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Part I.

Why support the Equal Rights Amendment?[1]

A. The right thing to do: equality for all

Equality of rights, regardless of sex, is a fundamental human right that belongs in the Constitution, just like other fundamental rights such as freedom of speech. When the Founding Fathers proposed and the people ratified the Bill of Rights, they could not foresee how those rights would manifest over time, yet they understood the necessity of guaranteeing these fundamental rights to sustain a democratic republic.

Today, most Americans believe that equality of the sexes belongs in the Constitution.[2] The American Bar Association supports ratification of the Equal Rights Amendment,[3] and recently sent Speaker Cox a letter urging him "to use the power of [his] office to secure ratification of the Equal Rights Amendment."[4]

Most importantly, over 80% of Virginia votes believe the General Assembly should ratify the Equal Rights Amendment.[5]

These convictions cross party lines. Although today many view the Equal Rights Amendment as a Democratic issue, it was the Republican party that first embraced the amendment in its 1940 party platform. Equality of rights continues to be such an important Republican value that it is included in the Virginia Republican Creed, which states: "We believe . . . [t]hat all individuals are entitled to equal rights."[6]

Because the Equal Rights Amendment will protect against sex discrimination on the part of the government, it likely will prohibit discrimination on the basis of transitioning or transgender status. In the context of Title VII and Title IX, courts

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[1] These materials are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

[2] *Americans – by 94% -- Overwhelmingly Support the Equal Rights Amendment (ERA),* https://www.prnewswire.com/news-releases/breaking-americansby-94---overwhelmingly-support-the-equal-rights-amendment-era-300286472.html

[3] ABA Resolution adopted by the House of Delegates, Feb. 8, 2016.

[4] Letter from Robert M. Carlson, President of the American Bar Association, to Delegate M. Kirkland Cox, Jan. 2, 2019.

[5] The Judy Ford Wason Center, Christopher Newport University, *Voters back Amazon deal, sports betting, ERA and independent redistricting commission* (Dec. 5, 2018), http://wasoncenter.cnu.edu/wp-content/uploads/2018/12/Dec-5-2018-Final-1.pdf

[6] Virginia Republican Creed, available https://virginia.gop/virginia-republican-creed/

have interpreted the proscription against sex discrimination as prohibiting discrimination on the basis of transitioning or transgender status.[7]

Court decisions interpreting the word "sex" in the context of Titles VII and IX, as well as other legislation, favor including transgender status within the protections of the Equal Rights Amendment. The precise interpretation of the word “sex” in the context of the Equal Rights Amendment, however, must wait until courts weigh in after the amendment becomes effective.

B. **The next step in our history of correcting inequalities**

The history of the United States shows that Americans have consistently valued equality, just not always understood who was entitled to equal rights. Once a significant number of Americans identified a class of people who did not enjoy civil rights, the Constitution was amended to correct this omission.

In the eighteenth century, the Founding Fathers did not count African Americans as full human beings, and they did not view women as citizens enjoying the same rights as landed men. The famous English jurist captured the perspective of the day among educated landed men: “The very being or legal existence of the woman is suspended during the marriage.” That is, the husband owned his wife’s body, property, and children.

Over subsequent years that included a war that almost destroyed the Republic, Americans came to realize that a true democratic republic could not deny citizenship rights to former enslaved people and their descendants. The Civil Rights Amendments were introduced by Congress, ratified by legislatures of three-fourths of the states, and incorporated into the Constitution.

At the same time that Americans advocated and then adopted the Civil Rights Amendments, many women and men promoted the concept that all people, not just men, should enjoy equal rights. This ideal was rejected at the time the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted.

Decades later (in between the adoption and repeal of a constitutional amendment barring the manufacture, sale, and transportation of intoxicating liquors), Congress proposed and the states ratified the right of United States citizens to vote, regardless

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[7] *See, e.g., EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution).

of sex. When this suffrage amendment became valid as the Nineteenth Amendment of the Constitution, it had not been ratified by Virginia.

The Virginia General Assembly allowed 32 years to pass after the Nineteenth Amendment was included in the Constitution before ratifying it. In other words, the Nineteenth Amendment was in force nationally for an entire generation before Virginia acted.

Sooner or later, one of the unratified states will ratify the Equal Rights Amendment and become the last state necessary to meet the Constitutional threshold of ratification by the legislatures of three-fourths of the states. By becoming the 38th and last state necessary to ratify the Equal Rights Amendment, Virginia could repeat its historical role in serving as the last state necessary to ratify the Bill of Rights and redeem itself for failing to timely ratify the Nineteenth Amendment.

C. Protection against erosion of women's rights

The Equal Rights Amendment is necessary to protect against erosion of women's rights. Over the last fifty years, Congress has enacted numerous statutes protecting women's rights, and states have, for the most part, abolished laws discriminating on the basis of sex, especially in the contexts of property and family law. The Supreme Court came to recognize that government discrimination on the basis of sex violated the Constitution unless the government could establish it had an important interest in doing so and its discriminatory action is substantially related to that interest. This judicial standard was used to strike down Virginia's policy of admitting only males to the Virginia Military Institute.[8]

Some would argue that these statutes and judicial standards do not go far enough. Even if they do, however, statutes can be repealed or modified, and court decisions can be repealed or retreated from. Neither statutes nor judicial rulings are as enduring as a Constitutional Amendment. Women's enjoyment of equal citizenship rights should not depend on who sits in the assemblies and courts.

There are signs that some in power would reverse the gains made by the United States in achieving equality of rights. For example, Secretary of Defense Mattis, in speaking at VMI in September 2018, expressed some skepticism of the military's policy of allowing women to serve in combat.[9] Women in the military continue to struggle for equal treatment, access to promotion, and justice.

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[8] *See United States v. Virginia*, 518 U.S. 515 (1996).

[9] *See* Remarks by Secretary Mattis at the Virginia Military Institute, Lexington, Virginia, https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1645050/remarks-by-secretary-mattis-at-the-virginia-military-institute-lexington-virgin/

In November 2018, a district court ruled that Congress lacked the authority to ban the harmful practice of female genital mutilation even though Congress has the power to enact healthcare legislation and regulate interstate commerce.[10]

Complacency with the status quo risks a return to a society in which women's roles and opportunities were more limited than they are now while their family responsibilities remain the same or increase. Specifically, we risk keeping women as second-class citizens in the public and economic spheres while demanding more and more of them within the private sphere, all without adequate compensation or recognition of their critical roles.

All citizens of the United States should enjoy equal citizenship stature unless they abuse that right. The Equal Rights Amendment is necessary to assure that equal citizenship will not be denied on account of sex.

D. **Consistency of judicial standards**

Government discrimination on the basis of race, national origin, and sex should be required to meet the same standard to pass constitutional muster. But they do not. With respect to race, discrimination is prohibited unless the government proves its discriminatory classification was narrowly tailored to serve the compelling government interest. State governments must meet this same standard for its classifications on the basis of national origin as well as race. Government action that violates individual fundamental rights, such as freedom of religion, must also meet this standard. With this high standard, it is very difficult for the government to discriminate on the basis of race, national origin, or religion.

Unlike race and national origin, sex, is not a proscribed classification. The state and federal governments may discriminate on the basis of sex so long as they can demonstrate an "exceedingly persuasive justification." Classification on the basis of sex does not violate the Constitution so long as the government has an important interest in doing so and its discriminatory action is substantially related to that interest.[11]

Why do courts impose one standard to test the constitutionality of government classification on the basis of race or national origin and a different one to sex? We do so because the Constitution does not prohibit sex discrimination. If the Equal Rights Amendment is added to the Constitution, then the Constitution will prohibit sex discrimination. With that addition, sex becomes, like race and national origin, a proscribed classification, and courts will test the constitutionality of government

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[10] *See United States v. Nagarwala*, ___ F. Supp. 3d ___, No. 17-CR-20274, 2018 WL 6064968 (E.D. Mich. Nov 20, 2018).

[11] *See United States v. Virginia*, 518 U.S. 515 (1996).

classifications on all of these bases by applying the same high "strict scrutiny" standard.

Court decisions that likely would have come out differently had the Equal Rights Amended been part of the Constitution at the time include *Nguyen v. INS*, which upheld a law that made it more difficult for a child born abroad to a male U.S. citizen than a child so born to a female U.S. citizen,[12] and *Rostker v. Goldberg*, which upheld registration of men but not women for the draft when women were excluded from combat service.[13]

E. Increased efficiency

Enshrining Equal Rights in the Constitution will enhance government and industry efficiency. Efficiency is the good use of resources in a way that does not waste any. Our current system is not fully harnessing the strengths that women have to offer. As a result, we are wasting valuable resources that could otherwise be used to advance our nation and its economy.

The Equal Rights Amendment will not effect immediate changes in the status of women, nor will it reach directly into the private sector. But ratification will be an important statement about equality as a principle that the private sector cannot ignore.

More significantly, the Equal Rights Amendment will affect federal and state governments, which collectively comprise our country's largest employer and employ a significant portion of Virginians. In turn, how federal and state governments treat women will directly impact the overall employee marketplace.

Both the principle of equality and government action supporting equality will coalesce toward the eradication of sex discrimination in government and the private sector. Valuable resources will not be discounted solely because of sex.

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[12] *See Nguyen v. INS*, 533 U.S. 53 (2001).

[13] *See Rostker v. Goldberg*, 453 U.S. 57 (1981). The Court may have reached a different decision today now that women are allowed to serve in combat.

Appendix to Part I

Court Decisions

EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018)

Nguyen v. INS, 533 U.S. 53 (2001)

Rostker v. Goldberg, 453 U.S. 57 (1981)

United States v. Nagarwala, ___ F. Supp. 3d ___, No. 17-CR-20274, 2018 WL 6064968 (E.D. Mich. Nov 20, 2018)

United States v. Virginia, 518 U.S. 515 (1996)

Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017)

Other Materials

Americans – by 94% -- Overwhelmingly Support the Equal Rights Amendment (ERA)

ABA Resolution adopted by the House of Delegates

Letter from Robert M. Carlson, President of the American Bar Association, to Delegate M. Kirkland Cox

Voters back Amazon deal, sports betting, ERA and independent redistricting commission

Virginia Republican Creed

Remarks by Secretary Mattis at the Virginia Military Institute

Part II.

The Equal Rights Amendment Will Not Eradicate Differences of the Sexes[1]

"The Equal Rights Amendment is not a unisex amendment."[2] Ratification will not eradicate the differences between the sexes. Many state constitutions, including Virginia's, have had Equal Rights Amendments in their state constitutions for decades without imperiling the differences between the sexes. Moreover, the Equal Rights Amendment will assure that government actions are based on compelling reasons instead of sweeping generalizations about the sexes.

Just like other constitutional rights, rights established by the Equal Rights Amendment are not absolute. For example, we see that the First Amendment protects freedom of expression, but it does not bar the government from outlawing yelling "FIRE" in a crowded theater. Likewise, the Equal Rights Amendment will not completely bar the government from making sex-based classifications.

We must also realize, however, that there are spheres of our lives where segregation by sex may disappear, and rightly so. As discussed below, the Equal Rights Amendment may end segregation of the sexes where the government is simply using sex as a proxy for other attributes.

A. Sex-segregated facilities

Hospitals, schools, prisons, jails, and other government agencies can continue to maintain or operate sex-segregated facilities as long as the government can show that the segregation is narrowly tailored to achieve a compelling government interest or otherwise survive Constitutional scrutiny by the courts. Sex segregation in such facilities may also be protected by privacy rights.

B. Sex-segregated activities, including sports

Ratification of the Equal Rights Amendment may have an impact on sex-segregated activities such as interscholastic and intercollegiate sports. Many states already allow

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[2] Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 Harv. Women's L. J. 19, 21 (1978). Ginsburg continued: The Equal Rights Amendment "does not require similarity in result, parity, or proportional representation. It simply prohibits government from allocating rights, responsibilities or opportunities among individuals solely on the basis of sex."

girls to try out for boys' teams, and at least one state, Massachusetts, allows boys to try out for girls' teams where there is no male-team equivalent.[3]

In Massachusetts, the state's Supreme Judicial Court applied strict scrutiny and concluded that barring a boy from playing on a girls' field hockey team violated the state's Equal Rights Amendment. Presumably, strict scrutiny would apply to challenges based on the federal Equal Rights Amendment, and programs that segregate the sexes would be prohibited unless the government established that the discriminatory action was narrowly tailored to achieve a compelling government purpose.

Schools and colleges can and should develop programs that segregate on the basis of ability, not sex. Segregating simply on the basis of sex may be administratively easy, but there are ways that programs can meet the goals of competitiveness, safety, and opportunity such as tiered programs based on abilities and other non-gendered classifications, with outlets to assure opportunities for all. Ultimately, programs based on abilities, strength, size, and other characteristics will often result in single-sex teams, but this segregation will not be the result of sex discrimination.

C. Set-asides and preference programs

The Equal Rights Amendment should not eliminate government programs such as set-asides and preference programs for women-owned businesses as long as the preference programs are not solely based on gender classifications. Courts have upheld preference programs against racial challenges where eligibility was not solely dependent on race.

For example, in *Rothe Development, Inc. v. Dep't of Defense*, the D.C. Circuit upheld the constitutionality of the Small Business Administration's ("SBA's") 8(a) program against a challenge that it discriminated on the basis of race.[4] The Supreme Court declined to hear the case.

Under the SBA's 8(a) program, "socially and economically disadvantaged" small businesses are eligible to compete in sheltered markets for government contracts. This arrangement expands opportunities for small businesses to be awarded government contracts. The statute establishing this program defines "socially disadvantaged individuals" as those "who have been subjected to racial or ethnic

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[3] *See Commonwealth by Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A. 2d 839 (Pa. Commw. Ct. 1975) (holding unconstitutional a rule excluding girls from boys' teams); *Darrin v. Gould*, 540 P.2d 883 (Wash. 1975) (same); *Attorney Gen. v. Mass Interscholastic Athletic Ass'n*, 398 N.E. 2d 284 (Mass. 1979) (declaring rule providing strict segregation of sports teams invalid under state Equal Rights Amendment).

[4] *See Rothe Development, Inc. v. Dep't of Defense*, 836 F.3d 57 (D.C. Cir. 2016).

prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."

Rothe challenged Section 8(a) on the grounds that it contained an unconstitutional race-based classification that hindered its ability to compete with minority-owned businesses for government contracts.

The D.C. Circuit disagreed. It concluded that strict scrutiny was not applicable because Section 8(a) "uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such."

By analogy, statutes using facially sex-neutral terms of eligibility may not be subjected to strict scrutiny and will, therefore, be more likely to survive constitutional challenges.

Eligibility for programs that benefit women-owned businesses solely on the basis of sex, such as the Disadvantaged Business Enterprise Program, will have to be amended to include other criteria such as economic disadvantage or historical discrimination. Alternatively, statutes that discriminate on the basis of sex must be supported by a compelling government interest and be narrowly tailored to serve that interest.

D. Insurance

Insurance rates are regulated by the states. Since Virginia has regulated insurance with a gender equality statement in our Virginia state constitution, it can be assumed no change would occur.

E. Public nudity

The Equal Rights Amendment will not necessarily render public nudity statutes unconstitutional. The Supreme Court has upheld enforcement of public nudity (or indecency) statutes against First Amendment challenges.[5] Courts may, by analogy, apply the reasoning in these decisions to uphold nudity statutes against challenges brought under the Equal Rights Amendment.

To test whether a government action violates First Amendment rights, courts apply what is called "strict scrutiny." Under this test, the government must show it had a compelling government purpose for its action and that the action was narrowly tailored to serve that purpose. The Supreme Court has developed less stringent tests to apply to commercial, symbolic, and other types of speech.

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[5] *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding enforcement of Indiana statute requiring nude dances to wear "pasties" and a "G-string" when they dance); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (same).

At issue in *Barnes* was enforcement of Indiana's public indecency statute against nude dancers. The Supreme Court viewed nude dancing as expressive conduct. But it treated this expressive conduct as symbolic speech. Instead of applying strict scrutiny, the Court applied an intermediate scrutiny and asked whether the enforcement of the statute furthered a substantial government interest, whether that interest was unrelated to suppressing speech, and whether the restriction was no greater than necessary to further the government interest. Under this test, Indiana's enforcement of its public indecency statute was upheld.

Similarly, statutes and ordinances barring public nudity may survive constitutional scrutiny. Under the rationale of *Barnes*, these acts could be deemed constitutional under an intermediate level of scrutiny. The test could require, for example, that the government show that its enforcement furthered a substantial government interest; the government's justification did not rest on overbroad generalizations about the different talents, capacities, or preferences of males and females;[6] and the restriction was no greater than necessary to further the government interest.

It should be noted that the Supreme Court Justice William Rehnquist, writing the plurality opinion in *Barnes*, approved public indecency statutes as "reflect[ing] moral disapproval of people appearing in the nude among strangers in public places." In *Barnes*, Justice Rehnquist stated:

> Public indecency statutes of this sort are of ancient origin, and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common law roots of the offense of "gross and open indecency" in *Winters v. New York,* 333 U.S. 507, 515 (1948). Public nudity was considered an act *malum in se*. *Le Roy v. Sidley,* 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664).

Although we cannot say for sure how the courts will rule, the Supreme Court's upholding enforcement of nudity statutes against First Amendment challenges may provide a road map for states and localities to enforce public nudity ordinances.

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[6] *See United States v. Virginia*, 518 U.S. 515 (1996) (applying intermediate scrutiny to test the constitutionality of Virginia's banning women from VMI).

Appendix to Part II

Court Decisions

Attorney Gen. v. Mass Interscholastic Athletic Ass'n, 398 N.E. 2d 284 (Mass. 1979)

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)

Commonwealth by Packel v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. Commw. Ct. 1975)

Darrin v. Gould, 540 P.2d 883 (Wash. 1975)

Rothe Development, Inc. v. Dep't of Defense, 836 F.3d 57 (D.C. Cir. 2016)

United States v. Virginia, 518 U.S. 515 (1996) -- *available in Appendix to Part I*

Other Materials

Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 Harv. Women's L. J. 19, 21 (1978).

Part III.

Equality Advancements Since the 1970s[1]

Prior to the women's movement of the 1970s, many more statutes and government practices discriminated on the basis of sex than do today. Advances against sex discrimination were made through courts and state and federal legislatures.

In the waning days of 1971, the Supreme Court held that an Idaho law that automatically chose men over women to administer estates was based solely on a discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment.[2] In 1973, a married female Air Force Officer sought increased benefits for her husband and successfully challenged a statute that presumed military wives were dependent on husbands but husbands were not dependent on their wives.[3] In 1975, ruling in favor of a man, the Court held that the Social Security Administration could not differentiate among covered employees solely on the basis of sex.[4] In 1979, the Court held that a sex-based alimony statute violated the Equal Protection Clause of the Fourteenth Amendment.[5]

On the legislative side, Congress had passed the Employment Protection Act in 1964 and the Civil Rights Act of 1964, but it was not until 1972 that Congress gave teeth to Title VII of the Civil Rights Act by empowering the Equal Employment Opportunity Commission (EEOC) to initiate litigation and define "discrimination."

During the 1970s and 1980s statehouses also took up amending statutes that discriminated on the basis of sex. Property, alimony, and child custody laws were changed.

Resistance to eliminating sex discrimination in the public sphere continued, however, and it was not until 1996 that Virginia was forced by a Supreme Court decision to allow women to attend its state-funded military college, the Virginia Military Institute.[6]

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[2] *See Reed v. Reed*, 404 U.S. 71 (1971).

[3] *See Frontiero v. Richardson*, 411 U.S. 677 (1973).

[4] *See Weinberger v. Wiesenfield*, 420 U.S. 636 (1975).

[5] *See Orr v. Orr*, 440 U.S. 268 (1979).

[6] *See United States v. Virginia*, 518 U.S. 515 (1996).

Today, some resisting the Equal Rights Amendment have claimed, anachronistically, that ratification of the Equal Rights Amendment will hurt women by diminishing their social security benefits, weakening their position in divorce and child custody disputes, and requiring them to register for the draft. These arguments are unfounded.

A. Social Security

As mentioned above, the Social Security Administration may no longer differentiate among covered employees solely on the basis of sex.[7]

B. Marital Property, Alimony, Child Support, & Child Custody

Virginia's domestic relations statutes no longer differentiate on the basis of sex. In determining both equitable distribution of property and spousal support, Virginia courts must consider a number of statutory factors, none of which is sex.[8] Similarly, courts must apply statutory child support guidelines or, if the court deviates from the guidelines, it must make written findings considering specified statutory factors, none of which includes sex.[9] In determining custody and visitation of a minor child, the court must give primary consideration to the best interest of the child.[10] To determine the best interests of the child for custody or visitation purposes, the court must consider a number of statutory factors, and, as between parents, there is no presumption or inference of law in favor of either.[11]

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[7] *See Weinberger*, 420 U.S. 636.

[8] *See* Va. Code Ann. Sec. 20-107.3 (equitable distribution); Sec. 107.1.

[9] *See* Va. Code Ann. Sec. 20-108.1.

[10] *See* Va. Code Ann. Sec. 20-124.2.

[11] *See id.*

C. The Draft

Women are already eligible to be drafted. In the last few days of World War II and were nearly drafted in the last couple of days of WWII, as nurses.[12]

Requiring both men and women to register for the draft is not dependent on passage of the Equal Rights Amendment. Already, in October 2017, the Pentagon recommended that women should register with the selective service.[13]

Regardless of ratification of the Equal Rights Amendment, a reinstated draft likely will include everyone, not just men. Conscripting only men into our military force, currently comprised of both male and female volunteers, would be unreasonable and antithetical to defense needs and morale. Women have proven their worth in our modern military and in a time of war, if a draft were necessary, our military would want the very best our country has to offer, which would include women.

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[12] Joseph Connor, *Drafting Women?* HISTORYNET (Aug. 6, 2016), http://www.historynet.com/drafting-women.htm.

[13] Julia Manchester, *Pentagon recommends requiring women to register for the draft*, THE HILL (Oct. 25, 2017), http://thehill.com/policy/defense/357055-pentagon-recommends-requiring-women-to-register-for-the-draft.

Appendix to Part III

Court Decisions

Frontiero v. Richardson, 411 U.S. 677 (1973)

Orr v. Orr, 440 U.S. 268 (1979)

Reed v. Reed, 404 U.S. 71 (1971)

United States v. Virginia, 518 U.S. 515 (1996) -- *available in Appendix to Part I*

Weinberger v. Wiesenfield, 420 U.S. 636 (1975)

Statutes

Va. Code Ann. Sec. 20-107.1

Va. Code Ann. Sec. 20-107.3

Va. Code Ann. Sec. 20-108.1

Va. Code Ann. Sec. 20-124.2

Other Materials

Joseph Connor, *Drafting Women?* HISTORYNET (Aug. 6, 2016)

Julia Manchester, *Pentagon recommends requiring women to register for the draft*, THE HILL (Oct. 25, 2017)

Part IV

The Equal Rights Amendment Is Not a Surreptitious Vehicle for Abortion Rights[1]

The Equal Rights Amendment will not change the existing Constitutional framework under *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] Under current law, the limited right to access abortion procedures is grounded in constitutional privacy rights, not equality rights.[4]

To be fair, some have argued that the Equal Rights Amendment will serve as a basis for challenging restrictions on abortion procedures. In the words of Justice Ginsburg, 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."[5]

This is not, however, the Supreme Court's current or foreseeable approach to abortion procedures, with or without an Equal Rights Amendment. More importantly, this approach to abortion will not apply under equal rights if pregnancy does not limit women's ability to enjoy equal citizenship stature, including participation in the economy that will allow access to equal citizenship stature.

Some have argued that the Equal Rights Amendment is a Trojan Horse encapsulating abortion rights. Proponents of this argument refer to cases where courts required states to pay for "medically necessary" abortion procedures if the states paid for all other "medically necessary" procedures.[6] In other words, under these decisions, a state cannot have a policy of covering all medically necessary procedures and then

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[2] *See Roe v. Wade*, 410 U.S. 113 (1973).

[3] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The decision in *Casey* prohibits states from enacting laws that place an undue burden on women seeking an abortion within the first trimester.

[4] *See Roe*, 410 U.S. 113. In *Roe*, the Supreme Court attempted to balance privacy rights against states' rights and duties to protect the health of their citizens.

[5] *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

[6] *See, e.g., State v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v. Maher*, 515 A.2d 134 (CT Super. Ct. 1986).

single out for exclusion medically necessary procedures that pertain only to women. These decisions *do not* rule on the legality or illegality of abortion procedures.

The Equal Rights Amendment will not operate in a vacuum. As is so often the case, courts and legislatures will have to balance competing rights, much as the Supreme Court in *Roe* balanced the right to privacy against states' obligations to protect the health of its citizens.

The Equal Rights Amendment will provide a basis for curbing pregnancy discrimination and the incidence of miscarriages caused by failure to accommodate pregnant women's health needs.

In contemplating abortion, we should not forget about the miscarriages caused by women's having to work without their employers' accommodating their health needs as instructed by their physicians.

Women who need to keep their jobs are sometimes forced to choose between performing their usual functions and complying with their physicians' care instructions. The results can be devastating, with women miscarrying while at work.[7]

Under the current legal framework, without the Equal Rights Amendment, judicial relief for women who seek work accommodations on account of pregnancies require that women prove they were being treated differently than men who were similarly situated. This standard is virtually impossible for women to meet. To illustrate, a workplace policy that limits the employer's obligation to accommodate an employee's injury only if the injury originated at work will not give rise to an equal protection claim for failure to accommodate limitations due to pregnancies.

The Equal Rights Amendment will prohibit the federal and state governments from discriminating on the basis of sex. With this mandate, government agencies should provide a new legal framework in which women who require accommodation because of pregnancy no longer have to choose between work and bearing children.

Although the Equal Rights Amendment relates only to government – as opposed to private sector – action, we believe the solutions the amendment provides in the public sector will translate to voluntary changes in the private sector. The state and federal governments are outsized employers, and, as such, how they act will have a great impact on the employment market. With the largest employers protecting pregnancies, it will be easier for private employers to follow suit.

Protecting working women and their pregnancies will help families too because most households in America depend, wholly or in part, on women's income.

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[7] *See* Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, NY TIMES (Oct. 22, 2018) (reporting on women who lost their pregnancies after denied requests for light duty accommodation).

Appendix to Part IV

Court Decisions

Doe v. Maher, 515 A.2d 134 (CT Super. Ct. 1986)

Gonzales v. Carhart, 550 U.S. 124, 172 (2007)

New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Roe v. Wade, 410 U.S. 113 (1973)

State v. Planned Parenthood of Alaska, 28 P.3d 904 (Alaska 2001)

Other Materials

Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, NY TIMES (Oct. 22, 2018)

Part V.

Congress's Ratification Deadline, Attempted Rescissions, & Next Steps

Under Article V of the United States Constitution, once legislatures of three-fourths of the states ratify an amendment, it becomes a part of the Constitution.[1] If Virginia votes to ratify the Equal Rights Amendment, it will be the 38th and final state necessary for ratification.

Some have argued that the General Assembly does not have the power to ratify the Equal Rights Amendment because the Congressionally-imposed ratification deadline expired in 1982. Some question whether states' attempts to rescind their ratification mean that Virginia will not be the last state necessary for ratification.

As explained below, the General Assembly does have the power to vote on ratification, and it is unlikely that states' attempts at rescission will be recognized.

A. The Amendment Process: Division of Power Between Congress and the States

The United States Constitution is notoriously difficult to amend. The process of amendment is set forth in Article V.

Either Congress or the people may propose amendments, either by a vote of two-thirds of Congress or by a constitutional convention called by two-thirds of the states. Once proposed, an amendment becomes part of the Constitution when ratified by three-fourths of the states. Today, thirty-eight of the fifty states are needed for ratification.

Article V says nothing about Congress having the power to set ratification deadlines. In fact, the first deadline on the ratification process was not introduced until the twentieth century when Congress proposed the Prohibition Amendment.

Since Prohibition, Congress inserted a seven-year deadline into the text of all proposed amendments except for the Suffrage Amendment and the Equal Rights Amendment. In proposing the Equal Rights Amendment, Congress departed from its own precedent and inserted the seven-year deadline, not in the amendment text, but in the precatory clauses of the proposing resolution.[2]

No court has ruled on whether the placement of the deadline outside the amendment text itself changes the effect of the deadline. The Supreme Court has, however, held

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[1] U.S. CONST. Art. V.

[2] H.J. Res. 208, 92nd Congr. (1972).

that Congress may fix a definite period for ratification.[3] In reaching this conclusion, the Court stated its philosophical view that "the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require."[4] Specifically, the Court reasoned that Article V did not contemplate that a proposed amendment "is to be open to ratification for all time, or that ratification in some States may be separated from that in others by many years and yet be effective."[5]

Notwithstanding this 1921 Supreme Court decision, an amendment originally proposed in 1789—the Madison Amendment, which prohibited Congressional salary changes from taking effect until the term following approval—became part of the United States Constitution over two hundred years after it was introduced. Maryland ratified the Madison Amendment in 1789. In 1992, when it was ratified by Michigan, the thirty-eighth state, the Madison Amendment immediately became part of the Constitution.

Allowing Congress to impose deadlines on the ratification process upsets the delicate balance between Congress's authority to propose amendments and the scope of the separate states' power to take up the amendments when they choose, especially where, as here, none of the ratifying states voted on the deadline.[6]

Neither the federal nor the state constitution prevents the General Assembly from voting to ratify the Equal Rights Amendment. The deadline did not prevent Nevada or Illinois from recently ratifying the amendment. More importantly for Virginia, the deadline did not prevent the Virginia Senate from passing ratification resolutions in 2011, 2012, 2014, 2015, and 2016.

B. Congress's Authority to Extend or Eliminate the Deadline

Alternatively, if Congress does have the power to impose ratification deadlines as the Court held in *Dillon*, it presumably may extend or eliminate its own deadlines, much like it has the authority to repeal legislation it has enacted. In fact, Congress has already once extended the ratification deadline from 1979 to 1982. Because the deadline was not included in the amendment text submitted to the states, Congress is not constrained by states' action when it considers extending or eliminating the

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[3] *Dillon v. Gloss*, 256 U.S. 368 (1921). This view of Constitutional interpretation is not held by many of the most recent judicial appointments. For example, President Trump and many Senators prefer judges who adhere to an originalist theory of constitutional interpretation in the mode of Justice Antonin Scalia.

[4] *Dillon*, 256 U.S. at 376.

[5] *Id.* at 374.

[6] *See* Mason Kalfus, *COMMENT: Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L.REV. 437 (Mar. 1, 1999).

deadline. To this end, resolutions eliminating the ratification deadline have been prepared by Representative Jackie Speier and Senator Ben Cardin to introduce during the 116th Congress.

In response to a formal request from Senator Richard H. Black, Attorney General Mark Herring opined that "the lapse of the ERA's original and extended ratification periods has not disempowered the General Assembly from passing a ratifying resolution."[7]

That states maintain the power to consider the Equal Rights Amendment is further supported by a study from the Congressional Research Service, which concluded that the deadline did not automatically invalidate the ratifications.[8]

C. Attempted Rescissions of Ratification

Article V of the Constitution is silent regarding rescission of a state's vote to ratify a constitutional amendment. Congress has consistently read Article V to grant state legislatures only a ratification power.[9] Once a state legislative body has ratified an amendment pursuant to Article V, its constitutional role is complete.[10] This interpretation avoids the confusion and lack of confidence in the amendment process that would result by reading Article V as granting the power to ratify with the ability to reverse course at any time.

Moreover, because the Supreme Court has confirmed that the power to ratify constitutional amendments "is the exercise of a national power specifically granted by the Constitution" and because the Constitution does not specifically also grant the power to rescind, states cannot exercise their own authority to do so.[11]

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[7] Letter of Mark R. Herring, Attorney General of the Commonwealth of Virginia, to Senator Richard H. Black (May 11, 2018).

[8] Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues,* CONGRESSIONAL RESEARCH SERVICE (July 18, 2018).

[9] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 HARV. L. REV. 386, 419-20 (1983).

[10] *Id.*

[11] *Hawke v. Smith*, 253 U.S. 221, 229–30 (1920) (determining the lower court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (holding that states may not impose qualifications for offices of the United States representative or United States senator in addition to those set forth by the Constitution).

Historically, attempts at rescission have been deemed ineffective.[12] For example, in 1868, Ohio and New Jersey attempted to rescind their ratifications of the Fourteenth Amendment. Both states were needed to reach the required total for the Fourteenth Amendment to become a part of the Constitution. Congress and the Secretary of State did not recognize Ohio's and New Jersey's attempts to rescind and, instead, confirmed the amendment's passage.[13]

In 1869, New York attempted to rescind its ratification of the Fifteenth Amendment.[14] In the meantime, Georgia ratified the amendment, which was added to the Constitution. Despite New York's efforts, it is deemed a ratifying state.

In 1920, West Virginia attempted to rescind its ratification of the Nineteenth Amendment. The Secretary of State ignored the attempt and certified the Amendment.[15]

In short, efforts to rescind have historically failed. There is every reason to believe that the same would be true with respect to any attempts to rescind ratification of the ERA.

One district court held that states have the power to rescind a prior ratification if done prior to ratification by three-fourths of the states.[16] This decision, however, was vacated by the Supreme Court without addressing the issue of whether states had the power to rescind ratifications.[17] Perhaps more importantly, in *Coleman v. Miller*,[18] the Court described the history of the Fourteenth Amendment (including attempts at rescission) and concluded that questions about the validity of ratifications are political questions, not to be resolved in court.

D. Next Steps

Once a state ratifies a proposed amendment, it notifies the National Archives and Records Administration ("NARA"). Once NARA has received notice that a proposed amendment has been adopted, it causes the amendment to be published, specifies

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[12] Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How*, 28 HASTINGS L.J. 979, 999-1000 (1977).

[13] W. F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 346 (1921).

[14] *Id*.

[15] Robinson Woodward-Burns, *The Equal Rights Amendment is one state from ratification. Now what?*, THE WASHINGTON POST (June 20, 2018).

[16] *Idaho v. Freeman*, 529 F. Supp. 1107, 1150 (D. Idaho 1981).

[17] *National Organization for Women v. Idaho*, 459 U.S. 809, 809 (1982).

[18] *Coleman v. Miller*, 307 U.S. 433 (1939).

the ratifying states, and states that it has become valid, to all intents and purposes, as a part of the Constitution of the United States.[19]

NARA has not opined on the state ratification process of the Equal Rights Amendment, but it has noted that ratification by three-fourths of the states is all that is required for an amendment to become a part of the Constitution, and no further acts are necessary on the part of Congress or otherwise.[20]

[19] *See* 1 U.S.C § 106(b).

[20] *See* Letter of David Ferriero, National Archivist to Representative Carolyn Maloney (Oct. 25, 2012).

Appendix to Part V

Constitution

U.S. CONST. Art. V.

Statutes & Legislative Materials

1 U.S.C § 106(b)

H.J. Res. 208, 92nd Congr. (1972)

Court Decisions

Coleman v. Miller, 307 U.S. 433 (1939)

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

Hawke v. Smith, 253 U.S. 221 (1920)

Idaho v. Freeman, 529 F. Supp. 1107, 1150 (D. Idaho 1981)

National Organization for Women v. Idaho, 459 U.S. 809, 809 (1982)

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995)

Other Materials

Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 HARV. L. REV. 386, 419-20 (1983)

W. F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 346 (1921)

Letter of David Ferriero, National Archivist to Representative Carolyn Malone (Oct. 25, 2012)

Letter of Mark R. Herring, Attorney General of the Commonwealth of Virginia, to Senator Richard H. Black (May 11, 2018)

Mason Kalfus, *The Equal Rights Amendment: Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, U. CHI. L.R. (Mar. 1, 1999)

Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How*, 28 HASTINGS L.J. 979, 999-1000 (1977)

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