eagleforum.org/publications/psr/feb1972.html [https://perma.cc/87CC-FWN2].

[35] *See* MANSBRIDGE, *supra* note 14, at 86 ("By 1980, the draft and combat had become, along with abortion, [Schlafly's] central themes. . . . As the ERA deadline neared, Schlafly became fond of posing for publicity photographs holding a pamphlet on women in combat.").

[36] *Id.* at 66.

[37] *Id.*

[38] Forty years after this fateful parade of young women, in 2018, Illinois became the thirty-seventh state to ratify the ERA, greatly heightening interest in the question of whether the ERA will become part of the Constitution. *See* Matthew Haag, *The Equal Rights Amendment Was Just Ratified by Illinois. What Does That Mean?*, N.Y. TIMES (May 31, 2018), https://www.nytimes.com/2018/05/31/us/equal-rights-amendment-illinois.html [https://perma.cc/BE5Q-XBZL].

[39] United States v. Reiser, 532 F.2d 673 (9th Cir. 1976).

[40] 453 U.S. 57 (1981).

[41] *See* Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. TIMES, June 25, 1982, at A1.

numbers of Americans that the ERA threatened deeply-held values and treasured ways of life. The federal judiciary today is no more likely to use the ERA as a vehicle for imposing radical feminist constitutional interpretations on an unwilling nation than it was in the late 1970s.

But there is a kernel of truth in what George Will says, which is that the original legislative history of the ERA, from the early 1970s, is spotty. When Congress sent the ERA to the states for ratification in 1972, the exact contours of the Amendment's equality guarantee were not clear. There were important issues the legislative history did not address, and there were other issues on which that history was ambiguous.[42] The exclusion of women from combat is a case in point. Proponents (and, for that matter, opponents) of the ERA generally agreed that its ratification would end the exclusion of women from the draft. But there was disagreement about whether it would also compel the government to lift the combat exclusion.[43] The combat exclusion remained firmly rooted enough in 1981 that the Court in *Rostker* cited it as a legitimate constitutional justification for the government's ongoing exclusion of women from draft registration.[44] Had the ERA been ratified, it is far from clear that the Burger Court, which shifted dramatically rightward over the course of the 1970s, would have taken a different position on the reservation of combat roles to male service members. The ambiguous legislative history of the Amendment from the early 1970s certainly would not have compelled it to do so.

Thus, if the ERA were to be ratified today, and if a court were subsequently to find that it required an end to discrimination against women in all military contexts, it would not be because the ERA unambiguously demanded that result. It would be due, in significant part, to all of the social change the women's movement, legislators and other political actors, female service members, and the military itself helped to bring about over the past four decades—some of it initially spurred by activism around the ERA. For instance, in 1975, Congress passed a law permitting women to enter the military service academies.[45] In 1991, Congress repealed statutory prohibitions on assigning women in the Air Force, Navy, and Marines to combat aircraft[46]; in 1993, the Secretary of Defense issued a directive instructing the armed forces to remove barriers to women in a broad range of combat situations.[47] In 1996, the Supreme Court held that the Virginia Military

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[42] *Cf.* Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1225–26 (suggesting that had the ERA been ratified, we cannot "know what [it] 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 never contemplated; and how the answers to all of these questions would have changed over time").

[43] *See* MANSBRIDGE, *supra* note 14, at 61–71, 76–86.

[44] *Rostker*, 453 U.S. at 76–79.

[45] Department of Defense Appropriations Authorization Act of 1976, Pub. L. No. 94-106, 89 Stat. 537-538.

[46] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), (b)(1), 105 Stat. 1290, 1365 (1991).

[47] John Lancaster, *Aspin to Open Combat Roles to Women*, WASH. POST, Apr. 28, 1993. A few months later, Congress voted to repeal the remaining statutory combat exclusion. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659

Institute's exclusion of women violated the Fourteenth Amendment.[48] In 2013, the Pentagon finally lifted the ban on women serving in combat roles.[49] A future court could interpret the ERA to bar the state from excluding women from combat in part because the idea of women in combat is so much more familiar now than it was forty years ago. This is the kind of change that emerges from decades of social activism and constitutional debate in society[50]; it does not spring out of nowhere from the mind of an activist judge.

This means that the ERA is not a Trojan horse poised to unleash a radical new feminist order, despite what George Will and fellow opponents of the ERA may suggest. But it also means that passage of the ERA would not automatically prompt judges to enforce a set of values consonant with those of the Amendment's most progressive supporters. The modern campaign in support of the ERA has already taken nearly half a century. If the ERA is ratified, the campaign to make the Amendment mean what its most ardent supporters believe it should mean will last at least as long and be just as hard fought.

(1993). For more on these changes, see Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 134–45 (2008).

[48] United States v. Virginia, 518 U.S. 515 (1996).

[49] Ernesto Londono, *Pentagon Removes Ban on Women in Combat*, WASH. POST (Jan. 24, 2013), https://www.washingtonpost.com/world/national-security/pentagon-to-remove-ban-on-women-in-combat/2013/01/23/6cba86f6-659e-11e2-85f5-a8a9228e55e7_story.html [https://perma.cc/ZY6E-WQM5].

[50] Indeed, a federal district judge in Texas recently ruled that excluding women from draft registration violates equal protection because the military has lifted the combat exclusion—which the *Rostker* Court relied on heavily as a justification for upholding male-only draft registration. *See* Nat'l Coalition for Men v. Selective Serv. Sys., Civ-H-16-3362, 2019 WL 861135, at *5 (S.D. Tex. Feb. 22, 2019) ("In the nearly four decades since *Rostker* . . . women's opportunities in the military have expanded dramatically. . . . [and] women are now eligible for all military service roles, including combat positions. Therefore . . . . [t]he dispositive fact in *Rostker*—that women were ineligible for combat—can no longer justify . . . gender-based discrimination.").