



Analysis of the Necessity of Ratifying the Affirmative Rights Amendment for Gender Equality

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Abstract. This article argues for the ratification of the Equal Rights Amendment (ERA) to ensure gender equality and prevent sex discrimination. While the Fourteenth Amendment’s Equal Protection Clause offers a level of equality, it lacks specific provisions for sex discrimination, resulting in less rigorous scrutiny. The ERA aims to establish gender equality as a fundamental right, prompting more stringent examination of sex discrimination cases and resolving inconsistencies in current judicial review standards. Through a comprehensive literature review and formal analysis, this article delves into the necessity of constitutional protection for fundamental rights and problematic classifications. The author states that the ERA’s ratification will urge immediate actions to address the inadequacies of existing laws and establish clear guidelines for handling sex discrimination cases. Furthermore, the article tackles the uncertainties surrounding the current judicial review standards and underscores the ERA’s pivotal role in ensuring consistent judicial protections against sex discrimination. By ratifying the ERA, this article concludes that the ERA’s ratification is necessary guarantee gender equality and protection from sex-based discrimination. It would solidify gender equality as a fundamental right, eliminate inconsistencies in the current judicial scrutiny standard, and provide a permanent framework for addressing gender discrimination cases. Ratifying the ERA would relieve the burden on the judiciary and ensure a consistent level of scrutiny protecting against gender discrimination.

Keywords: Gender equality, Equal Protection Clause, Fourteenth Amendment, the U.S. Constitution

1 Introduction

Ratification of the Equal Rights Amendment (“ERA”) remains necessary to guarantee protection from discrimination on account of sex. Admittedly, the Equal Protection Clause of the Fourteenth Amendment accords equal protection to any person within its jurisdiction; nevertheless, the law certainly does not require that each person is treated the same as any other person. Accordingly, legislatures have the freedom to incorporate classification in statutes if said classification passes the rational basis test--that the classification is aimed at a legitimate purpose and rationally related to achieving that purpose. Certain classifications infringe upon individuals’ fundamental rights and thus

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receive the much more stringent strict judicial scrutiny: that the disputed statutory classification must be necessary to serve a compelling state interest. The ERA's ratification would secure permanent judicial and legislative protection in two ways. First, it would clarify gender equality and freedom from gender-based discrimination as a fundamental right, thereby propelling the Court to adopt strict judicial scrutiny upon gender classification cases. Second, the inefficiencies of existing gender discrimination protection afforded by the Fourteenth Amendment derive from the Court's inconsistent and ambiguous standard of judicial scrutiny. As such, ratification of the ERA would relieve the Court from the burden of having to articulate the same ferocity of judicial scrutiny regarding gender classification, as strict scrutiny is much less subject to the ideological fluidity of the Court.

This paper aims to conduct a comprehensive exploration of constitutional protection and judicial review, drawing from relevant literature and landmark gender equality cases. Although the Constitution expressly forbids discrimination based on race, religion, and nationality, it lacks explicit provisions against sex discrimination. In turn, this analysis will predominantly concentrate on gender-based discrimination and its remedy (or lack thereof) within the legal system. Furthermore, the study will shed light on the disparities in the Supreme Court's approach to sex discrimination cases, as revealed by the varying judicial standards. The article will also delve into the dearth of uniform and enduring standards, unveiling the existing inconsistencies and ambiguities in the current judicial review framework.

2 Review of the Constitutional Protection for Fundamental Rights

Judicial review of suspect classification analyzes whether the disputed statute infringes upon the suspect class's fundamental rights, which are enumerated in or derived from the Constitution (*vis-à-vis* gender discrimination, the Bill of Rights and the Due Process Clauses, in particular) [1]. As noted by Justice Scalia, while the Constitution, among other suspect classifications, explicitly prohibits discrimination on the basis of race, religion, and national origin, it does not contain express provisions that prohibit discrimination based on gender [2]. Laws that may potentially encroach upon fundamental rights must pass the strict scrutiny test to be held constitutional. Since freedom from gender discrimination is not a fundamental right, the Court often employs the much more lenient intermediary or rational basis tests of constitutionality, which cannot strike down classification statutes nearly as effectively as strict scrutiny. That the ERA remains an unsettled debate among state legislatures also rendered the Court reluctant to declare gender equality a fundamental right "prematurely." In *Frontiero v. Richardson* 411 U.S. 677 (1973), while four justices concurred those classifications "based upon sex...are inherently suspect and must therefore be subjected to strict judicial scrutiny," Justice Powell, Blackmun, and Chief Justice Burger deemed the conclusion "unnecessary" because the ruling would indicate that the Court was assuming "premature decisional responsibility" upon an issue not yet resolved by state legislatures [3]. Knowing that the Court was hesitant to exercise decisional power before state legislatures settled

the debate, legislators have little motivation to change the law in a substantive way to fully protect citizens from sex-based discrimination, considering the extensive revision that existing legislatures would require. While congressional contributions do exist--the Equal Pay Act, Title VII, and Title IX come to mind--the progressive effect generated by these legislatures is "not an impressive record in view of the job to be done[3]." Accordingly, ratification of the Equal Rights Amendment would enshrine gender equality as one of the core constitutional principles and officialize its status as a fundamental right. More importantly, it would propel both the judicial and legislative branches to take prompt actions in addressing the deficiencies of current laws and establishing the precedent of applying strict scrutiny upon gender-based discrimination cases.

3 Inconsistency and Ambiguity of the Current Judicial Review Standard

Historically, gender-based discrimination cases receive the intermediate scrutiny test from the Supreme Court, which lacks a consistent, permanent standard and is subject to the ideological inclination of the Court at large. The uncertainty revolving around the clear definition of the intermediate standard is evident in the Court's opinions on sex discrimination cases for the past fifty years.

3.1 Reed v. Reed 404 U.S. 71 (1971) Case

In *Reed v. Reed* 404 U.S. 71 (1971), the Court apparently adopted the traditional rational basis test, striking down the disputed Idaho priority statute because it provided "dissimilar treatment for men and women who are similarly situated," which violates the Equal Protection Clause. The four-member plurality apparently employed strict scrutiny in *Frontiero*, highlighting that sex is inherently a suspect class. However, the plurality struck down the statute following the reasoning in *Reed*, citing that the statute "commanded dissimilar treatment for men and women who are similarly situated." The apparent allusion to the rationality test proved insufficient in conclusively resolving the dispute regarding the applicability of the strict scrutiny test to gender classification. Moreover, the Court refrained from explicitly indicating that gender classification must meet the criteria of being both "necessary" for a "compelling state interest," as mandated by the fundamental tenets of rigorous judicial scrutiny.

3.2 Craig v. Boren 429 U.S. 190 (1976) Case

While the 1976 *Craig v. Boren* 429 U.S. 190 (1976) case helped clarify the intermediary review criteria by incorporating the "substantial relations test," the Court's adoption of this new requirement did not provide "a precise standard [4]." The "substantial relations" test was an expansion upon the traditional "similarly situated" rational basis test, which required states to demonstrate the reason for burdening members of one sex does not apply with the same force to the other sex. In the case of *Craig*, the Court further required states to provide a substantial justification for any unequal treatment between

men and women. The Court invalidated the contentious Oklahoma statute by highlighting that the state failed to present a valid rationale for excluding both women and men aged 18 to 21 from the prohibition on selling 3.2% beer. This expanded “substantial relations” test was echoed in *Orr v. Orr* 440 U.S. 268 (1979), in which the Court maintained that “where...the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies...the State cannot be permitted to classify on the basis of sex.”

3.3 *Rostker v. Goldberg* 453 U.S. 57 (1981) Case

However, in *Rostker v. Goldberg* 453 U.S. 57 (1981), the Court majority refused to apply the Craig intermediate test with the same ferocity, raising uncertainty yet again about the degree of judicial scrutiny that should be applied to gender discrimination cases[5]. The dissenters, led by Justice Marshall, argued that the majority opinion “...is significantly different from the Craig approach [and]...focuses on the wrong question” by emphasizing that women would simply not be needed in the draft. The substantial relations test in Craig requires the government to show that gender-neutral statutes would be less effective than gender-based classification to achieve the alleged purpose, which the majority in *Rostker* did not address effectively. Essentially, the *Rostker* Court did not apply the Craig substantial relations test in its entirety and instead relied upon the conventional “similarly situated” rational basis test as exemplified in *Reed*.

3.4 *Michael M. v. Superior Court* 450 U.S. 464 (1981) Case

Similarly, in *Michael M. v. Superior Court* 450 U.S. 464 (1981), while the Court agreed on the legitimacy of state interest in upholding a California statutory-rape law, no majority could agree whether the statute passed the substantial relations test[6]. The plurality opinion deemed the statute substantially related to state interest, citing that since virtually all the harm in teenage pregnancy falls on young women and that teenage pregnancy already deters women more than it does men, the legislature is justified to “punish only [the males], who suffers few of the harmful consequences.” Justice Brennan, in dissent, argued that the Craig test required “[proof] that a gender-neutral statutory rape law would be less effective than [the statute in dispute] in deterring sexual activity leading to teenage pregnancy,” which the plurality opinion did not identify. The plurality countered by deeming Brennan’s interpretation irrelevant to the inquiry of constitutionality at hand, thus suggesting that the Court differed in their fundamental understanding of the Craig test’s requirement and validity.

4 Discussion

The discussion surrounding the ratification of the Equal Rights Amendment (ERA) goes beyond a mere analysis of legal frameworks and historical court decisions. It necessitates a critical examination of the current state of gender equality in the United States and the potential impact of the ERA on addressing the persistent challenges faced

by women and marginalized gender identities. While the Fourteenth Amendment's Equal Protection Clause provides a foundation for equality, it does not explicitly prohibit gender-based discrimination. The ERA's ratification would fill this void by enshrining gender equality as a fundamental right within the U.S. Constitution. This would have far-reaching implications for contemporary gender equality issues, as it would establish a legal framework that demands strict judicial scrutiny for gender-based classifications. The ERA's explicit recognition of gender equality as a constitutional principle would serve as a powerful tool in combating systemic biases and discriminatory practices that perpetuate gender inequalities. The ERA's impact extends beyond the courtroom. Its ratification would also send a clear message to legislators and policymakers that gender equality is a fundamental value that must be upheld and protected in all areas of society. By establishing the ERA as a constitutional amendment, it would provide a mandate for the legislative branch to enact comprehensive and inclusive policies and laws that promote gender equality and prohibit discrimination based on sex. This includes addressing issues such as the gender pay gap, workplace discrimination, reproductive rights, and access to education and healthcare. Furthermore, the ERA's significance lies in its ability to adapt and respond to the evolving nature of gender identity and gender-based discrimination. As society becomes increasingly aware of the intersectional aspects of gender discrimination, the ERA's ratification would serve as a guiding principle for dismantling systemic biases that disproportionately affect marginalized communities, including women of color, transgender individuals, and gender non-conforming individuals. However, it is essential to acknowledge that the ERA alone cannot single-handedly eradicate gender inequalities. Its ratification must be complemented by robust implementation, enforcement, and continued advocacy for gender equality. Moreover, challenges may arise in the interpretation and application of the ERA, requiring ongoing legal and scholarly discourse to ensure its effectiveness in addressing the complex and multifaceted nature of gender discrimination.

Within the vast expanse of legal philosophy and sociology, the ratification of the Equal Rights Amendment (ERA) serves as a profound touchstone for evaluating the intricate nexus between codified legal principles and the multifaceted socio-cultural landscape of gender discrimination. Historically, the legal edifice, informed by evolving jurisprudential paradigms, has sought to address gender imbalances, albeit with varying degrees of commitment and efficacy. The ERA's ratification is not merely an addition to this legal lineage, but rather a significant constitutional consecration, one that endeavors to align formal legal frameworks with the growing societal exigencies for unambiguous gender equity. From a sociological perspective, the salience of the ERA emanates from its potential to highlight and counteract the more nuanced, contemporary manifestations of gender discrimination. Even as the 21st century has ushered in an era of heightened gender consciousness and rigorous rights advocacy, structural and systemic biases remain pervasive, often mutating in form and expression. The ratification of the ERA, thus, can be construed as an acknowledgment of these subtler, yet deeply entrenched forms of discrimination that continue to permeate our social fabric.

Additionally, the ERA serves as an invaluable sociocultural barometer, reflecting the society's evolving consciousness and introspection concerning gender roles, rights,

and discrimination. Its ratification, in this sense, signifies a broader cultural shift—a societal movement towards rectifying historical injustices and realigning the sociopolitical landscape with the imperatives of gender justice in the modern epoch. In sum, while the legal implications of the ERA are profound, its broader academic and societal resonance underscores its indelible role in shaping discussions on gender in both jurisprudential and sociological realms. However, the contemporary landscape acknowledges gender as a spectrum, transcending the traditional binary. Herein lies a palpable deficiency in the current discourse: the ERA's exact scope vis-à-vis non-binary, genderqueer, and transgender identities remains nebulous. If the amendment's goal is to offer robust protection against all forms of gender-based discrimination, a clear articulation of its stance on these identities is imperative. Furthermore, the ERA's capacity to address subtle, systemic forms of gender discrimination, often resultant from longstanding societal norms rather than explicit legislative actions, is yet to be critically assessed. Finally, the intersectionality of gender discrimination, where biases based on gender overlap with those based on race, economic status, or disability, presents another dimension that the ERA must be assessed against. While the ERA's ratification can be a landmark moment for gender rights, it is essential that its scope be fully understood and delineated, ensuring that it serves as a comprehensive tool for justice in the multifaceted realm of gender discrimination.

5 Conclusion

In conclusion, this paper emphasizes the critical need for the Equal Rights Amendment (ERA) ratification to bolster protection against sex-based discrimination. Examining the constitutional framework, it showcases the ERA's role in enhancing gender equality beyond the limitations of current legal structures. While the Fourteenth Amendment's Equal Protection Clause provides some equality, it doesn't specifically outlaw gender discrimination. The ERA would elevate gender equality to a fundamental right, mandating the judiciary to apply strict scrutiny to gender cases, ensuring stringent examination of discrimination. The current judicial standards display inconsistencies and ambiguities. Varying tests, such as rational basis and intermediate scrutiny, create a lack of clarity in court rulings. Ratifying the ERA would replace these inconsistent standards with strict scrutiny, offering a uniform approach to gender-based classifications. A primary deficiency in the discourse surrounding the ERA's ratification lies in the limited exploration of its implications beyond traditional binary gender constructs. The ERA's text does not elucidate whether its protections would explicitly encompass the myriad gender identities and expressions, including non-binary, genderqueer, and transgender individuals, which are increasingly acknowledged in contemporary societal paradigms. Another point of debate pertains to whether the ERA would cover indirect and systemic forms of gender discrimination, which often emerge from deeply rooted societal norms and practices, rather than explicit legislative mandates. The ERA's potential to address intersectional forms of discrimination, where gender-based biases interplay with other marginalizing factors like race, socioeconomic status, or disability, also warrants

deeper consideration. In essence, while the ratification of the ERA undoubtedly signifies a momentous stride toward gender equality, its broader scope and its capacity to address nuanced intricacies within the modern socio-legal landscape remain areas necessitating further exploration and clarification. Future research should delve into these dimensions to ensure that the ERA's implementation aligns comprehensively with the evolving understanding of gender, discrimination, and equality in our society.

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