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Is the Equal Rights Amendment "Lost?": A Contemporary Analysis of the ERA

Lila Zarrella
Boston College, zarrelll@bc.edu

IS THE EQUAL RIGHTS AMENDMENT "LOST?": A CONTEMPORARY ANALYSIS OF THE ERA

LILA ZARRELLA [*]

Abstract: In January of 2020, Virginia became the thirty-eight state to ratify the Equal Rights Amendment (ERA). A Constitutional amendment becomes law when three-quarters of the states—or thirty-eight out of fifty—ratify the amendment. To this day, the ERA remains in limbo and as of yet has not been added to the Constitution due to numerous controversies surrounding its ratification—principally, the deadline for ratification passed in 1982, and five states have rescinded their ratification of the ERA. This paper seeks to examine the current state of the ERA from an analysis of the ratification process as well as the best ways to achieve gender equality under the law. It seeks to explore whether the ERA is legally viable as well as if it is politically prudent.

Introduction

In 1972, both houses of the U.S. Congress passed the Equal Rights Amendment (ERA), and sent it to the states for ratification. Within five years, thirty-five states had ratified the Amendment, three states away from meeting the requisite thirty-eight for full ratification. Despite initial momentum, by the extended deadline for ratification in 1982 the number of states that had ratified the ERA remained at thirty-five, marking a legislative defeat for the Amendment. Four years later, political scientist Jane Mansbridge published her seminal work, *Why We Lost the ERA*, which served as a critical evaluation of the ratification period and the factors that ultimately led to the ERA's spectacular defeat. Mansbridge contended that the ERA is "lost," but recent developments reveal a reemergence of the "lost" Amendment.

Since the 1977 impasse, twenty-four states have added their own equal rights amendments to their state constitutions and over ten of the "unratified" states have introduced bills to ratify the original ERA. Nevada and Illinois became the thirty-sixth and thirty-seventh states to ratify the ERA in 2017 and 2018, respectively.[1] On January 27, 2020, Virginia

[*] Lila Zarrella is a fourth-year student at Boston College studying Political Science and History. She is interested in the intersection of gender, sexuality and the law as well as the interplay between law and politics. She would like to express special thanks to Professor Kay Schlozman and her Inequality and Politics seminar for bringing attention to this issue as well as promoting lively and illuminating discussions.

[1] Deborah Machalow, "The Equal Rights Amendment in the Age of #MeToo," *DePaul Journal for Social Justice* 13, no. 1 (2019): 8.

became the thirty-eighth state to ratify the Equal Rights Amendment (ERA), almost fifty years after the ERA originally passed in both houses of Congress and the ratification process began.[2] This ratification marked an important milestone for the ERA, serving as the moment when three-fourths of the states ratified the Amendment, reaching the mandatory minimum for an amendment to be added to the Constitution.

Over two years later, the Constitution remains untouched. The National Archivist refuses to add the Amendment officially due to controversy surrounding both the deadline for ratification and the attempted rescission by several states. The ERA finds itself at another impasse. A 2020 Pew Research Center report found that 78% of U.S. adults, including majorities of both men and women as well as Democrats and Republicans, would at least "somewhat favor" adding the ERA to the Constitution. Yet, the ERA remains in limbo as legal questions regarding ratification are settled in the courts. In the same Pew report, however, a plurality of ERA supporters (49%) and a majority of ERA opponents (69%) believe that adding the Amendment to the Constitution "would not make much of a difference" for women's rights.[3]

This paper seeks to examine the nuances of the ERA and the ratification process in the twenty-first century. Given the expired ratification deadline and the rescission of five states, would the ratification of the ERA be a fair representation of the will of the people and the broader ratification process? Moreover, in light of the belief that the ERA would have little impact on women's rights, it is worth examining the likely effects of the Amendment in the twenty-first century, as well as if the language from 1972 provides the best basis for gender equality under the law today. This paper argues that, as currently situated, the ERA does not represent the ideal opportunity to enshrine gender equality under the law due to the controversy surrounding its ratification and the language of the Amendment itself, but perhaps represents the most practical and feasible opportunity to guarantee gender equality.

Back from the Dead(line): Extension or Expiration

[2] Timothy Williams, "Virginia Approves the E.R.A., Becoming the 38th State to Back It," *The New York Times*, 15 January 2020, sec. U.S., https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html.
[3] Juliana Menasce Horowitz and Ruth Igielnik, "A Century After Women Gained the Right To Vote, Majority of Americans See Work To Do on Gender Equality," *Pew Research Center's Social & Demographic Trends Project* (blog), 7 July 2020, https://www.pewresearch.org/social-trends/2020/07/07/a-century-after-women-gained-the-right-to-vote-majority-of-americans-see-work-to-do-on-gender-equality/.

Much of the current debate regarding the state of the ERA centers around the question of whether Congress can, or should, amend the original 1982 deadline. After Nevada ratified the Amendment in 2017, its legislature firmly asserted that this ratification was not symbolic, and argued that Congress could simply waive the deadline once three-fourths of the states ratified the Amendment.[4] In early 2020, however, as Virginia began engaging in the ratification process, the Department of Justice under former President Trump issued a memo arguing that because the deadline for ratification had expired, the ERA could "not become part of the Constitution, and the Archivist could not certify its adoption," so ERA supporters would have to begin the entire process anew.[5] Ultimately, both arguments have merit, and the issue regarding the deadline is a complicated one, with crucial legal and political aspects worth considering.

Congress initially included a seven-year deadline for the ratification of the ERA, mirroring prior amendment proposals from past decades. In 1977, however, ERA proponents pushed for a deadline extension; Representative Elizabeth Holtzman introduced a bill to extend the deadline to expire in June of 1982, adding three years to the ratification period. Holtzman's bill passed both the House and the Senate with a simple majority and was sent to the desk of President Carter, as ERA proponents thought that the President's signature would help legitimize the extension. Ultimately, Carter signed H.J.Res 638, but asserted that his signature was superfluous, reaffirming Congress's sole responsibility in the amendment ratification process.[6] Justice Ginsburg viewed the deadline extension as a "middle ground," as it reinforced the relevance and importance of the ERA without giving states an indefinite period for ratification.[7] This original debate offers insight to the current question surrounding the deadline of the ERA and serves as a salient example of past congressional action and logic. Many supporters of the current "three-state strategy" argue that because Congress has

[4] Gerard N. Magliocca, "Buried Alive: The Reboot of the Equal Rights Amendment," *Rutgers University Law Review* 71, no. 2 (2018): 634.
[5] Qtd. in Amber Phillips, "The Never-Ending Fight over Whether to Include the Equal Rights Amendment in the Constitution," *The Washington Post (Online)*, 31 January 2022, sec. Politics, https://www.proquest.com/docview/2624041233/citation/8139901394E64912PQ/19.
[6] Jessica Neuwirth, *Equal Means Equal: Why the Time for an Equal Rights Amendment Is Now* (New York, NY: The New Press, 2015), 96.
[7] Jon O. Shimabukuro, "Equal Rights Amendment: Close to Adoption Note," *Equal Rights Amendment: Close to Adoption*, 2 July 2018, 3.

already extended the deadline for ratification in 1978, Congress has the power to do so again in 2023.[8]

In order to assess the viability of the ERA, many legal scholars have returned to the text of the Constitution and prior legal precedent. Article V of the Constitution, which discusses the amendment process, offers little insight into procedural matters of the ratification process, such as the ability to impose a deadline or even a suggested time period for ratifying.[9] Given this immense responsibility with nebulous procedural regulations, a few influential Supreme Court cases have guided the ratification process in Congress. In the 1921 case *Dillon v. Gloss*, the Court determined that an amendment should be ratified in a "sufficiently contemporaneous" time period following its proposal to ensure the reflection of "the will of the people in all sections at relatively the same period."[10] Here, the Court viewed the proposal and ratifications not as two separate processes, but as one closely interrelated act. In 1939, the Court expanded on factors that determine whether or not an amendment remains "sufficiently contemporaneous" when they noted that there are a wide variety of "political, social, and economic" factors that can influence the relevance of the amendment, but maintained that the specifics should be left up to Congress. Justice Ginsburg argued that these cases "bracketed" the issues of procedural fairness, with the Courts endowing Congress with the responsibility to assess the contemporaneity of each amendment during the ratification process.[11]

Given these two influential cases, a pertinent question regarding the deadline extension for the ERA is, therefore, whether or not a fifty-year-old amendment can be considered "sufficiently contemporaneous." Most proponents of the ERA point to the case of the Twenty-Seventh Amendment, colloquially known as the Madison Amendment, which was ratified 203 years after it was initially proposed in 1789.[12] The Congressional Research Service has established that the ratification of the Madison Amendment does in fact bolster

[8] Lindsley Armstrong Smith and Stephen A. Smith, "Keeping Hope Alive: A Case Study of the Continuing Argument for Ratification of the ERA," *Frontiers: A Journal of Women Studies* 38, no. 2 (2017): 174, https://doi.org/10.5250/fronjwomestud.38.2.0173.
[9] Shimabukuro, "Equal Rights Amendment: Close to Adoption Note," 3.
[10] Qtd. in Allison L Held, Sheryl L Herndon, and Danielle M Stager, "The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States," *William & Mary Journal of Race, Gender, and Social Justice* 3, no. 1 (1997): 118-119.
[11] Shimabukuro, "Equal Rights Amendment: Close to Adoption Notes," 3.
[12] Held et al., "The Equal Rights Amendment," 114.

the argument for ratification of the ERA.[13] However, other legal scholars find this argument less convincing. Scholars first point out that the Madison Amendment did not contain a time limit for ratification, whereas the ERA has faced two such limits already. Additionally, Brandon Denning and John Vile highlight that "courts and most members of Congress have tended to treat the 27th as a 'demi-amendment,' lacking the full authority of the 26 that preceded it."[14] Furthermore, scholars and politicians alike have pointed out the dangerous precedent the Twenty-Seventh Amendment has set, and how the ratification of the ERA would reinforce such precedent. If the long-forgotten Twenty-Seventh Amendment and the once-expired ERA are to be ratified, "then why cannot States ratify other long-forgotten amendments?" asked Senator William Roth.[15] Some scholars wonder if the ratification of the Twenty-Seventh Amendment has made the ratification process into a perpetual, never-ending one, and believe that the ratification of the ERA would confirm this. As a result, many scholars and politicians alike question whether the history and implications of the Twenty-Seventh Amendment should encourage or worry ERA proponents.

Another important aspect of the historic debate surrounding the extension of the ERA in the late 1970s, as well as the renewed debate today, has been the location of the deadline within the proposing clause of the Amendment, as opposed to the text of the Amendment itself. As legal scholars and proponents of the ERA have noted, states only ratify the text of the amendment, not any proposing clauses, which are purely legislative and subject to the determination of Congress.[16] Many of the congressional supporters of the ERA argued that when they initially accepted the seven-year ratification deadline in the proposing clause, they viewed the addition as "customary," and not anything worth disputing. Legal scholars, such as Justice Ginsburg, concur, and argue that the location of the deadline in the preamble "entails a determination qualitatively different from agreement on the substantive content of the amendment."[17] However, those opposed to the Amendment point out that it only passed in Congress because it contained such a deadline. Judge Robert L. Wilkins argued in 2022

[13] Smith and Stephen A. Smith, "Keeping Hope Alive," 174.
[14] Brannon P. Denning and John R. Vile, "Necromancing the Equal Rights Amendment," *Constitutional Commentary* 17, no. 3 (2000): 600.
[15] Qtd. in Magliocca, "Buried Alive," 639-640.
[16] Held et al., "The Equal Rights Amendment," 115.
[17] Ruth Bader Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time Observations," *Texas Law Review* 57, no. 6 (1978-1979): 923.

that if the deadline is removed, "wouldn't then the result be that we invalidate the proposed amendment as opposed to just striking the deadline?"[18] This controversy over the location of the deadline speaks to issues that ERA proponents must grapple with, namely the legality of a deadline extension, but also the political and ethical considerations of removing the deadline.

Those opposed to the deadline extension find the "proposing clause" argument without merit, arguing instead that the entire text of the Amendment, including the proposing clause, served as a contract of sorts, one that both the states and Congress should uphold. Historian Mary Frances Berry notes that for a contract to be valid, there must be agreed-upon terms. For the ERA, Congress and the states agreed upon a time limit of seven years for ratification. She declares that "when seven years passed, all pre-existing ratifications expired."[19] Legal scholar Grover Rees III expands on this argument, noting that extension runs on the assumption that "the states which ratified the ERA with a seven-year time limit also would have ratified with a longer time limit," and thus, the deadline extension may be changing the terms of agreement.[20] For at least one state, South Dakota, Rees's argument holds true, as it rescinded its ratification once the deadline had been extended to ten years, believing this decision to have changed the terms for ratification.[21]

With all these factors taken into consideration, what are the current options for the future of the ERA? Currently, the three-states that have ratified the Amendment since the 1982 deadline are in the process of suing the federal government. They purport that the National Archivist should, by law, have already added the ERA to the Constitution, as it has been ratified by the requisite 38 states. On the other hand, the Department of Justice under President Biden has exhorted Congress to simply pass a resolution extending the deadline of the Amendment once again. In 2021, a resolution to do just that passed in the House of Representatives, but considering the current filibuster in the Senate, the possibility of this resolution passing is highly unlikely.[22] In addition to the infeasibility of these options, ERA

[18] Qtd. in Rachel Weiner, "Appeals Court Debates Whether Equal Rights Amendment Is Really Dead," *The Washington Post (Online)*, 28 September 2022, sec. Local, https://www.proquest.com/docview/2718752574/citation/8139901394E64912PQ/2.
[19] Qtd. in Thomas H Neale, "The Proposed Equal Rights Amendment: Contemporary Ratification Issues," *Congressional Research Service*, 2014, 22.
[20] Qtd. in Neale, "The Proposed Equal Rights Amendment," 22.
[21] Magliocca, "Buried Alive," 638.
[22] Phillips, "The Never-Ending Fight."

proponents both in and out of Congress must ask themselves the consequences of extending such a deadline. Will doing so create a dangerous precedent for future amendments, or even the revival of past amendments? Does an ERA ratified in this way represent the amendment process as intended? Either way, future actions regarding the ERA will have significant consequences on the amendment process as well as the legal rights and protections of U.S. citizens.

The Fight for Thirty-Eight: Not Quite There?

Notwithstanding the impending question of the ratification deadline, ratification of the ERA currently faces another barrier: the rescission of five states since the early 1970s. Although thirty-eight states have ratified the ERA since 1972, five have rescinded this ratification, meaning that there remains a question of whether or not the ERA has truly been ratified in three-quarters of the states. The first state to rescind its ratification was Nebraska in March of 1973. Legal analysts hired by the state of Nebraska were unable to come to an agreement on the legality of rescission, as it is an ill-defined legal term which has never truly been settled in the courts.[23] Since Nebraska's rescission in 1973, Tennessee, Idaho, Kentucky, and South Dakota have similarly rescinded their earlier ratifications. Legal scholar Gerald Magliocca remarks that usually the ratification of an amendment only requires "simple arithmetic." However, like many other aspects of the ERA, this issue too is complex and difficult to resolve.[24]

Currently, the ratification of the Fourteenth Amendment in 1868 serves as the most pertinent historical example regarding the question of rescission. Although both Ohio and New Jersey had already ratified the Fourteenth Amendment, the election of 1867 brought Democratic majorities to both states, and the states promptly attempted to rescind their ratifications. In July of 1868, the Secretary of State announced that the ratification of the Fourteenth Amendment was shrouded in "doubt and uncertainty" due to the two rescissions

[23] Veronica Monique Lerma, "The Equal Rights Amendment and the Case of the Rescinding States: A Comparative Historical Analysis" (M.A., United States -- California, University of California, Merced), accessed 1 November 2022, https://www.proquest.com/docview/1698104108/abstract/5342CC3FA5F64F16PQ/19, 13-14.
[24] Magliocca, "Buried Alive," 649.

in Ohio and New Jersey.[25] Congress, ignoring the proclamation, pronounced the Fourteenth Amendment as part of the Constitution, including Ohio and New Jersey in the total of the three-quarters of states and thus, indirectly declaring their recessions invalid.[26] Proponents of the ERA point to this decision as demonstrating the illegitimacy of rescission, but some legal scholars have questioned this interpretation. Given the specific context and circumstances surrounding the Fourteenth Amendment, some scholars have wondered whether Congress intended to promulgate a general rule regarding the amendment process or if this decision was specific to the circumstances surrounding the Fourteenth Amendment and the end of the Civil War.[27] As a result, it appears that this historical precedent on its own may not be enough to justify the rejection of ERA rescissions.

A more recent example, the court case of *Idaho v. Freeman*, addresses the legality of an ERA rescission, although once again, the applicability of this case has been called into question. In 1979, Idaho, Washington, and Arizona brought forth a lawsuit in the Idaho District Court, arguing that the states have a right to rescind their ratifications of an amendment. The presiding Judge in the case, Marion Callister, agreed that a rescission is within a state's rights, asserting that rescission "is clearly a proper exercise of a state's power [...] especially when that act would give a truer picture of local sentiment regarding the proposed amendment."[28] This case gained traction nationwide, with newspapers in other states referring to it as "life or death for the ERA." Proponents of the ERA, such as the National Organization for Women, argued that Judge Callister should be dismissed from the case because of his high-ranking position in the Mormon Church. These groups further pointed out that this issue lies under the jurisdiction of Congress, not the Courts.[29] Ultimately, the Supreme Court decided to "stay" the case, limiting its legal effect, and once the ratification deadline for the ERA expired, it vacated the District Court decision.[30] As a result, much like the Fourteenth Amendment, the *Freeman* decision holds little weight over the current rescission debate, although the argument and logic contained in its vacated decision are still employed by ERA opponents today.

[25] Magliocca, "Buried Alive," 651.
[26] Held et al., "The Equal Rights Amendment," 133.
[27] Magliocca, "Buried Alive," 652.
[28] Qtd. in Shimabukuro, "Equal Rights Amendment," 3.
[29] Lerma, "The Equal Rights Amendment and the Case of the Rescinding States," 14.
[30] Neale, "The Proposed Equal Rights Amendment," 18.

The current defenses for rescission continue to mirror the language that Judge Callister employed in his 1981 *Freeman* decision, often referencing the idea of "fairness" as well as ensuring that the ratification process continues to represent the "consensus" of the country. Many proponents of rescission argue that since the ratification of an amendment requires a "contemporaneous consensus," it therefore requires that three-quarters of the states reach a consensus on the amendment at the same time.[31] Rees further contends that "a consensus, by nature, cannot include anyone who does not wish to be included," and that the ratification of the ERA would thus not represent a consensus of the states, nor the will of the American people.[32] Furthermore, some ERA opponents maintain that if Congress blocked rescissions, it would infringe upon the states' rights during the amendment process.[33] Other ERA opponents more explicitly used the language of "fairness," noting that if a deadline extension was allowed, so too should rescissions be allowed. They also reasoned that if a state can change their vote from "no" to "yes" on an amendment, then why should the reverse be disallowed?[34] Ultimately, these defenses of rescission will be seriously considered by ERA proponents in the coming months.

On the other hand, those opposed to the rescission of ratification speak to the importance of the clarity and finality of the amendment process. According to a literal interpretation of Article V, a state that has not ratified an amendment may reconsider ratification, but a state that has already ratified may not rescind its ratification.[35] The Department of Justice operated under this understanding during the initial legal fight over rescission during the late 1970s; Justice Ginsburg summarized this position on ratification as "an act that cannot be accompanied by strings or conditions, a final act that cannot be withdrawn."[36] Many politicians and scholars alike highlight the importance of the finality of a ratification, as it provides a "fixed terminus to the amendment process."[37] If Congress were to allow the rescission of state ratifications, this "fixed terminus" would be completely upended and would thus undermine the functioning of the entire amendment process. The importance of

[31] Ginsburg, "Ratification of the Equal Rights Amendment," 939.
[32] Grover Rees, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension," *Texas Law Review* 58, no. 5 (1980): 878.
[33] Rees, "Throwing Away the Key," 891.
[34] Lerma, "The Equal Rights Amendment," 18.
[35] Held et al., "The Equal Rights Amendment," 131.
[36] Ginsburg, "Ratification of the Equal Rights Amendment," 939.
[37] Held et al., "The Equal Rights Amendment," 133.

a clear and straightforward amendment process cannot be underscored enough.Both opponents and proponents of the ERA continue to argue the importance of the "finality" of the amendment process, with proponents employing this argument to block possible rescissions and opponents to block a deadline extension.

Ultimately, like the question of a deadline extension, the debate regarding the rescission of state ratifications is complex. Proponents of the ERA and the "three-state strategy" argue that these rescissions are invalid, evidenced by the precedent of the Fourteenth Amendment and the importance of keeping the amendment process both clear and straightforward. Opponents of the ERA, on the other hand, declare that rescissions actually allow for a "consensus" and the will of the people to be better expressed, making the process all the more "fair." Both arguments clearly have merit to them and the current debate becomes more muddled once one considers how this debate does not occur in a vacuum, but instead has significant implications for enshrining gender equality in the Constitution and eliminating discrimination on the basis of sex. As a result, proponents of the ERA must ask themselves if they are willing to make these sacrifices to the amendment process and if the goal of gender equality through the ERA is worth these sacrifices.

Gender Inequality in the Twenty-First Century: Why the ERA Matters

Clearly, there are currently many political and legal barriers preventing the ERA from officially becoming a part of the U.S. Constitution. With the uncertainty of whether or not these obstacles can be overcome, the question remains of whether or not the ERA is worth fighting for. Even ignoring these legal questions, some politicians and scholars find the fight for the ERA to be of little value, arguing that in the decades since the ratification process began, gender inequality no longer presents an issue to Americans that needs to be solved with a Constitutional amendment. As Jane Mansbridge herself argues, "taking all of these changes together, it is hard to avoid the conclusion that while the ERA would have changed quite a lot in 1972, by 1982 most of this had been accomplished by other means."[38] During renewed discussions over the ratification of the ERA in Arkansas during the 2010s, state Senator Gilbert Baker reiterated a similar sentiment, proclaiming, "to change the

[38] Jane J. Mansbridge, *Why We Lost the ERA* (Chicago, UNITED STATES: University of Chicago Press, 1986), http://ebookcentral.proquest.com/lib/bostoncollege-ebooks/detail.action?docID=4003828, 98.

Constitution for the sake of making a statement— we just don't need to go there."[39] These claims are worth investigating, as it is important to consider whether the ERA would simply be "making a statement." Has the United States already accomplished most of what the ERA had set out to do?

Since the House of Representatives and Senate approved the ERA in 1972 and the ratification process began, it is true that significant steps towards achieving gender equality have been made, and it would perhaps be naive to think otherwise. Many legal scholars argue that the Supreme Court's interpretation of the Equal Protections Clause of the Fourteenth Amendment in regard to gender discrimination has led to a "de facto ERA."[40] Congress has also passed many forms of targeted legislation aimed at reducing gender inequality, such as the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Title XI of the Educational Amendments of 1972, the Pregnancy Discrimination Act of 1978, and the Violence Against Women Act of 1994. More recently, the Affordable Care Act has helped to eliminate certain forms of gender discrimination present in the insurance industry. Jessica Neuwirth, founder of the ERA Coalition, points out that these laws do not hold the same weight as a Constitutional Amendment though. They are also not comprehensive when it comes to eliminating gender inequality, and can be (and have been) struck down in whole or in part by the Supreme Court or repealed by Congress, such as aspects of the Violence Against Women Act and the Affordable Care Act.[41] The idea of a "de facto" ERA clearly does not offer women the same protections a de jure ERA enshrined in the Constitution would; a de facto ERA is highly susceptible to revisions and retractions, whereas a de jure ERA is not.

Given the limitations of gender equality under the law without the ERA, many proponents of the amendment highlight the continued disparities between men and women in many aspects of American society and the ways in which the ERA could eliminate or diminish those disparities. A 2020 PEW study found that over 57% of Americans believe that "the country has not gone far enough on gender equality," many of whom pointed to the

[39] Qtd. in Smith and Smith, "Keeping Hope Alive," 177.
[40] Julie C. Suk, "An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home," *Yale Journal of Law and Feminism* 28, no. 2 (2017 2016): 393.
[41] Neuwirth, *Equal Means Equal*, 10; Sarah M. Stephens, "At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment," *Brooklyn Law Review* 80, no. 2 (2015 2014): 419.

prevalence of sexual harassment and continued inequalities under the law as exacerbating this disparity.[42] Neuwirth highlights the persisting gender discrimination that greatly impacts the financial standing of women, such as hiring practices, unequal wages, and pension policies.[43] Congresswoman Carolyn Maloney, a major proponent of the ERA, has frequently called attention to the 2011 Supreme Court decision in *Wal-Mart v. Dukes*, where the Court decreed that all the women who had been denied promotions at Wal-Mart could not join a class action lawsuit. Maloney argues that this decision points to the persisting economic inequality empowered by the Court without the ERA to guide their decisions.[44] Proponents of the ERA further assert that the ERA could offer greater protections for pregnant women and bolster reproductive rights and freedom.[45] In fact, in states with their own gender equality amendments, high court decisions reveal that the ERA offers better protections to women under the law and have helped reduce discrimination based on reproductive capabilities.[46]

Currently, the Equal Protections Clause of the Fourteenth Amendment serves as the constitutional basis for gender discrimination protection. Even so, proponents of the ERA proclaim that this interpretation does not go far enough in protecting against gender discrimination. The Supreme Court first used the Equal Protections Clause to protect against gender discrimination in 1971, but the 1976 decision in *Craig v. Boren* codified this interpretation, creating an "intermediate scrutiny" test to determine sex discrimination.[47] In *Craig*, the Court developed a two-prong test, wherein to withstand intermediate scrutiny, the law must serve government interests and be substantially related to government objectives.[48] This interpretation continued to develop, reaching a zenith in the 1996 *United States v. Virginia* decision, after which Justice Ginsburg declared, "there is no practical difference between what has evolved and the [ERA.]"[49] However, unlike "strict scrutiny," which applies to suspect classifications such as race and ethnicity, the idea of "intermediate scrutiny"

[42] Horowitz and Igielnik, "A Century After Women Gained the Right To Vote."
[43] Neuwirth, *Equal Means Equal,* 8.
[44] Suk, "A Equal Rights Amendment for the Twenty-First Century," 388-389.
[45] Kate Kelly, "Op-Ed: The Best Way to Protect Abortion Rights? Finalize the Equal Rights Amendment," *Los Angeles Times (Online)*, 23 May 2022, sec. Opinion, https://www.proquest.com/docview/2667740385/citation/8139901394E64912PQ/3.
[46] Stephens, "At the End of Our Article III Rope," 419.
[47] Mansbridge, *Why We Lost the ERA,* 50.
[48] Lorraine Dusky, *Still Unequal: The Shameful Truth about Women and Justice in America*, 1st ed., (New York: Crown Publishers, 1996), 102.
[49] Qtd. in Stephens, "At the End of Our Article II Rope," 399-400.

is extremely nebulous and ambiguous. The two-pronged test has been applied in dramatically different ways since the *Virginia* ruling and has created more leeway than strict scrutiny would have allowed. Proponents of the ERA argue that it would require a strict or absolute scrutiny test as well as removing the idea of "intent" as a consideration when looking at possible discrimination.[50]

Ultimately, it is clear that the current protections against gender discrimination under the law leave much to be desired. Although the country has made strides towards gender equality in the decades since the introduction of the ERA, current legislation and Constitutional protections still enable and allow a certain degree of discrimination. Moreover, laws can always be struck down or repealed and, as evidenced by past Supreme Court actions, even the interpretation of legal tests can change over time. The author of the ERA, Alice Paul, once declared that "we shall not be safe until the principle of equal rights is written into the framework of our government."[51] However, it is important to acknowledge that nowhere in the language of the ERA does it guarantee strict scrutiny or protection against disparate impact.[52] Therefore, although it is clear that more legal protections for gender equality must be enacted, the question remains of whether the ERA is the most effective mechanism for achieving those goals.

Starting Over?: A New, Better Equal Rights Amendment?

Considering the recent developments in Nevada, Illinois, and Virginia, the "three-state strategy" for ratification has been frequently referenced as the most pragmatic approach to achieving the ratification of the ERA. The aforementioned obstacles of the expired deadline and the rescission of five states still remain in the way of ratification. What would an ERA that overcame these obstacles look like? Magliocca argues that a ratification of the ERA which ignores the deadline and the rescinded states would delegitimize the Amendment and "might lead a future Congress to contest that recognition."[53] Given the view of the Twenty-Seventh Amendment as a "demi-amendment" without the full weight or authority of other amendments, it is quite possible that the ERA could suffer a similar fate. In the courtroom, judges may use the narrowest possible reading of the ERA given its ambiguous ratification,

[50] Machalow, "The Equal Rights Amendment in the Age of #MeToo," 27-28.
[51] Qtd. in Smith and Smith, "Keeping Hope Alive," 197.
[52] Suk, "An Equal Rights Amendment for the Twenty-First Century," 394.
[53] Magliocca, "Buried Alive," 635.

meaning that the legal protection offered under the ERA may be undermined. If Congress tried to contest or even repeal the ERA under the assumption that its ratification was "illegitimate," not only would this act be disruptive to the fight for gender equality, but it would also be dangerous for maintaining trust in democracy and the rule of law.[54] Given such concerns, the likely strategy for ratifying the ERA faces obstacles not only in the interim, but possible consequences that could have an adverse effect on ensuring equality under the law in the long-term.

Since the 1982 ratification deadline expired, many politicians have advocated for a "start-over strategy." This approach would simply reuse the text of the 1972 Amendment and begin the ratification process anew; this strategy has been offered since the deadline for ratification passed in 1982 and was long championed by Senator Ted Kennedy.[55] More recently, however, Representative Carolyn Maloney has reintroduced the ERA to Congress, but with a substantive change in the language of the Amendment. Maloney added a sentence to the beginning of the Amendment, which reads, "Women shall have equal rights in the United States and every place subject to its jurisdiction."[56] This change of language would serve as an explicit reference to "women" in the Constitution–the first reference of its kind, carrying a certain symbolic weight. Additionally, Neuwirth notes that instead of simply covering non-discrimination, this new approach also will "more readily cover substantive equality."[57] Some legal scholars take issue with the original text being explicitly focused on prohibiting discrimination, wishing that the ERA would enshrine "a right to egalitarian institutions rather than a right against discrimination."[58] By using more affirmative language, legislators can craft an amendment that makes gender equality a goal the country can move towards, rather than just eliminating gender-based discrimination.

Legal scholars Kimberlé Crenshaw and Catharine MacKinnon have gone even further than the changes proposed by Maloney, advocating for an amendment that acknowledges intersectionality in terms of race, gender, and other relevant aspects of a person's identity. Women across and within racial groups have widely different experiences and those with

[54] Magliocca, "Buried Alive," 655.
[55] Neuwirth, *Equal Means Equal*, 101.
[56] Qtd. in Jessica Neuwirth, "Time for the Equal Rights Amendment," *Harbinger* 43 (2018-2019): 160.
[57] Neuwirth, *Equal Means Equal*, 102.
[58] Suk, "An Equal Rights Amendment for the Twenty-First Century," 384.

multiple marginalized identities experience various forms of oppression at disproportionately higher rates than those with fewer marginalized identities. As the legal system of the United States is inadequately equipped to deal with the disparate impact of these various identities, Crenshaw and MacKinnon seek to enshrine the concept of intersectionality and equal protection on account of both race and sex.[59] Crenshaw and MacKinnon's "Equality Amendment" also explicitly defines sex to include "pregnancy, gender, sexual orientation, and gender identity."[60] Crenshaw and MacKinnon included these terms under the broader concept of sex "because they are all facets of the unified but diverse system of inequality that privileges maleness and masculinity over femaleness and femininity."[61] Since the original text of the ERA only referred to "sex" and legal scholars are split on whether these protections could carry over to transgender or non-binary individuals, ERA proponents have understudied this question.[62] Ultimately, this Equality Amendment offers the broadest and most inclusive interpretation of gender equality, while also enshrining the protection of those with intersecting identities within the Constitution.

Conclusion: Where Does This Leave the ERA?

Currently, the United States faces multiple options to enshrine gender equality into law. Historically, the Equal Rights Amendment is the most well-known and most successful attempt at achieving gender equality under the law. With thirty-eight states ratifying the Amendment, as well as twenty-four adding their own versions of the ERA to their state Constitutions, it is hard to call the ERA defeated by any means, even if it has not been officially added to the Constitution. Even so, proponents of the ERA have clearly not given up on the viability of the Amendment, especially considering the recent victories in the past five years. The 1972 Amendment still serves as perhaps the most feasible path toward codifying legal protection based on gender under the law, but its proponents could consider shifting their perspective towards a new fight over an amendment that better reflects the contemporary realities of gender-based inequality in the United States.

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[59] Crenshaw, Kimberlé, and Catharine MacKinnon. "Reconstituting the Future: An Equality Amendment." *The Yale Law Journal* 129 (26 December 2019): 356.
[60] Qtd. in Neuwirth, "Time for the Equal Rights Amendment," 160.
[61] Crenshaw and MacKinnon, "Reconstituting the Future," 360.
[62] Hanna H. White, "The Equal Rights Amendment in the Twenty-First Century: Ratification Issues and Intersectional Effects," *DttP: Documents to the People* 47, no. 4 (2019): 36.

Crenshaw and MacKinnon acknowledge that, "it is the responsibility of 'We the People' to adapt the Constitution to the society we live in; to grow in our recognition of problems and potential solutions; to strengthen our democracy in an intimately interconnected world."[63] With this statement in mind, a reflection of the ERA reveals that it is perhaps inappropriate for the "society we live in." In order to ratify the Amendment, Congress and the Courts would need to ignore a decades-expired deadline as well as five rescinded states. Given this reality, perhaps gender equality advocates should undertake a different means of achieving their goals. Would ratifying the ERA undermine other aspects of the Constitution, hampering other ways to achieve equality under the law? Should the United States seek to enshrine gender equality with a more nuanced definition of gender, looking past the binary and acknowledging the importance of intersecting identities? Is anti-discrimination enough to guarantee gender equality? These complicated questions demand complicated answers. Given the lack of coverage and attention on this issue, it is unlikely we will see a resolution in the coming months. Even so, as Crenshaw and MacKinnon note, it is up to "We the People" to decide the path forward and find a way to reckon with these difficult questions. Jane Mansbridge seeks to answer "Why We Lost the ERA," but perhaps now the question is "how should we salvage it?"

[63] Crenshaw and MacKinnon, "Reconstituting the Future," 364.