

## WORKING MOTHERS AND THE POSTPONEMENT OF WOMEN'S RIGHTS FROM THE NINETEENTH AMENDMENT TO THE EQUAL RIGHTS AMENDMENT

JULIE C. SUK\*

*The Nineteenth Amendment's ratification in 1920 spawned new initiatives to advance the status of women, including the proposal of another constitutional amendment that would guarantee women equality in all legal rights, beyond the right to vote. Both the Nineteenth Amendment and the Equal Rights Amendment (ERA) grew out of the long quest to enshrine women's equal status under the law as citizens, which began in the nineteenth century. Nearly a century later, the ERA remains unfinished business with an uncertain future. Suffragists advanced different visions and strategies for women's empowerment after they got the constitutional right to vote. They divided over the ERA. Their disagreements, this Essay argues, productively postponed the ERA, and reshaped its meaning over time to be more responsive to the challenges women faced in exercising economic and political power because they were mothers. An understanding of how and why*

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\*Professor of Sociology, Political Science, and Liberal Studies, The Graduate Center of the City University of New York, and Florence Rogatz Visiting Professor of Law (fall 2020) and Senior Research Scholar, Yale Law School. Huge thanks to Saul Cornell, Deborah Dinner, Vicki Jackson, Michael Klarman, Jill Lepore, Suzette Malveaux, Jane Manners, Sara McDougall, Paula Monopoli, Jed Shugerman, Reva Siegel, and Kirsten Swinth. Their comments and reactions to earlier iterations of this project conjured this Essay into existence. This Essay began as a presentation of disconnected chunks of research for my book, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (2020), but the conversations generated by law school audiences nudged me to write a separate essay to explore more thoroughly how the story of suffragists' ERA dispute after the Nineteenth Amendment affects the future of constitutional lawmaking. I am deeply grateful for the opportunity to present this research at the AALS Constitutional Law Section's panel on the Nineteenth Amendment centennial, NYU Law School's Birnbaum Women's Leadership conference on "That Important Trust: Suffrage and Citizenship 100 Years After the Nineteenth Amendment," and seminar participants in the Constitutional History Colloquium at Fordham Law School, Harvard Law School's program on "The 19th Amendment and the ERA: A Conversation," and the University of Colorado Law School's virtual Rothgerber Conference on "Women's Enfranchisement: Beyond the Nineteenth Amendment."

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## INTRODUCTION

The Nineteenth Amendment's ratification in 1920 spawned new initiatives to advance the status of women. Shortly afterward, the National Woman's Party—the most militant suffragist group—launched the drive for another constitutional amendment that would guarantee women equality in all legal rights, beyond the right to vote: the Equal Rights Amendment. Both the Nineteenth Amendment and the Equal Rights Amendment (ERA) grew out of the long quest to enshrine women's equal status under the law as citizens, which began in the nineteenth century. Nearly a century later, the ERA remains unfinished business with an uncertain future.<sup>1</sup>

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1. I narrate the long legislative history of the Equal Rights Amendment in JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (2020).

The ERA was introduced in Congress in 1923.<sup>2</sup> Although hearings regarding the amendment were held in Congress from the 1920s through the 1970s, the ERA was not adopted by the requisite two-thirds of both houses of Congress until 1972.<sup>3</sup> It was not until January 2020, nearly fifty years after its adoption by Congress, that the ERA was finally ratified by three-fourths of the states.<sup>4</sup> But because the 1979 and 1982 ratification deadlines imposed by Congress have elapsed,<sup>5</sup> whether the ERA will be added to the Constitution remains a contested question.<sup>6</sup>

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2. H.R.J. Res. 75, 68th Cong. (1923). For an account of the National Woman's Party's militant strategies and their proposal for the Equal Rights Amendment, see CHRISTINE A. LUNARDINI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928* (1986).

3. See H.R.J. Res. 208, 92d Cong. (1972).

4. See Gregory S. Schoeller & Laura Vozella, *Virginia Finalizes Passage of Equal Rights Amendment, Setting Stage for Legal Fight*, WASH. POST (Jan. 27, 2020), [https://www.washingtonpost.com/local/virginia-politics/virginia-expected-to-finalize-passage-of-era-monday-setting-stage-for-legal-fight/2020/01/27/b178265c-4121-11ea-b503-2b077c436617\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-expected-to-finalize-passage-of-era-monday-setting-stage-for-legal-fight/2020/01/27/b178265c-4121-11ea-b503-2b077c436617_story.html) [<https://perma.cc/UQF9-VWSZ>].

5. Congress's joint resolution adopting the ERA included language in its preamble stating, "The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress." H.R.J. Res. 208, 92d Cong. (1972). Congress extended the time limit by adopting a joint resolution in 1978 that extended the deadline to June 30, 1982. See 92 Stat. 3799 (1978).

6. Several states challenged the validity of the ratification deadline in litigation, while other states intervened in that lawsuit to enforce the deadline as well as their efforts to rescind their ratifications. See *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. June 12, 2020) (order granting motion to intervene). A pro-ERA organization brought a separate lawsuit seeking immediate judicial declaration that the ERA is part of the Constitution. Both lawsuits were dismissed for lack of standing. See *Virginia v. Ferriero*, 2020 WL 848706 (Mar. 5, 2021); *Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105 (D. Mass. 2020). *Equal Means Equal* petitioned for a writ of certiorari in the Supreme Court, which was denied without comment. *Equal Means Equal v. Ferriero*, 141 S.Ct. 611 (2020). As of this writing, *Equal Means Equal*'s appeal is now pending before the First Circuit. Meanwhile, resolutions have been introduced in both houses of Congress to remove the deadline for the ratification of the ERA to recognize its validity once three-fourths of the states have ratified it. H.J. Res. 17, 117th Cong. (2021); S.J. Res. 1, 117th Cong. (2021).

Some legal commentators,<sup>7</sup> the Trump administration,<sup>8</sup> several states,<sup>9</sup> and even the late Justice Ginsburg<sup>10</sup> have suggested that it's now too late to revive the ERA. But some ERA proponents insist that it is legally or morally wrong to put a time limit on women's constitutional equality.<sup>11</sup>

This Essay explains why the ERA took so long to meet the requirements of Article V of the Constitution—namely, that constitutional amendments be adopted by two-thirds of both houses of Congress and ratified by three-fourths of the states.<sup>12</sup> Article V requires extraordinary consensus for a constitutional amendment. The long (and ongoing) struggle for the ERA mirrors the long struggle for the suffrage amendment. By the time the Nineteenth Amendment finally became law in 1920, it was long overdue. Its success took forty-two years, from its first

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7. See, e.g., Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1294–99 (2019); Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT. 593 (2000); Kim Forde-Mazrui, Opinion, *A Liberal Case Against the Equal Rights Amendment*, RICHMOND TIMES-DISPATCH (Jan. 16, 2020), [https://richmond.com/opinion/columnists/kim-forde-mazrui-column-a-liberal-case-against-the-equal-rights-amendment/article\\_a6356b64-5862-528e-a73f-e900cccf4b8e.html#:~:text=Unnecessary%20Reforms-.Kim%20Forde%2DMazrui%20column%3A%20A%20liberal%20case,against%20the%20Equal%20Rights%20Amendment&text=Virginia's%20vote%20to%20-ratify%20the,by%20many%20as%20a%20milestone.&text=The%20ERA%20is%20unnecessary%2C%20useless%20and%20harmful%20to%20women's%20equality](https://richmond.com/opinion/columnists/kim-forde-mazrui-column-a-liberal-case-against-the-equal-rights-amendment/article_a6356b64-5862-528e-a73f-e900cccf4b8e.html#:~:text=Unnecessary%20Reforms-.Kim%20Forde%2DMazrui%20column%3A%20A%20liberal%20case,against%20the%20Equal%20Rights%20Amendment&text=Virginia's%20vote%20to%20-ratify%20the,by%20many%20as%20a%20milestone.&text=The%20ERA%20is%20unnecessary%2C%20useless%20and%20harmful%20to%20women's%20equality) [https://perma.cc/RK6L-YBT6]; John McCormack, *Is the Equal Rights Amendment Back from the Dead?*, NAT'L REV. (Nov. 19, 2019), <https://www.nationalreview.com/magazine/2019/12/09/is-the-equal-rights-amendment-back-from-the-dead> [https://perma.cc/XCE4-9RX9]; Joan C. Williams, Opinion, *The Misguided Push for an Equal Rights Amendment*, N.Y. TIMES, Jan. 16, 2020.

8. Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1 (2020).

9. *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. June 12, 2020) (granting motions by two states that did not ratify the ERA and three states that voted to rescind their ratifications to intervene on grounds that ERA has expired).

10. Justice Ginsburg recently said, "I would like to see a new beginning. I'd like it to start over," because "a number of States have withdrawn their ratification [of the ERA]," so "if you count a latecomer [like Virginia] on the plus side, how can you disregard States that said, 'We've changed our mind?'" *Searching for Equality: The 19th Amendment and Beyond*, GEO. L. (Feb. 10, 2020), [bit.ly/2tUgeUw](https://bit.ly/2tUgeUw) [https://perma.cc/3U4N-Z3SL] (remarks begin at 43:55).

11. See Complaint, *Virginia v. Ferriero*, Case 1:20-cv-00242 (D.D.C. filed Jan. 30, 2020); Lisa Murkowski & Ben Cardin, Opinion, *It's Time to Finally Pass the Equal Rights Amendment*, WASH. POST (Jan. 25, 2019), [https://www.washingtonpost.com/opinions/its-time-to-finally-pass-the-equal-rights-amendment/2019/01/25/54b3626e-20d0-11e9-9145-3f74070bbdb9\\_story.html](https://www.washingtonpost.com/opinions/its-time-to-finally-pass-the-equal-rights-amendment/2019/01/25/54b3626e-20d0-11e9-9145-3f74070bbdb9_story.html) [https://perma.cc/XF8T-6Y4C].

12. U.S. CONST. art. V.

introduction in Congress in 1878 to its final ratification in 1920.<sup>13</sup>

The coalitions that brought success took generations to build because Article V required disfranchised women to persuade a significant supermajority of Congress and state legislatures—both consisting almost entirely of men—to value women’s contributions to American democracy. The consensus that women should have the right to vote was formed by different visions of law’s role in valuing women’s social, economic, and political contributions to a democratic society.<sup>14</sup>

These different visions led to divisions over the ERA. This Essay argues that these divisions productively postponed the ERA and gradually reshaped its meaning to be more responsive to the challenges women faced in exercising economic and political power because they were mothers. An understanding of how and why the amendment stalled speaks directly to the current controversy in Congress and the courts about whether a congressional ratification deadline should prevent the ERA from achieving full constitutional status. Such an understanding recognizes that suffragists disagreed in the immediate aftermath of the Nineteenth Amendment’s ratification over the ERA, and that the resulting divisions undermined the ERA’s prospects for at least a few decades. Ultimately, however, the ERA that earned congressional adoption and thirty-eight ratifications over almost a century was stronger because of its postponement.

This Essay proceeds in six Parts to trace the genesis of the ERA and the divisions among its supporters. Part I shows that both the Nineteenth Amendment and the ERA sought the recognition of women as citizens included in “We the People,” the democratic citizenry referenced in the opening words of the Constitution. Part II explains how the first piece of legislation that suffragists advanced after they won the vote, the Sheppard-Towner Maternity and Infancy Protection Act, promoted this vision of women’s inclusion in constitutional democracy. Part III shows that some ERA proponents intended the ERA to help

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13. For histories of women’s long, multigenerational struggle for the suffrage amendment, see ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN’S LONG BATTLE FOR THE VOTE* (2020); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* (1959); AILEEN KRADITOR, *THE IDEAS OF THE WOMAN’S SUFFRAGE AMENDMENT, 1890–1920* (1965).

14. See generally AMY E. BUTLER, *TWO PATHS TO EQUALITY: ALICE PAUL AND ETHEL M. SMITH IN THE ERA DEBATE, 1921–1929* (2002).

working mothers, while Part IV explains why other advocates of women's rights were reluctant to trust the sitting federal judiciary to protect working mothers with a new constitutional amendment. Part V shows how the views of ERA proponents and opponents of the 1920s were synthesized in the 1940s through engagement of global constitutional developments and attention to the experiences of African American women. Part VI introduces the concept of "productive postponement" to interpret the long and contested path of the ERA, arguing that the women who initially opposed the ERA made valuable contributions to the amendment that emerged in later decades. concludes.

### I. WOMEN'S INCLUSION IN "WE THE PEOPLE"

Since the first congressional hearing on the women's suffrage amendment in 1878, suffragists demanded recognition of women's inclusion in "We the People." At that hearing, Elizabeth Cady Stanton read the preamble of the Constitution and asked,

Does anyone pretend to say that men alone constitute races and peoples? When we say parents, do we not mean mothers as well as fathers? When we say children, do we not mean girls as well as boys? When we say people, do we not mean women as well as men?<sup>15</sup>

As Cady Stanton's line of questioning indicates, suffragists connected women's inclusion in constitutional rights to the need for mothers to have some recognition under the law. However, it took World War I to expose the essential contributions of mothers as workers and caregivers to the economic and political life of the nation.

For example, at a 1917 suffrage hearing, Mabel Vernon of the National Woman's Party invoked America's entry into the War: "The women of this country are being called upon for every

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15. *Prohibiting the Several States from Disfranchising United States Citizens on Account of Sex: Hearing on U.S. CONST. AMEND. XVI Before the S. Comm. on Privileges and Elections*, 45th Cong. 5 (1878) (Statement of Mrs. Elizabeth Cady Stanton). For a more thorough account of Elizabeth Cady Stanton's lifelong project of linking suffrage to women's subordination in family law, see TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* (2016); LORI D. GINZBERG, *ELIZABETH CADY STANTON: AN AMERICAN LIFE* (2009).

conceivable kind of service,” she said.<sup>16</sup> “We women know that during the very next few months probably we are going to be called upon to perform duties which we never have performed before.”<sup>17</sup> War made it necessary for women to take on what had previously been men’s work to sustain the nation. Did that not entitle them to vote on the composition of the government? “The women of this country feel that when the Government calls upon them for their services and places upon them the responsibility of government, it must also give to them, in decency—that is all it is—the privileges of government.”<sup>18</sup>

Anna Howard Shaw, who had been President of the National American Woman Suffrage Association, testified to Congress that the Great War would bring about new roles for mothers:

The time of reconstruction will come, and many women of this country will have to be both father and mother to fatherless children, and these women and their children will have no representatives in this Government, unless they are represented through the mothers who have given everything that the Government might be saved and democracy might be secured.<sup>19</sup>

As these remarks illustrate, to support the constitutional recognition of women as voting citizens, some suffragists emphasized women’s contributions to the nation as workers, while others emphasized women’s contributions to democracy as mothers. The Nineteenth Amendment’s legislative history hints at two different visions for women’s advancement after the vote. One vision saw law as the problem and the other saw law as the solution. One vision sought an ERA to dismantle existing laws that perpetuated women’s unequal status, most of which were common-law doctrines created by state judges.<sup>20</sup> The other

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16. *Woman Suffrage, Hearings Before the H. Comm. on the Judiciary*, 65th Cong. 214 (1917) (Statement of Mabel Vernon).

17. *Id.*

18. *Id.* at 215.

19. *Extending the Right of Suffrage to Women: Hearing on H.R.J. Res. 200 Before the H. Comm. on Woman Suffrage*, 65th Cong. 9 (1918) (Statement of Dr. Anna Howard Shaw).

20. Suffragist lawyer Catharine Waugh McCulloch’s 1899 book, *MR. LEX*, depicts the common-law doctrines in many states that undermined women’s economic security, including married women’s lack of access to property rights and mothers’ lack of equal guardianship to fathers over their own children. *See*

vision sought to build new laws and public policies to improve women's lives as equals, and its proponents feared that federal judges would use the ERA to dismantle them.<sup>21</sup> The two visions did not diverge or clash until after suffragists secured the vote. The ERA became the crucible of this conflict.

## II. SUFFRAGISTS AND THE LEGISLATIVE PROTECTION OF MOTHERS

In 1920, former suffrage groups shared a concern for motherhood and its effects on women's prospects for economic and political participation. Professor Reva Siegel argues that women's campaign for the vote, dating back to the Declaration of Sentiments at Seneca Falls, was always part of a larger campaign for the democratization of the family.<sup>22</sup> The larger campaign argued that women's disfranchisement was only one element of a legal order that regarded women as unfit for equal status in public life because they were mothers whose lives were centered on child-rearing in the home. At the same time, the grievances at Seneca Falls drew attention to the fact that even in their own separate sphere—family life within the home—mothers were subordinate to fathers. This was because the law deprived married women of property rights and equal guardianship over their own children.<sup>23</sup> In giving women the vote, the Nineteenth Amendment empowered women to change those laws.

After the Nineteenth Amendment's ratification and before the ERA's introduction, many women's organizations that had rallied for suffrage articulated new goals and reorganized. They formed the Women's Joint Congressional Committee (WJCC) to advocate for laws that would advance women's interests.<sup>24</sup> The WJCC included the League of Women Voters, the Women's Trade Union League, and the National Consumers' League,

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*generally* CATHARINE WAUGH MCCULLOCH, MR. LEX; OR, THE LEGAL STATUS OF MOTHER AND CHILD 82–85 (1899) (providing table of citations to state-court cases).

21. *See, e.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), discussed *infra* Part IV.

22. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 *YALE L.J. F.* 450 (2020).

23. *See generally* THOMAS, *supra* note 15.

24. For a history of the Women's Joint Congressional Committee's formation and work, see JAN DOOLITTLE WILSON, *THE WOMEN'S JOINT CONGRESSIONAL COMMITTEE AND THE POLITICS OF MATERNALISM, 1920–30* (2007).



among others.<sup>25</sup> The WJCC immediately tackled the problem of maternal mortality.<sup>26</sup> In 1918, 23,000 mothers had died, and more than 250,000 infants died each year. In a multinational study of twenty comparable nations, the United States ranked seventeenth for maternal mortality and eleventh for infant mortality. The vast majority of pregnant women received no advice or trained care.<sup>27</sup> To combat these problems, some former suffragists successfully lobbied Congress to enact the Sheppard-Towner Maternity and Infancy Protection Act. This legislation was a first step towards changing the laws that imposed a subordinate social status on women.

The Sheppard-Towner Act provided federal grants-in-aid to states willing to accept it for the purpose of establishing child and maternal health centers. At these centers, public health nurses and midwives educated women about prenatal and infant care. To receive federal funds, states had to pass enabling legislation and hold primary responsibility for administering the program.<sup>28</sup> Historians and political scientists have suggested that Congress adopted the Sheppard-Towner Act because legislators feared punishment at the polls by newly enfranchised women. These women had promised for decades in the suffrage campaign that they would be issue-oriented, rather than party-oriented, voters.<sup>29</sup>

Social reformer Florence Kelley led the Sheppard-Towner subcommittee of the WJCC. Kelley was a suffragist whose career focused on improving the conditions of women workers in industry. Having studied in Europe after American universities declined to enroll her in PhD programs,<sup>30</sup> she brought German social democratic ideals back to the United States, where she

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25. *See id.* at 19–26.

26. *See* NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 97–98 (1987).

27. *See* STANLEY LEMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S*, at 154 (1973).

28. *See* Sheppard-Towner Maternity and Infancy Act, 42 U.S.C. §§ 161–175 (1925).

29. *See* LEMONS, *supra* note 27, at 157; *see also* DOOLITTLE, *supra* note 24, at 48; Carolyn M. Moehling & Melissa A. Thomasson, *The Political Economy of Saving Mothers and Babies: The Politics of State Participation in the Sheppard-Towner Program*, 72 *J. ECON. HIST.* 75 (2012). Moehling and Thomasson suggest that Congress allowed the Sheppard-Towner Act to expire in 1926 when it came up for renewal because, by then, they learned from a few years' experience of women's suffrage that women were not single-issue voters and did not vote as a block. *Id.* at 82.

30. *See* KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE* 80 (1995).

studied law at Northwestern University Law School and advocated for the legal protection of working women.<sup>31</sup>

Kelley's drive to reduce maternal mortality through the Sheppard-Towner Act grew out of her decades of experience supporting the needs of women working in factories and other industrial workplaces. She believed that women's economically subordinate status resulted from their biological and social role as mothers, which in turn made them more susceptible to exploitation when they entered the industrial workforce. Two decades before she focused on maternal health policy in 1921, Kelley lobbied successfully for the adoption of state legislation guaranteeing minimum wages and maximum hours, particularly in Illinois.<sup>32</sup> In *Some Ethical Gains in Legislation*, published in 1906, she characterized maximum hours laws as establishing "the right to leisure." While some working men protected their right to leisure through collectively organized trade agreements, Kelley believed that women were more susceptible to overwork because they lacked the vote and collective bargaining power.<sup>33</sup> Legislation specifically regulating what employers could demand from women workers was therefore necessary, in Kelley's view.<sup>34</sup> For Kelley and the WJCC, women needed laws that protected them, both in the workplace and in the provision of maternal healthcare.

### III. AN ERA FOR WORKING MOTHERS

In 1920 other suffragists believed that, in addition to the vote, women needed another constitutional amendment to undo their exclusion from the legal rights in a whole range of laws affecting women's social, economic, and political lives. It was not clear, however, how such an amendment would affect laws like

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31. See NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S*, at 11 (2017). While immersed in this work, she attended law school at Northwestern University, graduating in 1894, prepared to pursue social change through legal reform. See JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER: FLORENCE KELLEY'S LIFE STORY* 43–44 (1953).

32. See WOLOCH, *supra* note 31, at 39. The Illinois Supreme Court struck down the law in *Ritchie v. Illinois*, 155 Ill. 98 (1895).

33. FLORENCE KELLEY, *SOME ETHICAL GAINS IN LEGISLATION* 132–37 (Arno 1969) (1905).

34. The Illinois legislature passed a factory law imposing an eight-hour workday and created the Illinois State Factory Inspection Department. The Legislative Committee's report relied on Florence Kelley's research on women and children working in factories. See GOLDMARK, *supra* note 31, at 33–34.

the Sheppard-Towner Act, or legislation protecting women from overwork, that treated women and men differently.

Popular accounts of the ERA's origins often credit Alice Paul as the author of the amendment, but Crystal Eastman, a lawyer with expertise on the industrial workplace, worked with Alice Paul on the early drafts developed by the National Woman's Party from 1921 to 1923.<sup>35</sup> Eastman graduated at the top of her class from NYU Law School in 1907 and contributed to the design of New York's first workers' compensation law, a subject on which she had authored a trailblazing book.<sup>36</sup>

Eastman articulated the ERA's goals in a letter published by *The New Republic*. First, it would sweep away any common-law precedents that made women dependent on and inferior to men. Second, it would protect women from sex-based discrimination. At the time, the paradigmatic instance of sex discrimination that she gave was the firing of women schoolteachers when they became pregnant. Third, Eastman envisioned an ERA that would end employment laws that treated women like children. For example, employment laws that required minimum wages and maximum hours protected women only. While Eastman did not view these laws as necessarily treating women like children, she worried that these labor standards were patronizing when they did not apply to all workers, including men. Eastman hoped that the ERA would extend these labor protections to men as well as women: "Genuinely protective legislation would probably be extended to include men and thus all element of tyranny removed from it."<sup>37</sup> Eastman explained, "The Equal Rights Amendment would not affect existing labor legislation, except to establish the principle that industrial legislation should apply to all workers, both men and women, in any given occupation and not to women workers alone."<sup>38</sup>

But Eastman's voice was absent from the congressional hearings on the ERA that took place throughout the 1920s. Under federal citizenship law at the time, a married woman lost

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35. See AMY ARONSON, *CRYSTAL EASTMAN: A REVOLUTIONARY LIFE* 234–35 n.64 (2020).

36. See CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* (1910).

37. Crystal Eastman, Letter, *The Equal Rights Amendment*, NEW REPUBLIC, Nov. 19, 1924.

38. CRYSTAL EASTMAN, *Equality or Protection* (Mar. 15, 1924), in CRYSTAL EASTMAN ON WOMEN AND REVOLUTION (Blanche Wiesen Cook ed., 1978).

her U.S. citizenship if she married a foreigner.<sup>39</sup> Although that rule was changed with the Cable Act in 1922,<sup>40</sup> Eastman, having married an Englishman,<sup>41</sup> moved to London in 1922 with her six-year-old son and one-year-old daughter.<sup>42</sup>

Although Eastman did not testify at the ERA hearings, her case for the ERA is similar to the arguments made in the testimony of Mary Murray, a war widow and mother of five who became a transit worker. Murray resisted the efforts of ERA opponents to claim the “flag of maternity:” “We working women, because we are mothers, potential and actual, say it makes it all the more imperative we be free to have the same chance as men to earn a good wage, to give opportunity to our children to get food, a good education, and a good environment.”<sup>43</sup> Murray continued, “Now, are not we women of the industrial class—we mothers—are not our children entitled to the same advantages as the children whose fathers have not been called home?” Murray was arguing that the ERA was needed to support mothers and families in this new reality.

Murray claimed, as Eastman had, that women were entitled to truly equal employment opportunity. Women should not be excluded from reputable schools and high-quality jobs. But there was also an implied claim that women were often unintentionally excluded through the operation of employment laws intended to protect them. Women-only maximum hours laws led employers to favor men over women because men could legally work longer hours. Other ERA proponents suggested that the ERA would require these women-only labor protections to be struck down. Eastman’s vision of an ERA that would expand rather than strike down labor protections faded away, perhaps because she died at the age of forty-six in 1928,<sup>44</sup> before the hearings that addressed labor protections for women in 1929 and through the 1930s and 1940s.

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39. See *Mackenzie v. Hare*, 239 U.S. 299 (1915) (upholding the Expatriation Act of 1907).

40. Married Women’s Independent Nationality Act, 42 Stat. 1021 (1922).

41. ARONSON, *supra* note 35, at 19.

42. See *id.* at 234.

43. *Equal Rights Amendment to the Constitution: Hearing Before the H. Comm. On the Judiciary*, 68th Cong. 34, 36 (1925) (statement of Mrs. Mary Murray, President, Women’s League of the Rapid Transit Co.).

44. ARONSON, *supra* note 35, at 278.

## IV. ANTICIPATED JUDICIAL INTERPRETATIONS OF THE ERA

By 1923, however, it was becoming clear that the sitting federal judiciary was more likely to strike down women-only labor protections than to adopt Eastman's approach of expanding them to include all workers. Shortly after the ratification of the Nineteenth Amendment and months before the introduction of the ERA, the Supreme Court decided *Adkins v. Children's Hospital*, which struck down a District of Columbia law requiring minimum wages for women workers.<sup>45</sup> Almost two decades before *Adkins*, *Lochner v. New York* struck down a New York state law that limited the working hours of (male) bakers in the name of freedom of contract.<sup>46</sup> Although the Court had created an exception to *Lochner* for laws that limited the working hours of women workers in *Muller v. Oregon*,<sup>47</sup> in *Adkins* the Court changed course. The *Adkins* court concluded that the women's minimum wage law violated the Fifth Amendment's due process guarantee. Although *Adkins* was decided on Fifth Amendment grounds, the Court also invoked the newly ratified Nineteenth Amendment to suggest that women now enjoyed equal status to men and therefore no longer required any special labor protections: "In view of the great—not to say revolutionary—changes which have taken place . . . , in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point."<sup>48</sup>

*Adkins* departed from the Court's 1908 *Muller* decision, which upheld an Oregon law that prohibited employers from requiring women to work more than ten hours per day in mechanical establishments, factories, or laundries.<sup>49</sup> In *Muller*, the Supreme Court had not extended *Lochner* to women because to do so would be to assume that "the difference between the sexes does not justify a different rule respecting the restriction of the hours of labor."<sup>50</sup> *Muller* had characterized the maximum

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45. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

46. *Lochner v. New York*, 198 U.S. 45 (1905).

47. 208 U.S. 412 (1908).

48. *Adkins*, 261 U.S. at 553.

49. *Muller*, 208 U.S. 412.

50. *Id.* at 419; see also ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN THE 20TH CENTURY 30–31 (2001).

hours law as a protection of motherhood. But in 1923, the Supreme Court applied *Lochner* equally to women in industry, leaning on the newly ratified women's suffrage amendment. The Court described *Muller* as manifesting an "ancient inequality of the sexes" that "has continued 'with diminishing intensity,'"<sup>51</sup> suggesting that women's vulnerability to exploitation was primarily in the past. Alice Paul was a consultant to the lawyers who represented the employer, Children's Hospital, in the *Adkins* case.<sup>52</sup> She helped the employers' lawyers link equal rights for women to the liberty of contract pronounced by *Lochner*.

However, the Court's repudiation of *Muller* undermined the broader agenda of legislating to protect all workers—starting with women. Decades before she advocated for the Sheppard-Towner legislation, Florence Kelley was an invisible force behind *Muller*. She became the General Secretary of the National Consumers League in 1899, having served as a factory inspector for the State of Illinois for almost a decade prior.<sup>53</sup> Josephine Goldmark headed the organization's committee on labor law. Together, Kelley and Goldmark enlisted Goldmark's uncle Louis Brandeis, who would go on to become a Justice of the United States Supreme Court in 1916. The "Brandeis Brief," as his brief for the National Consumers League in *Muller* came to be known, is celebrated as the pioneering exemplar of a sociological approach to jurisprudence, one which utilizes social science data to shape the law.<sup>54</sup> The influence of the Brandeis Brief on the Supreme Court's reasoning in *Muller* was apparent.

In *Muller*, the Supreme Court noted: "That a woman's physical structure and the performance of maternal functions, place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her."<sup>55</sup> The Court also said "history discloses the fact that woman has always been dependent upon man," and acknowledged that "some legislation to protect her seems

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51. *Adkins*, 261 U.S. at 553.

52. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 220 (1991).

53. WOLOCH, *supra* note 31, at 11.

54. Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605; see generally Zimmerman, *supra* note 52.

55. *Muller*, 208 U.S. at 421.

necessary to secure a real *equality of right*.”<sup>56</sup> The Court emphasized both the weaknesses caused by maternity for working women, as well as the state’s interest in promoting maternal health: “[A] proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”<sup>57</sup>

Social worker Molly Dewson, who worked with Florence Kelley and then-law professor Felix Frankfurter (who became a Supreme Court Justice in 1939) on the National Consumers League brief defending the women’s minimum wage, made a valiant effort to save *Muller*’s holding during the *Adkins* litigation. After the Nineteenth Amendment empowered women with the vote, Dewson and Kelley no longer emphasized women’s vulnerability as a separate and dependent class defined by motherhood. Instead, their briefing on the *Adkins* case characterized working women as breadwinners whose work was undervalued. The minimum wage law, according to Dewson and Kelley, was the “first step toward the elevation of women in industry to a plane where due recognition is given the value of their work.”<sup>58</sup> The women’s minimum wage was a measure to ensure women’s economic citizenship. Whereas *Muller* emphasized the state’s role to protect the health of mothers through the exercise of the police power, the National Consumers’ League argument in *Adkins* focused on the state’s role as a guardian of freedom and equality, to reduce women’s economic disadvantage.

When the Court struck down the women’s minimum wage, Florence Kelley described *Adkins* as “a new ‘Dred Scott’ decision,” establishing “in the practical experience of the unorganized, the unskilled, the illiterate, the alien, and the industrially sub-normal women wage-earners, the constitutional right to starve.”<sup>59</sup> But she had a solution, which flowed from the Nineteenth Amendment:

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56. *Id.* at 422 (emphasis added).

57. *Id.*

58. Sybil Lipschultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 *YALE J. L. & FEMINISM* 131, 154 (1989) (quoting Brief for Appellants at 767, *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (Nos. 795 & 796)).

59. Florence Kelley, *Progress of Labor Legislation for Women*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK* 112, 114 (1923).

Have we forgotten that the most important labor law ever passed never mentioned labor? That is the constitutional amendment which gives to working women, and to all other women, the right to vote. It is by far the most important labor law concerning women that ever has been or ever can be passed. It is the law which gives to half of the people of this nation the power to register their will and their conscience.<sup>60</sup>

Now armed with the right to vote, Kelley called on working women to use their right to vote with more imagination and initiative toward constitutional change: “We have to modernize the Constitution to meet the needs of our own century, and to modernize the court that interprets the Constitution.”<sup>61</sup> The problem, as she put it very bluntly, was that “[t]he progress of labor legislation depends upon the personnel of the Supreme Court of the United States and the social and economic opinions of the judges.”<sup>62</sup>

*Adkins* triggered Kelley to argue in 1923 that the Supreme Court needed women justices, fifty years before the first woman justice was appointed:

The court incarnates a world-old injustice. It has dealt with the whole people, but it has represented only half of the people. We have seen two child-labor laws destroyed. No woman had any share in that destruction, or opportunity to stay it. We have seen the minimum-wage laws of thirteen states endangered by the recent decision. No woman participated in that responsibility. Sooner or later women must [be] added to the court. The monopoly of the interpretation and administration of the law by men alone can never again be accepted without criticism and protest. It is a survival of the age before women were full citizens.<sup>63</sup>

Without a seismic shift in judicial personnel, Kelley had no faith in a judicially enforced ERA. Testifying in 1929 congressional hearings on the ERA, Kelley opposed what she called the “so-called Equal Rights Amendment.” She linked two of the policy issues on which she had played a leadership role in

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60. *Id.* at 114.

61. *Id.* at 115.

62. *Id.*

63. *Id.*



her career—maternal mortality and labor protections for women working in industry. Kelley maintained that the strains and hazards of industrial work were responsible for the rising deaths of mothers, and she asked, “Equal rights among whom? Everyone has talked about equality, but no one seems to have dwelt much upon the people concerned.”<sup>64</sup> The real problem was that “equal rights” were too vague, particularly when left to the interpretation of the same Court that had decided *Adkins*. With life-tenured federal judges, it was not until 1937, after Florence Kelley’s death,<sup>65</sup> that the Court finally upheld protective labor laws and overruled *Adkins* in *West Coast Hotel v. Parrish*.<sup>66</sup>

Furthermore, Crystal Eastman’s vision of the ERA as an expansion of labor protections to all persons, in a manner supportive of working women, was eclipsed by the vision of other lawyers for the National Woman’s Party whose voices registered in the congressional hearings on the ERA during this period. Burnita Matthews, the chief lawyer for the National Woman’s Party,<sup>67</sup> testified on its behalf at several hearings during the 1920s and 1930s.<sup>68</sup> Matthews was particularly concerned with a problem that Elizabeth Cady Stanton had identified when the suffrage amendment was introduced in 1878—the law’s unequal treatment of mothers and fathers. Matthews questioned the common-law rule in many states that assigned parental rights to fathers rather than to mothers.<sup>69</sup> The ERA was necessary to

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64. *Equal Rights Amendment: Hearing on S.J. Res. 64 Before a Subcomm. of the Comm. on the Judiciary*, 70th Cong. 56 (1929) [hereinafter *1929 Hearing*] (statement of Florence Kelley, National Consumers League).

65. Florence Kelley died in 1932. For a biography of Florence Kelley with particular emphasis on her advocacy on behalf of working women, see GOLDMARK, *supra* note 31.

66. *W. Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937).

67. See Linda Greenhouse, *Burnita S. Matthews Dies at 93, First Woman on U.S. Trial Courts*, N.Y. TIMES, Apr. 28, 1988, at D27.

68. See *Equal Rights Amendment to the Constitution: Hearing on H.R.J. Res. 75 Before the H. Comm. on the Judiciary*, 68th Cong. 12 (1925); *1929 Hearing, supra* note 64, at 2; *Equal Rights: Hearing on S.J. Res. 52 Before a Subcomm. of the S. Comm. on the Judiciary*, 71st Cong. 66 (1931); *Equal Rights Amendment to the Constitution: Hearing on H.R.J. Res. 197 Before the H. Comm. on the Judiciary*, 72d Cong. 3 (1932); *Equal Rights for Men and Women: Hearing on S.J. Res. 1 Before a Subcomm. of S. Comm. on the Judiciary*, 73d Cong. 1 (1933); *Equal Rights for Men and Women: Hearings on S.J. Res. 65 Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. 140 (1938).

69. See *Equal Rights Amendment to the Constitution: Hearing on H.R.J. Res. 75 Before the H. Comm. on the Judiciary*, 68th Cong. 12 (1925) (statement of Burnita Shelton Matthews, Chairman, Legal Research Department, National Woman’s Party).

strike down these laws so that mothers and fathers would have equal parental authority over their children.

But Matthews—who went on in 1949 to become the first woman appointed to a federal district court<sup>70</sup>—avoided taking a clear position on whether the ERA would strike down protective labor laws that applied to women only. In agreement with Crystal Eastman’s approach, she argued that laws requiring hours, conditions, and minimum wages for women only prevented women from getting jobs. Employers would prefer hiring men over women if women workers came with all these onerous requirements.<sup>71</sup> But Matthews did not take the additional step to say that the ERA would require these protections to apply to men as well. Rather, she discussed *Adkins* favorably and acknowledged that the ERA would simply require equal treatment,<sup>72</sup> which could mean striking down rules that applied to one gender or expanding their application to all genders.

Leaving this up to judges left those committed to labor legislation reasonably apprehensive about how the amendment would be deployed in litigation similar to *Adkins*. Before *Adkins*, women working in laundries made as much as \$16.50 per week, but after *Adkins*, women’s wages plummeted to as little as \$8.00 per week.<sup>73</sup> Dorothy Kenyon, who went on to litigate unsuccessful Equal Protection challenges to sex discrimination in the 1960s for the American Civil Liberties Union,<sup>74</sup> testified before a congressional subcommittee in 1929 that the ERA would be “like a blind man with a shotgun” because “[n]o lawyer can confidently state what it would hit.”<sup>75</sup> Both Florence Kelley and Dorothy Kenyon were well versed in law and attuned to the politics of the Court in this period. Before she testified against the ERA, Kelley publicly supported court packing and putting women on the Supreme Court in reaction to *Adkins*, noting that “[n]ine men cannot deal with the mass of cases that are

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70. See JILL NORGREN, *STORIES OF TRAILBLAZING WOMEN LAWYERS: LIVES IN THE LAW* 409 (2019) (ebook).

71. See *Equal Rights for Men and Women: Hearing on S.J. Res. 1 Before a Subcomm. of the Comm. on the Judiciary*, 73d Cong. 5–10 (1933) (statement of Burnita Shelton Matthews).

72. *Id.*

73. See VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE* 132 (1994).

74. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961).

75. *1929 Hearing*, *supra* note 64, at 42 (statement of Dorothy Kenyon, Attorney at Law, New York City).

constantly piled up before it,” so “[t]he court must be enlarged.”<sup>76</sup> Kelley and Kenyon publicly opposed the ERA because they knew that constitutional litigation would put the fate of working women in the hands of an all-male Supreme Court.

Kelley’s alternative to the ERA was legislation and public policy that judges should not disturb. Legislatures, not judges, would be the heroes of women’s rights. For this reason, Kelley regarded the Sheppard-Towner Act as the most important activity she had engaged in during her forty-year career.<sup>77</sup> The judiciary did not play any role in implementing the Sheppard-Towner statute, which was funded by Congress and put into action through collaboration with state and local government agencies. Indeed, judicial involvement in Sheppard-Towner was potentially destructive because judges weighed in on the statute only when the statute’s opponents brought a lawsuit challenging its constitutionality.

The lawsuit was brought by Harriet Frothingham, a member of the National Association Opposed to Women’s Suffrage (NAOWS). She argued that the federal program to reduce maternal and infant mortality violated states’ rights under the Tenth Amendment.<sup>78</sup> While the litigation did not successfully invalidate maternal mortality legislation, it is noteworthy that the suffragists’ first hard-won achievement after suffrage faced this threat of constitutional invalidation. This context explains why some women social reformers were skeptical of an ERA, despite their careers spent advancing the rights of women working in industry. Until the justices of the *Lochner* Court were replaced, judicial enforcement of the ERA was unlikely to deliver real equality for women.

## V. WORKING MOTHERS AND THE GLOBAL TURN

After the New Deal and World War II, the arguments surrounding the ERA changed. In hearings about the ERA in the 1940s, the amendment took on new meanings. New Deal legislation like the Fair Labor Standards Act required employers to pay minimum wages and overtime rates to male and female workers alike.<sup>79</sup> After an interbranch conflict about the size and

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76. Kelley, *supra* note 59, at 115.

77. See GOLDMARK, *supra* note 31, at 93.

78. See *Massachusetts v. Mellon*, 262 U.S. 447, 479 (1923).

79. See Fair Labor Standards Act of 1938, 29 U.S.C. § 203.

composition of the Supreme Court, the Court repudiated *Lochner* and *Adkins* to uphold a women's minimum wage law and other labor legislation.<sup>80</sup>

Skepticism about the ERA by women who otherwise advocated for women's equality began to subside in the 1940s. At that time, women of color also became part of the ERA's legislative history. In 1945, Mary Church Terrell, a founding member and once president of the National Association of Colored Women, testified in favor of the ERA before a congressional subcommittee: "We colored women are earnestly, hopefully praying that in the name of justice and democracy, the equal-rights amendment will be incorporated in to the Constitution of the United States."<sup>81</sup>

Terrell was a leading figure in organizing African American women for suffrage.<sup>82</sup> Terrell's support for the ERA grew out of her awareness of African American women's struggles as working mothers, as well as her engagement with global constitutional norms around women's equality. Despite Alice Paul's ambivalence about fully integrating African American women on equal terms into the 1913 suffrage parade organized by the National Woman's Party, Terrell supported the National Woman's Party by marching with her African American sorority at the back of the parade and by picketing the White House in 1917.<sup>83</sup> Three decades later, she publicly supported the ERA before Congress on behalf of women of color. But her arguments for the ERA sounded more similar to Florence Kelley's arguments against it than they did to the National Woman's Party position of the 1920s.

At a 1948 congressional hearing about the ERA, Terrell emphasized the needs of working mothers:

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80. See *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937). FDR's court-packing plan nudged the Supreme Court to flip its *Lochner*-era jurisprudence, the "switch in time that saved nine." See BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* 209–10 (1998).

81. *Equal Rights Amendment: Hearing on S.J. Res. 61 Before a Subcomm. of the S. Comm. on the Judiciary*, 79th Cong. 40 (1945) (statement of Mary Church Terrell, National Association of Colored Women).

82. For an account of Mary Church Terrell's support for women's voting rights as a leader of the National Association of Colored Women, see MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* 155–74 (2020).

83. See SUSAN WARE, *WHY THEY MARCHED* 175 (2019).

Many years ago it was customary for men in all walks of life to support their families, except, of course, those who either could not or would not conform to this rule. But today, conditions are entirely changed. Today, thousands of women are obliged to support themselves and their families entirely or help to do so. Today, women sorely need help to discharge their duties and obligations to their families which the equal-rights amendment could so easily afford.<sup>84</sup>

Terrell also specifically pointed out that the recently enacted Constitution of Japan “enables Japanese women to enjoy advantages and opportunities which are denied the women of the United States.” Articles 14 and 24 in Japan’s postwar Constitution named sex as a prohibited ground of discrimination and guaranteed equal rights to husbands and wives in marriage, respectively.<sup>85</sup>

While Terrell specifically invoked the post-World War II Constitution of Japan that the United States played a role in drafting, the hearings of the 1940s on the ERA invoked several other constitutions from around the world and the U.N. Charter. The U.N. Charter, for example, began by proclaiming a new world order committed to human rights, including “the equal rights of men and women.”<sup>86</sup> European nations that rewrote their Constitutions after World War II—West Germany, France, Italy, and others—all adopted provisions that explicitly guaranteed equal rights between women and men, as well as provisions guaranteeing that the state would protect motherhood.<sup>87</sup> Terrell had spent over a year living in France, Germany, and Italy as a young woman, and she had attended international women’s rights congresses in Europe for the better

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84. *Equal Rights Amendment to the Constitution and Commission on the Legal Status of Women: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 39 (1948) (statement of Mary Church Terrell, Founder & First President, National Association of Colored Women).

85. *See id.*; *see also* NIHONKOKU KENPŌ [KENPŌ] [Constitution], arts. 14, 24 (Japan).

86. U.N. Charter pmb.

87. *See* Grundgesetz [GG] [Basic Law], arts. 3, 6, translation at <http://www.gesetze-im-internet.de/> [<https://perma.cc/58NG-36PF>]; 1958 CONST. 1946 Pmb. § 3 (Fr.); Art. 37 COSTITUZIONE [COST.] (It.). For an extended discussion of constitutional guarantees of sex equality in post-World War II constitutions, including Germany and France, *see* Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381 (2017).

part of forty years prior to her advocacy for the ERA. She was fluent in French and German and was immersed in developments around gender and racial equality in her international engagements.<sup>88</sup>

By the 1940s, there were also a few women in Congress who supported the ERA. Republican congresswoman Katherine St. George argued that the amendment would recognize that “[m]aternity is not a disease, it is a natural and perfectly normal function.”<sup>89</sup> Therefore, maternity benefits and bonuses should be awarded to women in industry who had to be absent from work to tend to the normal function of maternity. She argued that such bonuses were no different from soldier bonuses and that her approach in no way conflicted with “the idea of equality” in the ERA.<sup>90</sup>

Nonetheless, the ERA did not attract sufficient support from the men who controlled the Judiciary Committee in the House to get a floor vote, so the House did not take it up until 1970. In the Senate, it passed twice with a two-thirds majority in 1950 and 1953 with the “Hayden rider,” which provided: “The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex.”<sup>91</sup> While a majority of the men in the Senate voted for the rider, the one woman in the Senate—Margaret Chase Smith—voted against it. The exemption was intended to allow for the forms of protective legislation that were championed by the women who opposed the ERA in earlier decades, but it risked being interpreted in a manner that would chip away at the amendment’s commitment to equal citizenship for women. Even with the Hayden rider in place, Smith ultimately voted for the ERA.<sup>92</sup>

Overall, this was a significant step forward for the ERA—it was the first time the amendment attained the support of two-thirds of one house of Congress. That it became politically

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88. See MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 72–99, 189–208, 329–58, 402–06 (1940); see also Ware, *supra* note 83, at 167–71 (recounting Terrell’s speech at the International Council of Women conference in Berlin in 1904).

89. *Equal Rights Amendment to the Constitution and Commission on the Legal Status of Women: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 7 (1948) (Statement of Katharine St. George).

90. *Id.*

91. 96 CONG. REC. 870 (1950).

92. 96 CONG. REC. 872 (1950).

possible because of a provision written to allow for the protection of mothers cannot be overlooked. What this suggests is that the success of the ERA, like the success of the Nineteenth Amendment, would depend on its responsiveness to the needs of mothers, whether explicitly expressed in the language of the ERA or not.

Attention to motherhood was vital to the ERA's forward trajectory. This insight matters because motherhood later became the rallying cry of the STOP-ERA movement in the 1970s, which was led by conservative icon Phyllis Schlafly. Schlafly's STOP-ERA movement, now depicted in the popular television miniseries "Mrs. America," stalled ERA ratification within the time period prescribed by Congress by claiming that the ERA would be bad for mothers.<sup>93</sup> In the *Phyllis Schlafly Report*, a newsletter that she mailed to a network of housewives and mothers, she wrote that the ERA would threaten "the most precious and important right of all" that only women in America possessed—"the right to keep her own baby and to be supported and protected in the enjoyment of watching her baby grow and develop."<sup>94</sup> Since "[m]ost women would rather cuddle a baby rather than a typewriter or a factory machine,"<sup>95</sup> she rejected legal changes that would enlarge women's roles in the workplace. Schlafly did not have a coherent account as to how equal opportunities for women would be bad for mothers. In fact, ERA proponents advanced equal employment opportunities to help the mothers who needed to work to support their families.<sup>96</sup> Nonetheless, the fact that Schlafly's rhetoric drew a significant following suggests that the ERA's political fate at least partially depended on whether it was perceived as responsive to mothers' needs.

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93. See generally MARJORIE SPRULL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* (2017); DONALD CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE* (2008). This narrative has been popularized in 2020 in the FX Hulu's television miniseries, *Mrs. America*.

94. Phyllis Schlafly, *What's Wrong with Equal Rights for Women?* PHYLLIS SCHLAFLY REPORT 5 (Alton, Ill.), no. 7 (Feb. 1972).

95. *Id.*

96. Martha Griffiths, the main House sponsor of the ERA in 1970, introduced the amendment on the floor by pointing out that it would help wives and widows support their families. See 116 CONG. REC. 27,999 (1970).

## VI. PRODUCTIVE POSTPONEMENT

Throughout its history, the ERA stalled at moments of uncertainty about what it would mean for mothers. Two related insights emerge from the division among the advocates for women's rights following the success of the Nineteenth Amendment. First, the interests of working mothers were central to their subsequent agendas. In the 1920s, both proponents and opponents of the ERA recognized the new roles that women occupied after World War I. Mothers, by choice or necessity, were becoming breadwinners while also caring for their children and families. As economic actors, they deserved a say in shaping the nation's future through public policy.

Second, some suffragists' opposition to the ERA—easily construed as evidence that women simply did not want equal rights—stemmed more from a distrust of the *Lochner*-era judiciary than from a resistance to constitutionalizing women's claims to equal citizenship. The constitutional order enforced by the Supreme Court in the two decades following the Nineteenth Amendment's ratification raised doubts about whether a new constitutional guarantee of equal rights would protect the legislation that was made politically possible by women's new voting power. Indeed, in a letter to Felix Frankfurter, and at a conference in the aftermath of *Adkins*, Florence Kelley proposed constitutional amendments to ensure the protection of social legislation and authorize Congress to legislate minimum wages for all.<sup>97</sup> That was her idea of an equality amendment—one that would empower the legislature to act robustly on behalf of working women, shielded from judicial interference. Legislation could offer real solutions to women's disadvantages through funding and social programs, whereas an abstract constitutional right to equality, in the hands of the *Adkins* Court, might undermine such solutions. The split among the defenders of working women over the ERA is best understood as one of strategy and prediction in a particular historical moment, rather than one of fundamental constitutional values.

This understanding of the 1920s ERA explains, in part, why the ERA was postponed for almost fifty years. It took fifty years

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97. Letter from Florence Kelley to Felix Frankfurter (May 26, 1923), in *THE SELECTED LETTERS OF FLORENCE KELLEY, 1869–1931*, 316–17 (Kathryn Kish Sklar & Beverly Wilson Palmer eds., 2009); *Conference on Minimum Wage Legislation and the Supreme Court Decision*, 10 *LIFE & LAB. BULL.* 1, 2 (June 1923).



for arguments persuasive to two-thirds of both houses of Congress to emerge, not only because women disagreed with each other after suffrage, but because these disagreements were shaped by the background conditions of male judicial power. The life-tenured incumbent federal judiciary generated uncertainty about whether the ERA would actually help women. Those who questioned the desirability of a judicially enforced ERA in the 1920s planted the seeds for a changed public discourse, particularly concerning the roles of judges versus legislatures in advancing real equality for women. The ERA that Congress adopted in 1972, and that states continue to ratify in the twenty-first century, is a transgenerational synthesis<sup>98</sup> of the Nineteenth Amendment's divided legacy.

Therefore, postponement of the ERA by its opponents in the 1920s was productive: it enabled the ERA's meaning to be reshaped and remade by continuing debates in Congress, rather than by a Supreme Court hostile to labor rights and women's advancement. Had the ERA been adopted and ratified in the period from 1923–1937, courts could easily have used it to strike down a range of legislative measures designed to overcome women's political underrepresentation and economic exploitation.

The voices of opposition to the ERA were not saying “no” to equal rights; they were saying “not yet” to the constitutional amendment in a particular legal moment. The women who opposed the “so-called equal rights amendment” championed legislative avenues toward real equality for women. Legislative change could be directly controlled by women voting for lawmakers; women's votes could only indirectly control the composition of the life-tenured judiciary. The advocates of mothers and working women therefore improved the ERA that emerged in the next generation. The ERA was not adopted, ratified, and handed over to the *Adkins* Court to interpret. Instead, the forty-eight years between the ERA's introduction and adoption in Congress saw the genesis of a 1970s ERA that was more responsive to the needs of more women, especially working women and mothers. As the ERA continues its path to ratification nearly a century after it was introduced in Congress, its living-constitutional meaning will be shaped not only by what

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98. See Julie C. Suk, *Transgenerational and Transnational: Giving New Meaning to the ERA*, 43 N.Y.U. REV. L. & SOC. CHANGE 163 (2019).

Crystal Eastman and Alice Paul wanted in 1923, but also by the legislative histories spanning generations in Congress and state legislatures.<sup>99</sup>

The 1972 ERA that has been ratified as of 2020 by thirty-eight states incorporated that piece of Florence Kelley's legacy—that is, a legislative rather than judicial vision of constitutionalism. Indeed, the women in Congress who successfully persuaded both houses of Congress to adopt the ERA from 1970 through 1972 embraced an ERA that put Congress, rather than the Supreme Court, at the center of the amendment's enforcement. Congresswoman Martha Griffiths, the leading sponsor of the ERA in the House in 1970 and 1971, emphasized Congress's power to enforce the ERA and argued that Section Three of the ERA, which put a two-year delay on its effective date, would enable Congress and state legislatures to adopt new laws to realize equality of rights.<sup>100</sup> Part of Griffiths' case for the ERA was that the Supreme Court had failed to strike down sex discrimination under the Fifth and Fourteenth Amendments. Advancing a discharge petition to bring the ERA to the House floor without a report of the House Judiciary Committee, she said, "this is not a battle between the sexes—nor a battle between this body and women. This body and State legislatures have supported women. This is a battle with the Supreme Court of the United States."<sup>101</sup> Patsy Takemoto Mink, the first woman of color ever elected to Congress,<sup>102</sup> also advanced a legislative vision of the ERA when testifying in House Judiciary subcommittee hearings in 1971. She said that further federal and state legislation would accompany the adoption of the ERA, to "eliminate situations which are discriminatory in effect."<sup>103</sup>

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99. For a narrated account of the legislative debates in Nevada in 2017, Illinois in 2018, and Virginia in 2020 leading to ratifications of the Equal Rights Amendment, see JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* 129–71 (2020).

100. See *ERA Hearings Before the H. Judiciary Subcomm.*, 92d Cong. 44 (1971) (statement of Rep. Martha W. Griffiths).

101. 116 CONG. REC. 28,004 (1970).

102. See Patsy Takemoto Mink, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/detail/18329> (last visited Nov. 7, 2020) [<https://perma.cc/Q34M-RDA9>].

103. See *ERA Hearings Before the H. Judiciary Subcomm.*, 92d Cong. 521–22 (1971) (statement of Rep. Patsy T. Mink).

Nearly fifty years later, when Nevada resurrected the ERA by ratifying it in 2017,<sup>104</sup> state senator Pat Spearman also advanced a legislative vision of the ERA in ratification debates. Quoting a Ruth Bader Ginsburg article from 1978, she explained that the ERA would lead “Congress and the state legislatures to undertake in earnest systematically and pervasively the law revision so long deferred and in the event of legislative default the courts will have an unassailable basis for applying the bedrock principle: All men and women are created equal.”<sup>105</sup> Faithful to this vision, in that same session the Nevada legislature passed legislation requiring the accommodation of pregnant workers,<sup>106</sup> prohibiting employers from firing victims of domestic violence,<sup>107</sup> and meeting the needs of breastfeeding mothers.<sup>108</sup> The legislative vision of equality for women, advanced by ERA dissenters in the 1920s, is clearly part of the ERA that twenty-first-century ratification has embraced.

#### CONCLUSION

The concept of productive postponement and synthesis illuminates the multi-generational processes that made the constitutional amendments enshrining the rights of women—from the Nineteenth Amendment to the ERA. The lens of productive postponement and synthesis lends democratic legitimacy to constitutional amendments that are made across generations. Such amendments are subject to the criticism that democratic legitimacy requires synchronous registration of a majority’s preferences.<sup>109</sup> But the long struggles for women’s rights amendments reflect the inherent challenges of pursuing

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104. Nevada State Assembly, S.J. Res. 2, 79th Sess. amend. No. 50, Mar. 22, 2017.

105. See S. Floor Sess., (Nev. 2017), [https://nvleg.granicus.com/MediaPlayer.php?view\\_id=29&clip\\_id=6871](https://nvleg.granicus.com/MediaPlayer.php?view_id=29&clip_id=6871) [<https://perma.cc/YBR5-QBY5>]; Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN’S L.J., 19, 26 (1978).

106. Pregnant Workers’ Fairness Act, S.B. 253, 79th Sess. (Nev. 2017).

107. Domestic Violence Leave Law, S.B. 361, 79th Sess. (Nev. 2017).

108. Nursing Mothers’ Accommodation Act, Assemb. B. 113, 79th Sess. (Nev. 2017).

109. Sai Prakash argues that synchronicity is an essential feature of democratic legitimacy, including in the process of amending the Constitution. State efforts to ratify the ERA decades after Congress proposed run afoul of this understanding of legitimate democratic lawmaking. See Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1294–99 (2019).

empowerment from a position of legal subordination. Getting the right to vote without the right to vote, and insisting on equal rights without having equal rights, takes abnormal amounts of time because the supermajority of incumbents who may benefit from women's subordination must be persuaded to vote for women's equal status. Under persistent conditions of male supermajorities in Congress and in state legislatures, and particularly in the life-tenured federal judiciary, women struggled from one generation to the next to determine how a constitutional amendment would affect the laws and policies they needed.

That struggle continues today, even after Virginia became the thirty-eighth state to ratify the ERA.<sup>110</sup> Because three state ratifications occurred nearly four decades after the 1979 ratification deadline originally set by Congress in 1972, and well after Congress's extended deadline of 1982, there is contemporary debate about whether the ERA should now be added to the Constitution. The three states that ratified decades after the deadline—Virginia, Nevada, and Illinois—argued in litigation that, because ratification deadlines are neither mentioned nor authorized by the Constitution, post-deadline ratifications are constitutionally legitimate.<sup>111</sup> While their lawsuit against the National Archivist was dismissed for lack of standing, the question of ERA's validity despite this decades-long ratification period is pending in Congress.

Congress has taken steps to lift the deadline and recognize the thirty-eight state ratifications completed as of 2020 as sufficient to legitimize the ERA. In February 2020, a majority of the House of Representatives voted in favor of a resolution recognizing the ERA as valid "whenever [it is] ratified" by three-fourths of the states, notwithstanding any prior ratification deadlines.<sup>112</sup> A bipartisan resolution to that effect had forty-

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110. See S.J. Res. 1, 2020 Sess. (Va. 2020); H.J. Res. 1, Equal Rights Amendment (Jan. 27, 2020). For an account of the floor debates leading to Virginia's ratification, see SUK, *supra* note 1, at 158–71.

111. *Virginia v. Ferriero*, 2021 WL 848706 (D.D.C. Mar. 5, 2021).

112. H.R.J. Res. 79, 116th Cong. (2019). The House Judiciary Committee held a hearing on the resolution on April 30, 2019. See *Removing the Deadline for the Ratification of the Equal Rights Amendment: Hearing on H.J. Res. 79 before the Subcomm. on the Const., Civ. Rts., and Civ. Liberties*, 116th Cong. (Apr. 30, 2019); *Removing the Deadline for the Ratification of the Equal Rights Amendment, Full Committee Markup of H.J. Res. 79*, (Nov. 13, 2019), available at <https://judiciary.house.gov/legislation/markups/h-j-res-79-removing-deadline-ratification->

eight sponsors in the Senate in 2020.<sup>113</sup> As of January 2021, new resolutions to remove the ERA deadline have been introduced in both houses of Congress.<sup>114</sup> On the 101st anniversary of the day on which the Senate adopted the Nineteenth Amendment, Republican Senator Lisa Murkowski of Alaska, a leading sponsor of the Senate's ERA deadline removal resolution, declared that "you cannot put a time limit on women's equality. . . Women's equality is fundamental to the American way of life, and it is far past time to be expressly recognized in the Constitution." In the same speech, she acknowledged the persistence of racial injustice and its connection to the struggle for women's equality: "Today, June 4, is not only a recognition of women's suffrage, but it is the funeral of George Floyd."<sup>115</sup> Her remarks suggest that the synthesis of the ERA's meaning is ongoing and can include the concerns of the Black Lives Matter movement.

From the Nineteenth Amendment to the ERA, women's prolonged quest drew necessary attention to working mothers' contributions to constitutional democracy in the United States and the dangers of judicial supremacy. As the courts and Congress are asked to nullify the ERA's ratification deadline, it is essential that they consider the ERA's history of productive postponement. Like the Nineteenth Amendment, the ERA has taken several generations to make because of the excessive male power that these amendments were proposed to change. Further, the disagreements that delayed the ERA's success were symptomatic of that very power imbalance.<sup>116</sup> The ERA evolved across generations to address the problems identified by its early dissenters. While this history does not fully resolve the complex legal question of whether Congress or the courts can eradicate ratification deadlines,<sup>117</sup> it does suggest that the length of the ERA struggle is a strength rather than a stain.

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equal-rights-amendment [<https://perma.cc/4JYP-DHPV>]; H.R. REP. No. 116-387 (2020); 166 CONG. REC. H1137 (2020).

113. S.J. Res. 6, 116th Cong. (2019).

114. See H.J. Res. 17, 117th Cong. (2021); S.J. Res. 1, 117th Cong. (2021).

115. 166 CONG. REC. S2718 (2020).

116. For a further elaboration of the ERA as an instrument towards equal power for women, as evidenced by the legislative history of the 1970s and the recent ratifications in 2017-2020, see Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 3 (2021).

117. This question is taken up in a constitutional law scholars' amicus brief in the pending *Virginia v. Ferriero* case. See Brief of Amici Curiae Constitutional Law

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Professors Erwin Chemerinsky, Noah Feldman, Reva Siegel, & Julie C. Suk, *Virginia v. Ferriero*, No. 1:20-cv-00242; *see also* Julie C. Suk, *Who Decides the Future of the Equal Rights Amendment?* TAKE CARE BLOG (July 6, 2020), <https://takecareblog.com/blog/who-decides-the-future-of-the-equal-rights-amendment> [<https://perma.cc/5TYU-33RX>].