

MAKING THE EQUAL RIGHTS AMENDMENT THAT IS NEEDED IN THE TWENTY-FIRST CENTURY

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Thank you so much to the Columbia Law School ERA Project. It's an honor to be here with my distinguished co-panelists. I was asked to talk about what the ERA could do. Why is it still needed in the twenty-first century?

My answer to that question connects the history of the ERA's making with the ongoing controversy about whether the ERA is part of the Constitution now, including what steps remain necessary to legitimize the ERA.

The ERA is the only amendment that has met the requirements of Article V, but has not been added to the Constitution. And the reason it has not been added to the Constitution is that Congress put a seven-year deadline on the ratification of the ERA, and only thirty-five out of the thirty-eight states ratified the ERA within that seven-year time limit. Congress, of course, attempted to extend the time limit once, so it was extended to 1982. But no additional states ratified, and several states rescinded their prior ratifications before the expiration of the original time limit.

Today we have a handful of States now either talking about rescissions or actually taking votes to rescind in the twenty-first century, including, most recently West Virginia. Indeed, the central question as to what steps are now needed to legitimize the ERA depends on the legitimacy of the deadline and, as David Pozen and Tom Schmidt's recent work on all of our constitutional amendments has brilliantly shown, there has been reasonable disagreement about what Article V actually requires and whether those requirements have in fact been met, not only about the ERA, but about almost every amendment that we now treat as part of our Constitution.¹

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¹ See David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317 (2021).

In our constitutional history, the only other amendment that was primarily concerned with the status of women spawned bitter contestation about its legitimacy. A few men litigated to challenge the validity of the Nineteenth Amendment's ratification in *Leser v. Garnett*.² They argued that forcing unconsenting states to accept women as voting members of the political community altered the equal representation of the states in the Senate without every state's consent, invoking the pieces of Article V's text that require the consent of each state to the alteration of its equal representation in the Senate.³ The argument was legally plausible; indeed the litigants included a man who had who had served as a state-court judge in Maryland and was thus well-versed in the law. Nonetheless, without much explanation, the Supreme Court rejected their contention that the Nineteenth Amendment was contrary to Article V and upheld the validity of the Nineteenth Amendment.⁴

Within the ERA context, there is certainly a plausible legal argument that ratification deadlines are not legally valid, because of the silence of Article V on this issue. One can plausibly read that silence as indicating that Congress lacks the power to impose a deadline on ratification to constrain the states in the way that it did. That is the theory that is being advanced in the civil litigation brought by the three states that ratified after the deadline, with only two states now continuing to litigate with the goal of getting the ERA recognized in the Constitution by forcing the Archivist to add it to the Constitution.⁵ By the logic driving their litigation, Congress does not have the power to constrain the states in the amendment process by imposing this deadline, so any deadline that Congress expressed was just advisory and non-binding, and without legal effect. Therefore, upon this reading of Article V's silence as a prohibition of deadlines, the ERA would be part of the Constitution now, and specifically January 27, 2022. That is the date on which, by the terms of the text of the ERA itself it is supposed to be valid, two years after the date of ratification. Virginia became the thirty-eighth state to ratify on January 27, 2020, so if the deadline did not stop the ERA from being validly and completely ratified, the amendment became effective and enforceable as of the end of January of this year.

² See *Leser v. Garnett*, 258 U.S. 130 (1922).

³ *Id.* at 130–33.

⁴ *Id.* at 135–38.

⁵ The three States that ratified after the deadline are Nevada, Illinois, and Virginia, although Virginia is no longer participating in the lawsuit.

While this legal theory is not obviously incorrect, it departs from over a century of constitutional practice, by which Congress has been imposing ratification deadlines on amendment proposals. Ratification deadlines were controversial when they first appeared on the scene, but they have been accepted as part of Congress's available toolkit since it proposed the Twentieth Amendment. Therefore, some practical considerations must be taken into account in assessing the likelihood that a general challenge to ratification deadlines will enable the ERA's actual survival and effectiveness. The ERA will not function as part of the Constitution, as law that can change gender relations and the real prospects for equality beyond existing law, without being recognized as legitimate by courts and a range of other constitutional actors—lawyers, lawmakers, and the people themselves. Even if the Archivist publishes the ERA in the Constitution now, the ERA will not be deployed effectively if all these relevant makers of constitutional meaning remain skeptical of its procedural legitimacy. Any act of publication by the Archivist would likely be rejected by the unratified and rescinding states as *ultra vires*, and could also be rejected by the sitting Supreme Court. And, if the ERA is not accepted as legitimate by judges, lawmakers, and the American people, it will not be able to do the work that its most passionate proponents hope it will do. The Archivist's publication of the ERA now, in the context of a pending congressional resolution recognizing its validity and additional state efforts at rescission, is more likely to hasten the ERA's burial than to advance constitutional gender equality.

This is why the most important strategy for legitimizing the ERA for the purpose of advancing constitutional gender equality must focus on Congressional action to remove the ratification deadline altogether. This is important not just as a legal matter as to what is the correct reading of Article V with regard to deadlines, about which we could debate. Perhaps reasonable constitutional lawyers would disagree about Article V's precise allocation of powers over amendment timelines to Congress and the states. Within that debate, the question arises as to whether it is *necessary* for Congress to act in order for the ERA to become a part of the Constitution. Certainly, the historical precedent of the Fourteenth Amendment points to Congress's authority to resolve any ambiguity about the validity of an amendment's ratification. Congress—our nationally elected legislative body—played that role when states disputed the validity of the amendments that we now can consider to be foundational to our constitutional identity as a nation of equals. Specifically, the post-Civil War amendments banning slavery, guaranteeing equal protection of the laws, and prohibiting the abridgment of the right to vote on account of race, were added to the Constitution even though some opponents claimed that they had not been validly ratified. Unlike the Nineteenth Amendment, questions about the validity of those amendments' ratification were resolved by Congress, not the Supreme Court.

There is also plenty of Supreme Court precedent recognizing that disagreements about the validity of amendments are best resolved by Congress, rather than by judges. Article V gives Congress plenary power to propose amendments. That proposal power encompasses the setting of certain procedures, including timelines for ratification. *Dillon v. Gloss*⁶ and *Coleman v. Miller*⁷ recognized Congress's power to set (or not set) ratification deadlines pursuant to its proposal power in Article V's text. *Coleman v. Miller* also notes that, with regard to the question of timeliness of an amendment proposal, that it is a political question as to whether an amendment remains vital and timely.⁸ Whether an amendment is still needed depends on a fundamentally political, rather than legal, judgment. It depends on an assessment of social, economic, and political conditions that the political branches, rather than the judiciary, have legitimate power to make. Congress is the only federal political branch mentioned in the text of Article V capable of making these judgments on a national scale.

Congressional action to legitimize the ERA, rather than any judicially compelled move by the Archivist, would be consistent with the approach of the current Executive Branch as well, as expressed in the statement by the OLC in early 2022 on ERA ratification. Instead of withdrawing what was said in the Trump Administration's OLC memorandum on ERA ratification in 2020, the current OLC stated that the prior memo recognizing the validity of Congress's seven-year deadline on ERA ratification does not preclude Congress from taking action to change or remove the deadline altogether.⁹

So, Congress's removal of the deadline, whether you think it is *legally* necessary to make the ERA law or not, is *politically* necessary. Why? Because there are too many relevant actors – judges, lawyers, lawmakers, and citizens—who would doubt the ERA's procedural legitimacy under current circumstances. However, additional action taken by Congress would significantly alter many of these actors' understanding of the ERA's procedural legitimacy.

⁶ *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

⁷ *Coleman v. Miller*, 307 U.S. 433, 452–53 (1939).

⁸ *Id.* at 459.

⁹ Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment, slip op. OLC (Jan. 26, 2022).

Furthermore, the process by which Congress removes the deadline, much like the process by which the three state legislators revived the ERA, is crucial to the ERA's enduring vitality and twenty-first century relevance. As I detail in my 2020 book, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment*, the state legislative processes in Nevada, Illinois and Virginia created important spaces in which the modern ambitions of the ERA were articulated, largely by women lawmakers, including many women of color in leading roles.¹⁰ These processes actually matter, not only because they produced the additional ratifications to constitute three-fourths of the states under Article V, but because they legitimized the content of what the ERA is intended to do in the twenty-first century.

The most unique feature of the ERA, as compared to other constitutional amendments, is its transgenerational genesis. What it can do as law raises extremely challenging questions for constitutional interpretation. Taking the perspective of one mode of judicial interpretation embraced by several Justices of the Supreme Court—originalism—what is the ERA's original meaning, when the moments of drafting, congressional adoption, and completed ratification are each separated by a generation?

What the ERA's congressional adopters intended for the amendment in the 1970s is different from what the ERA's twenty-first century ratifiers intended the amendment to achieve since 2017. And this is something that I talked about a lot in the book but Ting Ting mentioned with the women. The 1970s legislative history is clear that the ERA's supporters proposed an amendment because the Supreme Court refused to recognize sex discrimination as a constitutional problem in its interpretation of the Equal Protection Clause. They introduced the ERA because no existing constitutional provision by that time was deployed to invalidate laws that excluded women from the equal rights of citizenship. The ERA's framers described this problem as much broader than sex discrimination and sex classifications in the law. The problem was legislative inaction to in the face of barriers that prevented women from participating fully as economic and political citizens because of their sex. Often, those barriers were imposed on women because they were mothers or because of women's distinctive role in reproduction, both biological and social. As early as 1971, the Supreme Court began to strike down sex-discriminatory laws under new interpretations of the Equal Protection Clause, but the inequalities women faced because of motherhood and caregiving persisted without much intervention from any branch of government. The framers of the ERA viewed Section 3 of the ERA, which built in a two-year gap between ratification and the ERA's effective date, as the time for the political

¹⁰ See JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* 129–71 (2020).

branches, whether it was state legislatures or Congress, to work on the legislative projects necessary to realize the broader aims of the ERA.

Legislation, not litigation, would take the first stab at changing laws that discriminated against women directly, and also writing new laws to remove the full range of barriers to the exercise of equal rights by persons of all genders. The floor debates in Congress over the ERA from 1970 to 1972 clearly show that the political branches, rather than the judiciary, were envisioned to be the primary enforcers of the Equal Rights Amendment. Certainly, the judicial project of scrutinizing gender classifications in the law was also an important part of the ERA's purpose, but that purpose has become less urgent because of the Supreme Court's decisions throughout the 1970s by which it came to scrutinize and strike down laws that discriminated on the basis of sex or perpetuated gender stereotypes in a manner that perpetuated women's second-class citizenship.

The ERA was proposed by two-thirds of Congress in this context of trying to get the law to forbid sex classifications, and that project actually succeeded, even without the ERA, because of litigation that was led by the late justice Ruth Bader Ginsburg as a lawyer, who was herself an unabashed proponent of the ERA. Does that render the ERA no longer necessary? The Supreme Court increasingly recognized sex discrimination under the law as a constitutional problem through interpretations of the Fourteenth Amendment. Now, if we were to freeze the ERA's 1970s purpose in the context of the twenty-first century revival, it could plausibly be argued that the 1970s purpose is no longer very pressing today, because there were so many other strategies by which feminists achieved those goals.

While courts changed constitutional law to recognize sex discrimination as a problem, on the other hand, robust legislative action to eradicate gender inequality did not materialize in the way the ERA's framers envisioned. Barriers that women faced because of motherhood, because of lack of childcare, because of their reproductive capacities, cry out for legislative solutions, and cannot be removed by judges' power to strike down unconstitutional laws.

But in order for that project, instead of the project of scrutinizing gender classifications, to become the center of the ERA's twenty-first century meaning and purpose, more work needs to be done before the ERA is added to the Constitution. The three states that revived debates about the ERA by ratifying it in 2017, 2018, and 2020 have begun that work. The House, in twice passing the resolution to remove the deadline, and in holding committee hearings and floor debates about why the deadline should be extended, has also contributed robustly to updating the ERA's meaning for the twenty-first century. Without remaking the

ERA's meaning, the ERA we end up with will be frozen in the 1970s. That is not why the current generation of ERA proponents are working so hard to get it to the finish line.

The House floor debates in 2020 and 2021 brought twenty-first century concerns to the 1970s ERA. The new disadvantages that women are now facing because of the COVID-19 pandemic, with its effects on women's employment, violence against women, childcare, and reproductive justice, require public policy solutions that the ERA can anchor. This was explicit in the March 2021 House debates on removing the ERA deadline.¹¹ The lack of availability of childcare and its implications for women's integration into the workforce was raised in the early 1970s by ERA proponents, and the childcare issue persists half a century later. Gender equality amendments in constitutions around the world that were adopted in the twentieth and twenty-first century are dealing with these issues. At the level of both legislation and judge-made law, it seems that, if we want the ERA to have any real relevance to the twenty-first century problems of gender inequality, we really need continuing public processes by which those twenty-first century problems become the focal point of this amendment, rather than just having a frozen in time 1970s amendment now ratified and added to the Constitution without further elaboration.

Without these important opportunities and processes, we will just be taking that '70s frozen in time amendment and handing it off to the sitting Supreme Court, to decide (a) whether it is valid, and (b) what it means to them. This point needs to be emphasized. It is why it is so important for Congress to weigh in on the vitality of the ERA. Not only to clear up any ambiguity about the validity of ratification, but also to deliver an ERA that has been worth the multigenerational fight.

¹¹ 167 CONG. REC. H1417 (2021).