

The Equal Rights Amendment in the Twenty-First Century

Ratification Issues and Intersectional Effects

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The Equal Rights Amendment (ERA), originally introduced only three years after women gained the right to vote, has seen a resurgence in interest in the twenty-first century with recent ratifications in Nevada and Illinois. This is in spite of the fact that the version of the ERA these ratifications pertain to, which passed in Congress in 1972, appeared to expire in 1982. This paper seeks to summarize the history and present of the ERA, with particular attention paid to how ratification might affect current hot-button issues such as restrictions on abortion access and transgender rights.

In March of 2017, the state of Nevada became the 36th state to ratify the Equal Rights Amendment (ERA), 35 years after the Congressional ratification deadline had passed. In its joint resolution, the Nevada legislature stated that “The Legislature of the State of Nevada finds that the proposed amendment is meaningful and needed as part of the Constitution of the United States . . . political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue.”¹ Indeed, the well-publicized backlash against current threats to *Roe v. Wade* and to the legal status of transgender individuals indicates a strong public interest in the topic of gender equality. Yet this interest does not apparently indicate an informed understanding of the current law; according to statistics from the National Organization for Women, more than 70 percent of people believe that the constitution already grants equal treatment under the law regardless of sex.² With recent actions in Nevada and Illinois and upcoming action in Virginia, now is an appropriate time to take stock of the ERA’s complex past and nebulous future.³

Background

The ERA was originally introduced to Congress in December 1923, only three years after the 19th amendment was ratified.

This original version of the ERA read as follows: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.”⁴ Little progress was made on this ERA for the following two decades, principally due to objections from organized labor and some women’s groups regarding the potential effect of the ERA on protective legislation around women and labor.⁵ The so-called Hayden rider was developed in the 1950s to address these concerns: “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.”⁶ This rider was removed in 1964 by the Senate Committee on the Judiciary.⁷

In 1969, the version of the ERA that would ultimately be sent to the states for ratification was introduced to the House by Representative Martha Griffiths.⁸ It passed in the House in October of 1971, and passed in the Senate six months later.⁹ While concerns about the proposed amendment’s effect on protective legislation remained, the ERA at this time had broad support in Congress, passing both chambers with more than 90 percent of representatives in favor. By the time of its passage, the text of the ERA had been updated; Section 1 of the 1972 ERA reads, simply, “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”¹⁰ At the time of passage, Congress set a seven-year ratification limit for the amendment, as had been done for each amendment since the 20th. However, this time limit was included not in the text of the amendment itself, but in the preamble, a distinction that would prove key in the decades following.¹¹

The ERA was ratified by 22 states in 1972, but ratification slowed between 1973 and 1977.¹² Anti-ERA groups coalesced around concerns similar to those once addressed by the Hayden



Figure 1. Martha Griffiths at ERA rally in Houston, Texas, 1977. From U.S. National Archives, <https://catalog.archives.gov/id/7452294>.

rider, as well as additional concerns such as the possibility that the ERA could allow same-sex marriage.¹³ In 1978, finding themselves three states short of the thirty-eight necessary for ratification, ERA advocates convinced Congress to extend the ratification deadline to 1982.¹⁴ No additional states ratified, and the amendment seemingly died in 1982. Conversation around the amendment was revived in 1997 by the publication of an article in the *William & Mary Journal of Women and the Law* suggesting that because the ERA deadline was in the preamble rather than the amendment itself, it might still be ratified.¹⁵ What became known as the “three-state strategy” has become a “one-state-strategy” two decades later. Following the aforementioned ratification by Nevada and a 2018 ratification in Illinois, the feasibility of the three-state strategy may soon be put to the test.¹⁶

Alternatives to the ERA

One objection to revivification of the ERA that has been voiced by some is that there are already a set of laws which, taken together, ensure gender equality nationally. These include Title VII of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments Act, the equal protection clause of the 14th amendment, and the existing patchwork of state and local laws which guarantee gender equality. While these objections are too many and varied to address fully here, it is worth noting that these existing rules are not equivalent to an ERA. Title VII, as amended by the Lilly Ledbetter Fair Pay Act of 2009, prohibits employment discrimination based on sex as well as differences in pay that occur because of sex, leaving women and minority genders vulnerable to discrimination in other areas.¹⁷ Title IX pertains only to federally-funded education programs.¹⁸ The Equal Protection Clause was not found to apply

to gender-based discrimination until 1971, and its guarantees apply only to state actors.¹⁹

Even state-level ERAs do not consistently guarantee equal treatment regardless of sex. Though state constitution ERAs have often been a useful tool in advancing gender equality, in some cases they have been interpreted to go no further than the 14th amendment in guaranteeing against discrimination.²⁰ In addition, less than half of U.S. states even include an ERA in their constitutions.²¹ Many advocates hope that a federal ERA, if ratified, would cover these gaps and provide a more comprehensive guarantee of equal treatment.

The ERA Today

Currently (as-of this writing), joint resolutions to officially remove the 1972 ERA’s ratification deadline are in committee in both the House and Senate.²² Article V of the Constitution does grant Congress extremely broad authority over the amendment process, as demonstrated by the case of the 27th Amendment, ratified over a century after it was passed by Congress.²³ The question of what effect the 1972 ERA would have if ratified today is thus relevant. As the possible ramifications of a full constitutional guarantee of equality between sexes are numerous, this paper will focus on two particular areas of concern: abortion rights, and rights of transgender people.

Regarding abortion access, the possibility that the ERA could require government-funded abortion is one of the reasons often brought up by ERA opponents to justify their cause, as demonstrated by the ongoing debate over ratification in Virginia.²⁴ There are significant reasons to believe that the ERA would not affect reproductive justice issues. *Roe v. Wade* was decided based on a right to privacy and due process, rather than an equality-based interpretation.²⁵ In addition, the inclusion of an ERA in state-level constitutions has generally not impacted state courts’ decisions on reproductive rights issues.²⁶ However, there is some precedent for rights-based arguments on abortion, as seen in Justice Ginsberg’s dissenting opinion in *Gonzales v. Carhart*: “[Women’s] ability to realize their full potential . . . is innately connected to ‘their ability to control their reproductive lives.’ Thus, legal challenges to undue restrictions on abortion procedures . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”²⁷ Considering the current political climate, the abortion issue is almost certain to come up in any new federal proceedings around the ERA.

Shockingly little attention has been paid by legal scholars to the question of how a ratified ERA could affect the rights of transgender Americans. Historically, dialogue about the ERA’s possible effects on the LGBT community have been dominated

by fears that its passage would legalize same-sex marriage, a point rendered moot by the Supreme Court's 2015 decision in favor of same-sex marriage in *Obergefell v. Hodges*.²⁸ Though transgender issues seem more related to the ERA than those surrounding sexuality, this researcher could find few explicit mentions of transgender people in connection with the ERA on either side of the argument. What follows is therefore conjecture.

The wording of the 1972 ERA does not explicitly mention either men or women, sticking instead to the somewhat vague "sex." Historically, federal courts have upheld, in a number of instances, that Title VII protections against sex-based discrimination apply to transgender individuals.²⁹ For example, in *Glenn v. Brumby*, the 11th Circuit Court ruled that "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."³⁰ Given this and other precedents, it seems entirely possible that the 1972 ERA would be upheld by the courts to cover discrimination against transgender individuals if ratified. Pro-ERA organizations including the National Organization for Women have also suggested that the ERA's non-specific language lends itself to an inclusive interpretation.³¹ Recent controversies over transgender rights, including the Trump administration's plans to define gender as permanent male or female sex assigned at birth, make this a deeply pertinent question which deserves further inquiry.³²

Threats to Ratification

Revivification of the 1972 ERA is not without its potential issues, the most obvious of which exist around the expired ratification deadline. Many pro-ratification arguments list the 27th Amendment as an example when discussing the continued viability of the ERA. Unlike the ERA, however, when the 27th Amendment was passed in 1789, Congress neglected to set a time limit at all.³³ The precedent established by the Supreme Court in *Coleman v. Miller* determined that "it is only when there is deemed to be a necessity . . . that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently" and that "there is a fair implication that [ratification] must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."³⁴ This contemporaneity requirement will probably be brought to the



Figure 2. Photograph of Jimmy Carter Signing Extension of Equal Rights Amendment (ERA) Ratification, 10/20/1978. From U.S. National Archives, <https://catalog.archives.gov/id/181981>.

courts and/or the legislature if a thirty-eighth state ratifies the ERA.

Another significant issue affecting the viability of the ERA is that of state rescissions of previous ratifications. Between 1973 and 1979, five states (Nebraska, Tennessee, Idaho, Kentucky, and South Dakota) passed resolutions rescinding their previous ERA ratifications. In 1979, Idaho brought legal action to the U.S. District Court asserting its right to rescission. The case went to the Supreme Court, who agreed to hear it in January 1982. When the ERA ratification deadline expired later that year, the court dismissed the case, leaving the question of states' right to rescission undecided.³⁵ ERA advocates maintain that states' right to rescission has not previously been recognized as valid as both the 14th and 15th Amendments were confirmed by Congress to have been ratified after one or more states rescinded.³⁶ However, the Supreme Court's willingness to hear Idaho's case suggests this precedent may be challenged should a thirty-eighth state ratify the ERA.

Conclusion

The "one-state" strategy is not the only possibility for the ERA going forward. "Fresh start" versions of the ERA were proposed in each Congress from the 97th (when the ratification deadline expired) to the 115th. Interestingly, section 1 of the 2017 house resolution used different language than 1972 amendment, harkening back instead to the 1923 ERA: "Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."³⁷ It is unclear whether or not this change in language would lend itself less to an intersectional interpretation which would include the transgender population in addition

to cisgender women under the ERA umbrella. As of this writing, members of the 116th Congress have proposed no similar measures, sticking instead to resolutions intended to remove the ratification deadline. This, along with recent popular media coverage related to the ERA and discussions of it during presidential primary debates, suggest strongly that the ERA ratification is far from dead as it was once perceived to be.³⁸ Only time will tell how, and if, it might come to pass.

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