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An Analysis of Arguments Against the ERA

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Many arguments against the Equal Rights Amendment (ERA) advanced by its opponents while the amendment was before the states for ratification between 1972 and 1982 are well-known, including largely irrational fears raised about mandating unisex bathrooms and banning women from being supported financially by their husbands. Same-sex marriage and women in combat, which ERA opponents claimed would stem from ratification, have been legally recognized without the ERA. Additional arguments advanced against the ERA in the 1920s included concerns that the amendment would strike down protective legislation for women, concerns voiced by anti-ERA feminists such as Florence Kelly and Ethel Smith. Such arguments have been rendered moot in subsequent decades due to legal strides toward applying protective labor legislation to both women and men.¹ However, there remain certain arguments against the ERA with which supporters of constitutional gender equality still need to contend.

An excellent starting point for comprehending and combating anti-ERA arguments is Kerrie Sue Elliott's 1996 Iowa State University master's thesis "The Equal Rights Amendment: Natural Rights Amendment and the Commonplaces of Stock Response." Addressing pro- and anti-suffrage arguments as well as pro- and anti-ERA arguments between the amendment's introduction in 1923 and its defeat in 1982, Elliott identifies five types of "commonplaces," or stock arguments, used by opponents of the ERA: theological, biological, sociological, define-and-divide, and "meaningful and meaningless."² With theological commonplaces, activists asserted that the ERA was against God's will and design for men and women; biological commonplaces made anti-egalitarian, anti-feminist claims about women's and men's innate, biologically determined natures; sociological commonplaces pointed emotionally to the threat to the

¹ Amy E. Butler, *Two Paths to Equality: Alice Paul and Ethel M. Smith in the ERA Debate, 1921-1929* (Albany: SUNY Press, 2002), 1-11.

² Kerri Sue Elliott, "The Equal Rights Amendment: Natural Rights Arguments and the Commonplaces of Stock Response," in *Retrospective Theses and Dissertations* (Ames: Iowa State University Digital Repository, 1996), ii.

existing social order that the ERA supposedly entailed; define-and-divide commonplaces pitted pro- and anti-ERA women against each other as, respectively, “bad” and “good” women; and “meaningful and meaningless” commonplaces alternately attacked the ERA as either being dangerously broad in its implications and applications or as not bringing about any meaningful change.

Elliott notes, “The rhetorical commonplaces that comprise all anti-ERA arguments are characteristically emotional appeals, they utilize familiar plots and normative messages, which reassure voters that voting against an ERA is reasonable and just.”³ “Anti-ERA arguments, I found, sounded vastly different from pro-ERA arguments. They included a great deal more visceral, value-laden material that appealed to people’s deep-seated beliefs about women, society, and the family. I also found that many pro-ERA rhetors clung to lofty ideals such as ‘simple justice for all,’ while the rabble tore each other to pieces over ideas like unisex bathrooms and witchcraft.”⁴ The author saw these same arguments repeated during an attempt to revive the ERA in Iowa in 1992.⁵ Elliott adds:

Anti-ERA rhetors have unabashedly-- and successfully --used emotional appeals to stop passage of the ERA. Historically, pro-ERA rhetors have faithfully employed traditional, logical appeals, and [their usual approach to rebutting anti-ERA claims] simply censures them as ‘lies” and “lists of horrors.” Beyond this lament, however, pro-ERA rhetors have not seriously addressed the fact that anti-ERA arguments-- as they have been used for generations-- work. By describing anti-ERA claims as lies and horrors, they effectively discount them and fail to recognize, analyze, and therefore understand their opposition.⁶

In contrast, pro-ERA arguments typically focus on “natural rights” and are based on rationalism and logic; as a result, they often lack the visceral appeal of the much more emotionally driven anti-ERA arguments.⁷ Elliott states that anti-ERA people made the same types of arguments against state ERAs, including in her own experience in Iowa in 1992. She notes:

The state ERA campaigns were conducted in much the same way as the federal campaign. Pro-ERA rhetors continued to argue for the ERA based on natural rights and anti-ERA rhetors continued to utilize the commonplaces of stock response arguments by focusing on homosexuality, abortion, the draft, and radical feminism. A popular slogan for the pro side was, “It’s a matter of simple justice,” and a popular slogan for the anti side (in Maine) was, “Who put the sex in [amendment] six?” (Fund 9). Based on the defunct status of the federal ERA, anti-ERA arguments appear to be more compelling than pro arguments, both in the 1923 and 1970s

³ Ibid., iv.

⁴ Ibid., 1.

⁵ Ibid.

⁶ Ibid., 5.

⁷ Ibid., 2.

debates. And, based on the more recent thwarted attempts at state ERAs, it appears that the anti-ERA commonplaces continue to resonate with voters.⁸

Elliott further identifies the “familiar plot,” “normative message,” and “reassurance of range” as common features of all emotionally based anti-ERA arguments.⁹

To give some idea of the kinds of arguments that ERA supporters must still confront in the twenty-first century, an examination of the Illinois Family Institute’s “Nine Reasons to Reject the Equal Rights Amendment” is instructive. This right-wing organization gives the following reasons for opposing the ERA:

1. **Misleads publicized purpose** – The ERA is not about equal rights for women. If it were, it would duplicate the 14th Amendment.
2. **Contradicts Years of Social Science** — Men and women are different. ERA would remove all legal distinctions between sexes. ERA does not mention “women.”¹⁰
3. **Rejected time and time again** — Previous Illinois lawmakers understood the true intention of the ERA and voted it down 13 times from 1972 to 1982. Every time it has been presented in Illinois General Assembly committees since 1982, it was stopped. Five states rescinded their passage of ERA: Nebraska – 1973, Tennessee – 1974, Idaho – 1977, Kentucky – 1978, South Dakota – 1979.
4. **Ignores 1979 ratification deadline** — Congress granted an extension to 1982 which was ruled unconstitutional by a U.S. District Court in 1981 and the case went to the U.S. Supreme Court. On October 4, 1982, the Court dismissed it as moot, stating, “The amendment has failed of adoption no matter what the resolution of the legal issues presented here.” Additionally, no states passed ERA during the time extension.
5. **Ends Social Security Benefits for Spouses** – According to *Sex Bias in the U.S. Code*, a book written by U.S. Supreme Court Justice Ruth Bader Ginsburg, the ERA will change 800 federal laws including the elimination of social security benefits for wives and widows. (pages 206, 211-212).
6. **Forces Women into Combat** – “Not only would women, including mothers be subject to the draft, but the military would be compelled to place them in combat units alongside of men and in some cases... (U.S. House Judiciary Committee Report (No. 92-359, July 14, 1971). “Equality of rights under law shall not be denied...on account of sex.”
7. **Eliminates Child Support** – “...[I]t could relieve the fathers of the primary responsibility for the support of even infant children, as well as the support of the mothers of such children...” (U.S. House Judiciary Committee Report (No. 92-359, July 14, 1971). “Equality of rights under law shall not be denied...on account of sex.”
8. **Invalidates legal privacy protections** – The ERA would be used to invalidate any laws or policies that prohibit men and women suffering from Gender Identity Disorder (GID) from using

⁸ Ibid., 104.

⁹ Ibid., 106.

¹⁰ This is not true of the revised ERA text of Representative Carolyn Maloney’s “begin anew” approach.

restrooms, locker rooms, and dressing rooms designated for the opposite sex. “Equality of rights under law shall not be denied...on account of sex.”

9. **Gives even more power to Federal Government** — Section II of the ERA states that “The Congress shall have the power to enforce by appropriate legislation the provisions of this article.” This would give enormous new powers to the Federal Government that now belong to the states in areas of law which include traditional differences of treatment “on account of sex”: marriage, property laws, divorce and alimony, child custody, adoptions, abortion, sex crimes, private and public schools, prison regulations, and insurance.¹¹

Many of these arguments were made successfully between 1972 and 1982. In addition to the legal arguments (which are still somewhat emotionally based), the institute advances biological (“men and women are different”) and sociological commonplaces against the ERA. Opponents of the ERA are still focused on women’s and men’s supposedly divinely ordained and/or biologically and sociologically determined roles. The first reason is more emotionally driven than it at first appears. The author of this piece does not explain how duplicating the 14th Amendment would ensure equal rights for men and women, given that judges have leaned in this direction on the 14th Amendment only – in some instances – since the 1970s, more than a century after the amendment’s ratification. Pointing out that the ERA has been repeatedly defeated by state legislatures says nothing about the actual merits of the ERA and is an emotional argument in disguise, appealing to a deep-seated conservatism (in the most literal sense of this term).

Arguments related to women in combat still have resonance, with anti-feminists now reframing their position not as blanket opposition to women in combat but rather to an imagined situation in which women would be forced into combat roles, a scenario that would not actually result from the adoption of the ERA. It is also highly likely that anti-ERA activists will appropriate the transphobic opposition to trans-inclusive bathrooms by resurrecting Phyllis Schlafly and the Eagle Forum’s 1970s fear-mongering about the ERA mandating unisex bathrooms. This would especially be an issue if an explicitly LGBT-inclusive version of the ERA advances in Congress. Despite social progress seemingly knocking down some familiar anti-ERA arguments, it is likely that right-wing opponents of the amendment will continue to use them. In a 2007 opinion piece in the Los Angeles Times, Schlafly rehashed the old arguments:

While claiming to benefit women, the ERA would actually have taken away some of women's rights. We based our arguments on the writings of pro-ERA law professors, among them current Supreme Court Justice Ruth Bader Ginsburg. The amendment would require women to be

¹¹ Kathy Valente, “Nine Reasons to Reject Equal Rights Amendment,” Illinois Family Institute Website, May 26, 2014. <https://illinoisfamily.org/marriage/nine-reasons-to-reject-equal-rights-amendment/>, n.p.

drafted into military combat any time men were conscripted, abolish the presumption that the husband should support his wife and take away Social Security benefits for wives and widows. It would also give federal courts and the federal government enormous new powers to reinterpret every law that makes a distinction based on gender, such as those related to marriage, divorce and alimony.¹²

Opposition to the ERA is not confined to the political right, however. In the 1920s, some suffragists opposed the ERA because they believed it would invalidate protective labor legislation for women. In the 1970s, some radical feminists considered uses of the legal and constitutional system to advance women's rights an exercise in futility and therefore rejected the ERA as a distraction from the task of anti-patriarchal revolution. Hannah Miyamoto, in a blog post entitled "The Feminist Case Against the Equal Rights Amendment," cites "diversion of effort," "limited [legal] value of the ERA" (she claims that the ERA would not block draconian anti-abortion laws), "Women are already legally equal," and "Equal means strictly equal" (suggesting that legal action pertained specifically to women in fighting sexual harassment; essentially, this is a variation of the 1920s anti-ERA arguments that laws specifically helping women would not be allowed under the ERA). Miyamoto also cites the courts' history of striking down certain forms of race- and gender-based affirmative action as "reverse discrimination" and that, with the ERA in place, the courts would apply this strict scrutiny in a similar way against laws and programs designed specifically to help women. She concludes by proposing that feminists focus instead on statutory reform at the state level instead of a constitutional amendment.¹³

Rob Natelson, in an article entitled "Let's Not Waste Time Reviving the Zombie Equal Rights Amendment," claims that the ERA would have "done little for women's rights" and would have entailed a massive power grab by the federal government against states' rights – familiar right-wing anti-ERA arguments. Ignoring the "begin anew" approach (that is, re-starting the ratification process from the beginning) of some ERA advocates, he also argues that the ERA cannot be revived because its deadline for ratification has passed and that the extension of the deadline from 1979 to 1982 was invalid. Beyond these reasons, Natelson does not advance logical arguments against the ERA. Nowhere in his article does he explain exactly why the ERA would have done little to advance women's rights or why the powers it would give to the federal government would be any more dangerous than the federal powers established by a number of previous constitutional amendments, including the civil rights amendments. Instead, he attempts to change the subject by essentially arguing that agitation for constitutional amendments such as James Madison's

¹² Phyllis Schlafly, "Equal Rights' for Women: Wrong Then, Wrong Now," *Los Angeles Times*, April 8, 2007. n.p.

¹³ Hannah Miyamoto, "The Feminist Case Against the Equal Rights Amendment," *National Progressive Review*, May 4, 2012, <http://nationalprogressive.blogspot.com/2012/05/feminist-case-against-era.html>, n.p.,

Congressional apportionment amendment,¹⁴ term limits, and a balanced budget requirement is more important than working to achieve gender equality through the constitutional amendment process.¹⁵ Though seemingly legally and constitutionally based, Natelson's arguments actually lack substance and are just as subjective as more emotionally driven anti-ERA arguments.

Perhaps, advocates of the ERA need to not only continue to make strongly logical arguments but also developing, within ethical bounds, effective emotional appeals of their own.

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¹⁴ Passed by Congress in 1789 with no deadline for ratification, the Congressional Apportionment Amendment would determine the number of members of the House of Representatives in accordance with the results of each decennial census. Eleven states ratified this amendment between 1789 and 1792; no state has acted upon it since then. Twenty-seven more states would have to ratify the Congressional Apportionment Amendment for it to become an operative part of the Constitution, a substantially greater hurdle than that faced by proponents of the three-state, now one-state strategy for ratifying the ERA.

¹⁵ Rob Natelson, "Let's Not Waste Time Reviving the Zombie Equal Rights Amendment." *The Hill*. November 6, 2017, <http://thehill.com/opinion/civil-rights/358916-lets-not-waste-time-reviving-the-zombie-equal-rights-amendment>, n.p.

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