The Potential Abandonment of Stare Decisis and the Necessity of the Equal Rights Amendment

Addie McDaniel

The History of the Equal Rights Amendment

The Equal Rights Amendment was first introduced to Congress in December of 1923 after Alice Paul and Crystal Eastman, two women's rights activists, arranged for its introduction (Murray). The amendment did not pass in 1923 but was introduced every year after that in some form until its eventual passage in 1972 (Murray). Section one of the passed version of the ERA reads, "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" (National Archives).

Congress initially set a seven-year deadline for the amendment to be ratified, which was extended three more years. Within the ten-year deadline, thirty-five of the thirty-eight states necessary had ratified the amendment. Congress's deadline had expired. To complicate matters, after the lapsing of the deadline, five states decided to rescind their ratifications (Kowal).

More recently, the ERA has begun to garner more attention with support for its ratification. In 2017 and 2018, the state legislatures of Nevada and Illinois ratified the ERA (Murray). The thirty-eighth state to ratify the ERA was Virginia in 2020 (Chappell). Despite the required number of states ratifying the amendment, it has not been added to the Constitution on several grounds (Berman). Congress's expired deadline and the five states that have rescinded their ratifications have been a source of confusion regarding the status of the ERA becoming the Twenty-Eighth Amendment (Berman). The archivist of the United States, who at that time was David Ferriero, refused to certify the amendment to the Constitution because Congress's deadline had expired (Berman).

The 1921 Supreme Court case *Dillon v. Gloss* holds that Congress is permitted to place a timeline on the ratification of Constitutional amendments. Although Congress is permitted to set

deadlines for amendments, they are not required to by the amendment procedure detailed in the Constitution. The absence of discussion of deadlines in the Constitution raises the question of whether or not congressional deadlines are binding regarding Constitutional amendments. The Justices in *Dillon v. Gloss* state that the ratification of an amendment should not be strung out over a large number of years; however, the Twenty-Seventh Amendment, ratified in 1992, took just over 202 years to ratify and add to the Constitution after its initial proposal by James Madison in 1789 (Kowal). Compared to the Twenty-Seventh Amendment, the proposed Twenty-Eighth Amendment, at the time of the refusal by the archivist in 2020, was about forty-eight years old.

The Countermovement; "STOP ERA"

Led by conservative lawyer Phyllis Schlafly, the "STOP ERA" campaign saw significant support. Schlafly echoed the initial concerns of working-class women when the ERA was first proposed, arguing that the ERA would take away a woman's ability to be a "dependent wife" and strip them of certain "material privileges" associated with a women's dependent status (Murray). By "dependent wife," Schlafly was referring to a woman dependent on her husband and whose job was to care for children and the household (Schlafly). Schlafly also argued that by ratifying the ERA, no-fault divorces, governmentally provided paternity leave and comprehensive child care would have to be adopted (Schlafly). Schlafly stated that she was defending the "real rights" of women and that a woman should have the right to be in the home as a wife and mother" (Kennedy).

To build more support for the "STOP ERA" campaign, Schlafly made connections between the ERA and support for civil, gay, and reproductive rights (Murray). The ratification of the ERA, which initially had a great deal of bipartisan support, slowed to nearly a halt because of the counter-campaign (Murray).

When the amendment was initially proposed in 1923, it had much support from middle-class and upper-class women but not working-class women (Murray). Middle and upper-class women championed the prospect of enabling legislation that would take apart social and legal hindrances, making them inferior to men in the eyes of the law (Murray).

The Guarantee of Equal Rights

The United States Constitution should guarantee equal rights for women. When the ERA was initially proposed in 1923, its purpose was to eliminate legal distinctions between men and women (National Archives). In the decades following the ratification of the Nineteenth Amendment, many court battles were fought to expand women's rights (Murray). The Supreme Court, to this point has essentially read an ERA of sorts into the Constitution; however, Supreme Court decisions may not be as stable as they once were (Murray). Everything we have worked diligently to achieve in women's rights may crumble at our feet.

The recent backsliding of women's rights following the overturning of *Roe v. Wade* and *Casey v. Planned Parenthood of Southeastern Pennsylvania* needs to be promptly mitigated. The potential abandonment of stare decisis in the United States Supreme Court has the potential to have devastating consequences on civil rights and liberties. Stare decisis, or "let the decision stand," means precisely that – jurists should hold previously established court decisions in higher regard and honor the previous rulings (Epstein et al. 38). In a concurring opinion for *Dobbs v.*

Jackson Women's Health Organization 597 U.S., the case that overturned *Roe* and *Casey*, Justice Thomas stated that the Court should reconsider all of their substantive due process precedents, namely *Griswold*, *Lawrence*, and *Obergefell*. By substantive due process, Justice Thomas is referring to a principle that relies on the Fifth and Fourteenth Amendments for the protection of fundamental rights from interference by the government (Epstein et al. 329). Decided in 1965, *Griswold v. Connecticut* provides the right to privacy for married couples to use contraception (Epstein et al. 504-507). *Lawrence v. Texas,* decided in 2003, protects private, consensual, adult intimacy, and *Obergefell v. Hodges* (2015) protects the right of couples of the same sex to marry (Epstein et al. 527-539). If it sticks with its recent trend, the current United States Supreme Court may decide to overturn the precedents set in *Griswold*, *Lawrence*, *Obergefell*, and more.

The ERA would strengthen privacy-based protections that pertain to sex discrimination because the Court would apply strict scrutiny rather than intermediate or heightened scrutiny in cases regarding sex discrimination. Currently, when the Court takes a case that pertains to sex discrimination, it applies what is called an equal protection test at a level of intermediate or heightened scrutiny. The equal protection tests have three levels of scrutiny; rational basis, intermediate or heightened scrutiny, and strict scrutiny (Epstein et. al. 616). In the rational basis test, the burden of proof is on the party challenging the law. The intermediate or heightened scrutiny test requires proof that the unequal treatment has served a legitimate governmental interest with no other feasible or adequate remedy. In the strict scrutiny test, the burden of proof is on the government to prove that their action was not unconstitutional. When strict scrutiny is applied to a case, the government typically always loses (Epstein et. al. 615). If the ERA were to be added to the Constitution, it would likely make it so the Court would apply a stricter method

of judicial review. Constitutional rights that are infringed upon are often subject to the strict scrutiny test (Epstein 615-616).

Once put in the Constitution, judges or justices, especially those who rely on textualism as a method of constitutional interpretation, will have a specific clause to examine when it comes to cases concerning women's rights. Textualists interpret the Constitution by emphasizing precisely what the document says (Epstein et al. 33). By adding a clause that specifically concerns itself with preventing sex-based discrimination, court cases may yield more favorable results for the individual or individuals being discriminated against.

A judge or justice who relies on originalism as a means of interpretation would think back to the time of passage, in this case, 1972, and attempt to decipher the original meaning behind the clause in question (Epstein et al. 33). When Congress passed the proposed Twenty-Eighth Amendment in 1972, it is likely that they were only referring to women. In 2022, our society generally views sex and gender to be two separate things. To fully protect individuals from sex and gender-based discrimination, it is necessary to include a clause relating directly to the prevention of gender-based discrimination. The Nineteenth Amendment and the proposed Twenty-Eighth Amendment both use the term "sex" and make no reference to gender. With the potential abandonment of stare decisis in the United States Supreme Court, it is of utmost importance to enumerate civil rights and liberties in the Constitution, including those pertaining to sex and gender discrimination.

When the United States Constitution was written in 1787, women were not mentioned or acknowledged anywhere in the document. Regarding women's rights, the current version of the United States Constitution only directly includes voting protections. Ratified in 1920, the Nineteenth Amendment marked the first, and thus far only, instance where women have been

acknowledged in the Constitution. The Nineteenth Amendment states that citizens will not have their right to vote denied or infringed upon because of their sex. According to Crystal Eastman, true freedom for women includes a wide array of issues such as the economic position of women, workplace inclusion, and the destruction of harmful stereotypes which push the idea that housework is solely women's work, among other things (Murray).

The founders created the Constitution in a way in which it could be amended to reflect changes in society. Although the document is not easily modified, it is necessary in some instances for a change to occur. The addition of the Twenty-Eighth Amendment is one of those occurrences.

For the Twenty-Eighth Amendment to be added to the Constitution, the Senate must be certain that President Biden's appointee for the Archivist position favors certifying the ERA. A congressional override of the lapsed deadline may need to occur in conjunction with the appointment of an archivist that supports the ERA certification. While legal battles are currently being fought over the lapsed deadline, the path forward is not entirely clear; however, having the United States archivist on board with certifying the amendment is certainly an excellent first step.

The ERA has the ability to provide additional protection to the rights of many while the fate of stare decisis is uncertain. It is of utmost importance to protect and preserve fundamental rights from the dangers of discrimination and the abandonment of previously held precedents.

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