New Jersey Women Lawyers Association 2020 Scholarship Program Essay

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On January 15, 2020, both chambers of the Virginia legislature voted to approve the Equal Rights Amendment ("ERA"). With this approval, Virginia became the thirty-eighth state to ratify the ERA; however, this threshold vote occurred thirty-eight years too late. As a second-year law student in 2020, I have had the unique experience of learning the law at the same time as a contentious Supreme Court confirmation hearing, a Special Counsel investigation, and presidential impeachment hearings. But only one month after reading *Bradwell v. State* and learning about the Equal Protection Clause in my Constitutional Law class, nothing felt quite as personal as witnessing the long-awaited ratification of the ERA by a thirty-eighth state. Despite the advancements towards gender equality since Congress approved the ERA in 1972, the amendment remains a necessity for safeguarding women's rights as equal citizens in the United States.

One argument against ratification of the ERA is that the Fourteenth Amendment already protects women from discrimination based on sex. In my Constitutional Law class, we discussed the Fourteenth Amendment's transformative impact on American jurisprudence. The Fourteenth Amendment protects American citizens with a trilogy of rights, including the guarantee of equal protection for all persons under the law against the States, and later against the federal government when enumerated in the Bill of Rights.[2] The Fourteenth Amendment was ratified in 1868, along with the other Reconstruction Amendments, as a direct response to racial discrimination following the Civil War. Sex discrimination was rampant at the time of the Fourteenth Amendment's ratification, but it was not the aim of the amendment. Legal scholars debated about whether the Equal Protection Clause should even apply to sex discrimination. In 1873, five years after the ratification of the Fourteenth Amendment, the Supreme Court held in *Bradwell v. State*, that under the privileges and immunities clause of the Fourteenth Amendment, women did not have a right to practice law in a state's court.[3] The Court refused to find the right to practice law as a privilege worthy of constitutional protection.[4] Justice Bradley's concurrence relied on archaic gender roles and debated whether the expansion of a woman's right to pursue professional careers would result in the death of the traditional family.[5] Justice Bradley argued, "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[6]

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[2] U.S. Const. amend. XIV, § 1.

[3] *Bradwell v. State*, 83 U.S. 130 (1873).

[4] *Id.* at 139.

[5] *Id.*

[6] *Id.* at 141 (Bradley, J., concurring).

It was not until the 1970's that the Supreme Court recognized the application of the Equal Protection Clause to sex-based discrimination and developed a test of intermediate scrutiny.[7] Similar to the context of the ratification of the Fourteenth Amendment, the enactment of the Civil Rights Act of 1964 was a result of the Civil Rights Movement's fight for racial equality.[8] Title VII of the Civil Rights Act prohibits employers from discriminating based on race, color, religion, sex, or national origin.[9] Legislative history of the Civil Rights Act reflects the main intention of the legislation was to combat racial discrimination, with the addition of sex discrimination as a last-minute measure.[10] The importance of the Civil Rights Act and Fourteenth Amendment cannot be overstated in the fight for racial equality, but their legislative histories do not place the same emphasis on gender equality.

Opponents of the ERA argue that the existing protections in the Civil Rights Act and Fourteenth Amendment make the ERA redundant. But the uncertainty of judicial interpretation and lasting legislation make the ERA a necessity. All it takes is one decision to overturn decades of precedent. The composition of the Supreme Court is changing, and just as the Court evolved its test from *Bradwell v. State* to *Craig v. Boren,* without the certainty of a Constitutional Amendment there is no guarantee that women and men will always be protected from discrimination based on sex.[11] Even more precarious than Supreme Court decisions is the repeal of context-specific legislation. In a divisive political climate, the threat of Congress repealing fundamental Civil Rights legislation is an important reason why gender equality should be enshrined in the Constitution. It is the only way to ensure the protection of future generations from sex discrimination.

Since women gained the right to vote one hundred years ago, women in the United States have made considerable strides toward gender equality, Women receive approximately 57% of the bachelor's degrees in United States institutions.[12] They earn 48.5% of all law degrees.[13] Most recently, women have reached gender parity in the college-educated labor force.[14] Despite this growth, women make up only 5% of Fortune 500 CEOs. The proportion of women in state and federal government positions continues to grow with each election, but men still occupy the vast majority of seats. Women hold only 23.7% of seats in Congress (126/535).[15] When examining

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[7] *Craig v. Boren,* 429 U.S. 190, 1999 (1976) (requiring the government to prove that sex-based discrimination serves an important government interest and is substantially related to furthering this interest).
[8] Bridget L. Murphy, Note, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 939 (2018).
[9] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20002-2000e-17 (2012).
[10] Murphy, *supra* note 8, at 947.
[11] Alexandria C. Dean, Article, *One State Away: The Need for Ratification of the Equal Rights Amendment in a Justice Kavanaugh, Conservative Court Era*, 10 WAKE FOREST J.L. 1 (2019).
[12] https://www.washingtonpost.com/local/education/the-degrees-of-separation-between-the-genders-in-college-keeps-growing/2019/10/25/8b2e5094-f2ab-11e9-89eb-ec56cd414732_story.html.
[13] Judith Warner, Norah Ellmann, & Diana Boesch, *The Women's Leadership Gap*, AMERICAN PROGRESS (Nov. 20, 2018 9:04 AM), https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/.
[14] Richard Fry, *US. Women Near Milestone in the College-Educated Labor Force*, PEW RESEARCH CENTER (June 20, 2019) https://www.pewresearch.org/fact-tank/2019/06/20/u-s-women-near-milestone-in-the-college-educated-labor-force/.
[15] *Women in Government: Quick Table*, CATALYST (Dec. 9, 2019) https://www.catalyst.org/research/women-in-government/.

the intersectional identities of the women elected to Congress, there is even less diversity. Of the 126 female members of Congress, just 47 of them were women of color.[16] Only three women elected to Congress in 2018 identify as LGBTQ.[17] Similar to the federal government, 28.9% of state legislature positions belong to women.[18] Only nine governors across the country are women.[19] Despite the advancement of women in education and the workforce since 1920, the gender pay gap, the #MeToo movement, and the disparity in political representation demonstrate that women are far from complete equality.

The argument that the ERA does not give women any rights that they do not already have is not persuasive in the greater context of the fight for women's rights. For many women, including myself, true equality means recognition under the law. The need for the ERA is as much symbolic as it is practical. The ERA 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." The Constitution expresses the most fundamental values of our democracy. As our country continues to change, we have amended the Constitution to reflect how our values have changed for the better, like in the Reconstruction Amendments. Now is the time to amend the Constitution to establish that men and women deserve to be treated as equals under the law.

After reading about the Virginia legislature's recent vote, it was difficult not to think about the Supreme Court's infuriating opinion in *Bradwell v. State*. Myra Bradwell studied law while completing an apprenticeship with her husband, despite being interrupted by the birth of her four children and her involvement in caring for wounded soldiers during the Civil War.[20] In 1869, Bradwell passed the Illinois bar.[21] Despite her qualifications, the Illinois Supreme Court denied her application because she was a woman.[22] Bradwell took her case all the way to the Supreme Court, only to be denied once again because the Court did not recognize the right to practice law as one of the Constitutional privileges and immunities of women as citizens.[23] When I read this case in Constitutional Law, it made my blood boil. I could not imagine being denied the opportunity to practice law simply because I am a woman. All because the Constitution did not explicitly guarantee me that right. The Equal Rights Amendment is a necessity because for future generations, no man or woman should ever be prohibited from pursuing their dream on the basis of sex.

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[16] *Id.*
[17] Warner, Ellman, & Boesch, *supra* note 13.
[18] Warner, Ellman, & Boesch, *supra* note 13.
[19] Warner, Ellman, & Boesch, *supra* note 13.
[20] Jane M. Friedman, *America's First Woman Lawyer: The Biography of Myra Bradwell* (1993) (ch.1), *reprinted in* 28 VAL. U. L. REV. 1287, 1288 (1994).
[21] *Id.*
[22] *Id.* at 1291.
[23] *Bradwell*, 83 U.S. at 130.