Erin Stidham
NJWLA Scholarship Essay
January 31, 2020

In Favor of the Equal Rights Amendment

In the wake of the #MeToo movement, the women's march, and unprecedented numbers of women running for and winning government offices, there has been a significant renewed interest in the Equal Rights Amendment ("ERA" or "the Amendment"). First proposed in 1923, and passed by Congress in 1973, the ERA was thought of as a way to both enshrine hard-earned victories for women, and to push the constitutional jurisprudence forward to guarantee even more protection for women.[1]

Despite its promise, the ERA was not ultimately ratified by enough states within the timeframe designated by Congress.[2] While some anti-feminist groups argued against the ratification of this amendment, differences in feminist ideology contributed significantly to the Amendment's failure. Among the anti-ratification arguments were included: that women would be forced to participate in the draft, that women would lose their respect or honor as primary caregivers, that the ERA would primarily benefit men rather than women, and that the amendment would lead to greater protections for gay and transgender individuals. Despite the original deadline having passed, Virginia became the 38th and final state needed for ratification in January of 2020.[3] Attorney generals from three states have filed a lawsuit to void the

---

[1] Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 939 (2018).

[2] *Id.* at 942.

[3] Eileen Filler-Corn et al., *Virginia Just Passed the ERA. Here's Why We Still Need It.*, WASH. POST, (Jan. 27, 2020), https://www.washingtonpost.com/opinions/2020/01/27/virginia-just-passed-era-heres-why-we-still-need-it.

congress-imposed timeframe, arguing that the legislature cannot constitutionally impose timeframes for amendments.[4]

As the lawsuit works its way through the courts, it is important to remember why the ERA is crucial for the advancement and equality of women. First, the ERA is necessary as a bulwark against backsliding in feminist gains. The past several decades have seen a number of important legislative advancements toward achieving gender equality under the law. Importantly though, these advancements are merely statutory—thus, under the current level of constitutional protection, legislation concerning equal pay, maternity leave, domestic violence, and other issues affecting gender equality could be repealed by a simple majority.

Current Equal Protection jurisprudence holds gender to be a mere quasi-suspect classification, subjecting laws that discriminate on the basis of sex to intermediate or heightened scrutiny, while race, religion, national origin, and alienage classifications are subjected to strict scrutiny—a far more challenging bar to clear. This lowered standard of scrutiny for laws that treat men and women differently is simply not justified. There is no clear factual basis for believing that women are at less risk of being discriminated against than ethnic and religious minorities are. Absent such a showing, the current jurisprudence reflects an unacceptable level of tolerance of gender-based discrimination, or, at very least, an attitude that gender discrimination is somehow less constitutionally offensive than race discrimination. The enactment of the ERA would remedy this.

---

[4] Patricia Sullivan, *Herring, Other State AGs File Lawsuit Demanding Addition of the ERA to the Constitution.*, WASH. POST, (Jan. 30, 2020), https://www.washingtonpost.com/local/virginia-politics/era-lawsuit-herring/2020/01/30/027eb956-42dc-11ea-aa6a-083d01b3ed18_story.html.

While intermediate scrutiny is, indeed, too lenient a standard for gender-discriminatory laws, it is also important to recognize that it would only take a majority of U.S. Supreme Court Justices, ruling on a single case, to lower it. While a decision to lower the level of scrutiny for gender-based discrimination might be difficult to imagine, it has, in fact, been done before. Women were initially given strict scrutiny on their claims in *Frontiero v. Richardson*,[5] but only three years later the standard was reduced to intermediate scrutiny.[6] Having a constitutional amendment explicitly protecting equality for the sexes would not only raise the scrutiny standard for laws that discriminate based on sex, but it would prevent further reduction in the standard.

Moreover, if enshrined as a constitutional interest, gender equality would be protected when weighing competing interests, such as in religious freedom disputes and abortion laws. For example, the ERA could have changed the outcome in the historic case of *Burwell v. Hobby Lobby Stores, Inc.*,[7] where the Court struck down a regulation that required employers to provide health insurance coverage for certain forms of birth control. The Court considered only whether a corporation's religious rights were burdened. Neither considerations of how the decision would affect women's access to healthcare, nor whether Hobby Lobby's policy constituted sex-discrimination were accorded comparable import to Hobby Lobby's religious interest. Enactment of the ERA would permit a fairer balance of these conflicts in the future.

Additionally, the ERA would open up pathways to enforce other legal rights centered on gender equality. For example, the federal right of action to sue sexual harassers in court was

---

[5] 411 U.S. 677 (1973)

[6] *See* Craig v. Boren, 429 U.S. 190 (1976).

[7] 573 U.S. 682 (2014).

struck down as outside of congress's power, in *United States v. Morrison*.[8] Given that the ERA's purpose is analogous to the Civil War Amendments, its enactment would arguably give Congress the power to enact additional appropriate legislation to properly effect the Amendment's purposes. Under such power, federal claims against sexual harassers—and other similarly-aimed laws—would fall much more squarely within the legislature's powers.

Second, the ERA would not only grant greater constitutional protection for women, but might also provide greater constitutional protection for gay and transgender individuals. Though certainly not universal, some Circuits have recognized claims brought by transgender plaintiffs as "discrimination on the basis of sex."[9] Passage of the ERA, then, would extend the standard of strict scrutiny for laws that treat gay and transgender persons differently than the rest of the population in at least those Circuits. Thus, the ERA could prevent discriminatory laws, regulations, and executive orders, such as the transgender military ban, from going into effect.

Third, the ERA ought to be enacted because most Americans already believe that it has been. A 2001 poll showed that nearly three-quarters of Americans already believe the ERA—or something suitably like it— exists.[10] Americans are consequently in the precarious position of relying on protection they do not have. Personally, I was shocked that nowhere in my high school history classes, undergraduate degree in history, or first semester of law school did I learn

---

[8] 529 U.S. 598 (2000).

[9] Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 742 (E.D. Va. 2018); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); Dodds v. United States Dep't of Educ., 845 F.3d 217 (6th Cir. 2016).

[10] ROBERTA W. FRANCIS, THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS 9 (2019), https://www.alicepaul.org/wp-content/uploads/2019/05/ERA-FAQs-updated-2_19.pdf.

that women were not afforded the same constitutional protections granted to racial, ethnic, and religious minorities.

Some groups argue that there simply is no need for an Equal Rights Amendment. Specifically, they point to the fact that women's growing representation in Congress, at 19%, and in the Senate, at 25%, indicates that women are being represented in decision-making bodies. These groups, of course, are conceding more than they think. Another way to phrase the claim 19% of Congress is female is to say that there are four times as many men introducing and voting on federal legislation than there are women. Similarly, for every woman in the Senate voting on the appointment of a federal judge (including Supreme Court Justices) or a cabinet position, there are three men voting. While the Equal Rights Amendment would not directly address these issues, it is clear that these statistics show that even with legislative protection, women are not being represented adequately. Similar statistics show that women of color are more severely underrepresented in legislative bodies, as well as leadership positions in the private sector.

Other arguments against the ERA suggest that it would overturn laws that were written specifically to help women. In the 1970s, these arguments centered around concerns that the ERA would abolish social security support specifically for wives and widows, or require women to participate in the draft. However, this argument is not constitutionally sound. When striking down laws that make gender distinctions (as the passage of the ERA certainly would enable), the laws in question could always be re-written to apply to both genders, as an alternative to simply being eliminated. In the case of social security, social security support could be extended not just to wives, but to all spouses, and to both widows and widowers. As to the draft, progression has led to the erosion of all meaningful distinctions amongst genders and what they are allowed to do in the military. Women could serve in combat roles, or they could serve in other capacities, just

as men who do not fit specific physical parameters can serve in non-combat roles. Or, the ERA could bring about striking down the draft altogether.

Other arguments made primarily in the early days of rallying against the ERA were that the Amendment could be read expansively to protect individuals who did not conform to sex stereotypes.[11] Primarily, critics were concerned with transgender individuals using bathrooms that conform with their gender identities, as well as granting equal rights, such as marriage to gay individuals. These critics were, and are, right about what banning discrimination based on sex entails. However, with major advances in LGBTQ+ advocates in gaining public support, this should be an argument for, not against, the ERA.

It is clear that equal rights should be enshrined in the American Constitution. Not simply for our status right now, but for future generations. Without constitutional protection, women's position is tenuous, which renders them not-full participants and citizens. We should be part of a society that has in its most fundamental document an acknowledgment that women and men are equal.

[11] These arguments are not limited to the 1970s. Phyllis Schlafly, who was instrumental in slowing down the ratification of the ERA, continued advocating against it until her death in 2016. *See* Phyllis Schlafly, *Equal Rights for Women: Wrong then, Wrong Now,* L.A. TIMES (Jan. 27, 2009), https://www.latimes.com/la-op-schafly8apr08-story.html.