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Beyond the Fourteenth Amendment: Feminist Demand for the ERA

Chenxi Zhu

Wuxi Dipont School of Arts and Science, Wuxi, China
001729@nkcswx.cn

Abstract. During the 1970s, the Supreme Court started interpreting the Constitution as granting more rights for women under the Fourteenth Amendment, namely in the cases of Reed v. Reed (1971) and Frontiero v. Richardson (1973). However, feminists were still advocating the passage of the Equal Rights Amendment (ERA) as the only way to properly secure these rights through the Constitution. This paper explores why feminist activists saw that even such decisions did not make Fourteenth Amendment enough. With the help of textual analysis of constitutional provisions, court decisions, organizational documents and Congress hearings, we will show how the ambiguity of the Fourteenth Amendment, the temporary nature of judicial victories and the lack of the status of suspect classification of discrimination by sex made equality constitutional fragile and reversible. Moreover, the arguments of the opponents of the amendment-especially the famous speech of Phyllis Schlafly on how the ERA would provide a "blank check" for the judges-showed the accuracy of the feminists' assessment. With the use of the works of Mayeri, Siegel, and Mansbridge, we show how the supporters and the opponents of the Fourteenth Amendment recognized its insufficiency and only differed in opinion of whether it was a flaw or a strength. These findings highlight the enduring tension between judicial interpretation and constitutional amendment as mechanisms for securing fundamental rights.

Keywords: Equal Rights Amendment, Fourteenth Amendment, constitutional equality, feminist movement, judicial interpretation

1. Introduction

In 1974, Phyllis Schlafly, the most prominent opponent of the Equal Rights Amendment, wrote to her supporters about the amendment that would be a "blank check" for federal judges that it would force courts to apply strict scrutiny to all sex-based laws and fundamentally disrupt traditional gender roles [1]. What Schlafly feared, feminists celebrated. However, only three years prior to that, the Supreme Court had ruled against a discriminatory law regarding the sex of the individual for the very first time in the history of America [2]. If the Supreme Court was now finally extending the rights of women according to the Fourteenth Amendment, why did the feminists still insist upon getting an amendment to the Constitution that their opponents also thought was stronger than what they already had?

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The Fourteenth Amendment, adopted in 1868, was originally meant to protect the rights of former slaves and did not include sex equality within its scope [3]. Courts for more than a century refused to interpret its Equal Protection Clause in such a way that would extend the clause to females, sustaining laws restricting women's right to work, serve on juries, and own property. Unlike the Fourteenth Amendment, the ERA, introduced in 1923 and passed by Congress in 1972, is based on the language of the constitution, which states, "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." [4] The distinction between these two constitutional provisions, the former being vague and historically unenforceable, the latter being specific and direct, forms the core of the feminist struggle. While the Supreme Court started granting rights to women under the Equal Protection Clause of the Fourteenth Amendment since the beginning of the 1970s, the feminists sought the ERA because the Constitution was too vague, the court's victories provisional, and the understanding of equality as a concept in the public consciousness required constitutional ratification rather than judicial interpretations.

In this work, we examine why feminist activists in the 1970s considered the Fourteenth Amendment inadequate for securing permanent constitutional sex equality, despite the Supreme Court's expanding interpretation of the Equal Protection Clause. A close textual analysis of constitutional provisions and legal rulings-including the Fourteenth Amendment, the ERA, and key Supreme Court decisions-is conducted to compare their explicit language and legal reasoning. Organizational documents such as NOW's Statement of Purpose and the Congressional Hearings on the ERA are examined to understand the activists' own stated motivations. Furthermore, by analyzing the opposition's arguments, particularly Schlafly's STOP ERA campaign, this paper demonstrates by contradiction that even opponents recognized the Fourteenth Amendment's insufficiency. The arguments of legal historians Mayeri and Siegel and political scientist Mansbridge are synthesized to build a comprehensive explanation of the underlying concepts of rights and power that motivated the activists.

2. Historical background of constitutional sex equality

2.1. The Fourteenth Amendment and its origins

The Fourteenth Amendment, ratified in 1868 at the end of the Civil War, was aimed at protecting the rights of the former slaves. While the language of this amendment is gender- neutral, it did not apply initially to the right of women's suffrage. Indeed, ratification of this amendment was associated with the explicit use of the word "male" in section two of the Fourteenth Amendment [3].

2.2. Early judicial interpretations

In 1875, the Supreme Court decision in Minor v. Happersett made clear the meaning of the Fourteenth Amendment [5]. Citizenship did not automatically imply the right to vote, and therefore, this amendment did not include women's suffrage. During the subsequent century before the ratification of the Nineteenth Amendment to the Constitution in 1920, the courts continued to protect the laws which denied women their employment, jury service, and property rights.

2.3. The ERA and the Civil Rights Movement

The Equal Rights Amendment was introduced for the first time in 1923 by Alice Paul, the founder of the National Woman's Party [6]. However, feminists were not united about the necessity of this

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initiative. Some of them believed that ERA could repeal protective legislation for women, and others argued that any kind of protection for women implied discrimination.

The Civil Rights Movement of the 1960s offered both the morality and legal theory through which the emerging feminist movement would work. The founding of NOW in 1966 and the congressional hearings on the ERA in 1970 represented the aim of the "full participation in the mainstream of American society." [7] Feminists came to understand, however, that this could not be accomplished solely by appealing to the Equal Protection Clause.

2.4. The Supreme Court's shift in the 1970s

During the early 1970s, the Supreme Court began to interpret women's rights under the Fourteenth Amendment more broadly. In Reed v. Reed (1971), the Court first invalidated an act of sexual discrimination but did so based on the lower standard of "rational basis." [2] In Frontiero v. Richardson (1973), a plurality of the justices maintained that sex should be considered a suspect classification and thus subject to strict scrutiny [8]. But there was no majority opinion in this case, nor any decision that women deserved the benefit of strict scrutiny. As Justice Powell explicitly stated in his concurring opinion, the Court should await the passage of the ERA before issuing its own decision [8].

3. Analysis: the insufficiency of the Fourteenth Amendment

3.1. Comparative textual analysis of constitutional provisions

Before directly analyzing why feminists considered the Fourteenth Amendment insufficient, the constitutional texts that defined this issue must be examined. The Fourteenth Amendment, ratified in 1868, established the constitutional baseline. Its broad wording-"equal protection of the laws"-permitted later reinterpretation but never explicitly mentioned women or sex discrimination [3]. Its power depended entirely on judicial interpretation.

In comparison, the Equal Rights Amendment text, passed by Congress in 1972, explicitly stated that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." [4] The language used here is more absolute, more direct, and less open to interpretation. After comparing these two constitutional texts, it becomes clear that the Equal Rights Amendment's simple and forceful mandate was precisely what activists felt was missing from the Fourteenth Amendment.

3.2. Judicial interpretation and its limits

The legal cases between the 1870s and 1970s reveal the changing constitutional understanding of women's rights. Minor v. Happersett (1875) explicitly established the original constitutional understanding [5]. The Court ruled that citizenship did not automatically include voting rights, demonstrating that nineteenth-century judges did not interpret the Equal Protection Clause as protecting women from discrimination. This decision provides a historical baseline from which later constitutional developments can be measured.

Legally, by 1971, it was apparent that Reed v. Reed signified an important change in the Court's attitude towards sex discrimination cases [2]. This was the first time the Equal Protection Clause was used to invalidate a discriminatory sex legislation by the Court. Nonetheless, the Court did not apply any higher test, applying the rational basis test to determine whether there existed a

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"reasonable" basis for legislation on sexual basis. This showed that the law viewed sex as not a suspect classification, which is strictly scrutinized. The feminist lawyers had asserted that sex should be viewed as a suspect classification. Nonetheless, the Court chose to ignore the feminist lawyers' claim. The decision still allowed for reasonable and rational explanations of laws on sexual basis; there was no recognition of equality between men and women or creation of strict classifications.

The case of Frontiero v. Richardson (1973) extended the precedent set in Reed, with a plurality of Justices holding that gender ought to be a suspect classification [8]. The Court was divided with only four Justices concurring on this opinion. Powell stated explicitly in his concurring opinion that the Court should leave the matter for the ERA and not make a broad pronouncement. He said that "democratic processes are debilitated when sensitive issues of broad social and political concern are resolved by the judiciary at the same moment that the matter is being considered through constitutional procedures." It became evident that the Court could not agree on the standard for gender discrimination cases and this reflected the uncertainties of the Fourteenth Amendment.

3.3. Feminist activism and congressional engagement

The position of the National Organization for Women regarding law reform was stated in its "Statement of Purpose" in 1966. Even though it predates the 1970s, it was still an important document. Indeed, in this "Statement of Purpose" it is argued that the law that was there at that point did not work for women. While the ERA is not mentioned here, the statement about "the right to enjoy the rights and privileges of citizenship" and "an equal partnership with men" laid the ideological ground for the ERA.

This statement extended to the congressional hearings on the ERA before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary in 1970 [9]. These hearings took place two years before Congress passed the ERA and included over 793 pages of testimony from feminist lawyers, constitutional scholars, and activists. The sheer volume of testimony is itself evidence that feminists kept returning to Congress due to the lack of sufficient constitutional protection for women's rights. The key argument from feminists was that the Fourteenth Amendment's Equal Protection Clause was "vague" and dependent on "changing judicial interpretation." Witnesses argued that the ERA would provide a clear and explicit constitutional command that courts could not ignore. They also framed the ERA as a democratic solution-a constitutional amendment passed by Congress and ratified by the states- versus court-dependent litigation. This reframing was not only legally revolutionary but also politically and democratically transformative.

3.4. The opposition's inadvertent confirmation

During the 1970s, not everyone supported the Equal Rights Amendment. Some viewed it as a threat to the status quo. The STOP ERA letter from Phyllis Schlafly to her supporters revealed the concerns from opponents that the ERA would be too powerful-that it would force courts to apply strict scrutiny to all sex-based laws [1]. Schlafly's letter reveals that opponents of the ERA also believed the Fourteenth Amendment was insufficient-but they saw this as a feature, not a bug. They believed the Equal Protection Clause was weak enough that it would not disrupt traditional gender roles. Schlafly and other opponents understood that the Fourteenth Amendment had not required courts to strike down most sex-based laws. They feared the ERA would change this by creating an explicit constitutional command. The opposition's fear that the ERA would be a "blank check" for judges ironically proves feminists were right: the Fourteenth Amendment's Equal Protection Clause

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was not doing enough to protect women from discrimination. Schlafly's argument shows that both sides understood the Fourteenth Amendment was insufficient, but for different reasons: feminists believed the insufficiency was a problem that required fixing, while opponents thought this was a feature that preserved traditional gender arrangements.

4. Scholarly perspectives on constitutional equality

Scholars have recognized the limitations of relying on judicial interpretation for securing women's constitutional rights, providing evidence that feminists had good reason to demand the ERA.

4.1. Litigation and its discontents: Mayeri

In Reasoning from Race: Feminism, Law, and the Civil Rights Revolution (2011), Serena Mayeri looks into how feminist lawyers employed arguments from the Civil Rights Movement cases to mount their attack on discrimination based on sex by means of the Equal Protection Clause [10]. In this case, her main concern is that though the decisions made in cases like Reed v. Reed and Frontiero v. Richardson were great advancements in terms of constitutional law, they did not remove all ambiguities since the future interpretations of the Constitution might differ.

4.2. Constitutional meaning and social movements: Siegel

In her work "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," Reva B. Siegel discusses how constitutional meaning emerges from the interplay of social movements and the courts [11]. Her objective is to illustrate how feminist groups have shaped the Supreme Court's concept of equality despite the constraints of depending solely on court interpretation of constitutional rights. This view implies that constitutional rights are strengthened by political activism; however, activists still sought constitutional guarantees due to the potential instability of interpretations by courts.

4.3. The Permanent Guarantee: Mansbridge

In her book, Why We Lost the ERA, Jane J. Mansbridge explores the reasons why the ERA movement became one of the most significant women's movements during the 1970s [12]. The author wants to clarify the reasons for which the supporters perceived court rulings as incapable of protecting the permanent equality of women. Mansbridge believes that interpretations made by the courts can vary from judge to judge and depending on the situation, and thus, the supporters saw ERA as a constitutional amendment necessary beyond other legal amendments.

4.4. Synthesis and contribution

Together, Mayeri, Siegel, and Mansbridge offer an explanation for the feminists' demand of the ERA. Mayeri proves that litigation was tentative and fragile, while Siegel proves that although constitutional meanings change in connection with social movements, judicial interpretation is still fragile. Finally, Mansbridge proves that ERA supporters saw the ERA as a necessary constitutional guarantee. Both Mayeri, Siegel, and Mansbridge argue that the judicial wins of the Fourteenth Amendment were not enough to achieve permanent constitutional equality of women.

This paper offers an addition to the existing scholarship by synthesizing legal history and political activism to prove that the inadequacy of the Fourteenth Amendment was known by both

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proponents and opponents of the ERA. Although such scholars as Mayeri, Siegel, and Mansbridge have analyzed the particular aspects of this history, no one has analyzed how the arguments of the opposition itself, like Schlafly's belief that the ERA would serve as a "blank check" for judges, accidentally confirmed the feminists' arguments.

5. Conclusion

Feminist activists in the 1970s recognized the importance of cases like Reed v. Reed and Frontiero v. Richardson, but their reliance on the varying interpretations of the Fourteenth Amendment was precisely why they demanded a more absolute, stable, and powerful form of constitutional change-the Equal Rights Amendment. Both primary and secondary sources provide evidence suggesting a clear legal and political insufficiency of the Fourteenth Amendment: the lack of "suspect classification" for women, the fragility of judicial victories, and the recognition by both supporters and opponents that the ERA would create stronger constitutional protections. This moment revealed a fundamental truth about constitutional law: rights that come solely from judicial interpretation are inherently fragile.

This paper has proven that the decision by feminists to demand the ERA was not a strategic one, but rather a necessary one given the structural weaknesses of the Fourteenth Amendment. The comparative textual analysis has shown that the explicit language of the ERA offered a clear and direct mandate which the vague "equal protection" clause of the Fourteenth Amendment could not. Judicial precedents from Minor v. Happersett to Frontiero v. Richardson have proved that courts were unwilling to give sex discrimination the strict scrutiny necessary for constitutional equality. Moreover, the opposition itself confirmed the argument of the feminists through Schlafly's fear that ERA will become a "blank check."

The results of this study are laden with great significance within the context of contemporary constitutional discussion. As discussions on interpretation of constitutions become a part of lawmaking in America, it is worth remembering that rights established only through judicial decisions can never be anything but tentative. The failure of the ERA campaign should not negate the legitimacy of the feminists' constitutional analysis. Further studies could consider whether there are lessons from the ERA experience for contemporary constitutional reform movements.

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