The Heritage Foundation

LEGAL MEMORANDUM

No. 291 | OCTOBER 26, 2021

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

Not Your Grandmother's ERA: Why Current Equal Rights Amendment Strategies Will Fail

Thomas Jipping

KEY TAKEAWAYS

The original ERA's objective of legal equality between men and women has been achieved by both legislatures and courts without the ERA itself.

The 1972 ERA proposed by Congress failed because the risk of its use for a different agenda far outweighed any remaining potential benefit.

None of the current strategies to promote the ERA will succeed because the 1972 ERA can no longer be ratified—and because the new ERA is even more radical.

On March 22, 1972, after five decades of controversy, dozens of hearings, and more than 1,000 resolutions,[1] the U.S. Senate followed the House of Representatives by approving the Equal Rights Amendment (ERA) and sending it to the states for possible ratification. It read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have power to enforce this article by appropriate legislation."

The 1972 ERA had a seven-year ratification deadline, a feature of many resolutions proposing constitutional amendments including eight that are today part of the Constitution. Resolutions to introduce the ERA began to include a ratification deadline in the 1940s—and supporters said that a seven-year deadline was "customary" and would be "perfectly all right."[2] The National Woman's Party (NWP), which

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

originally drafted and had long promoted the ERA, said that supporters would have no objection to "a reasonable time limitation in which the amendment should be ratified."[3]

This position by ERA supporters had not changed by January 1971 when Representative Martha Griffiths (D–MI) introduced House Joint Resolution 208,[4] which Congress would pass to formally propose the ERA. The National Federation of Business and Professional Women's Clubs, for example, acknowledged that a ratification deadline would "prevent indefinite procrastination,"[5] and the Women's Equity Action League agreed with Griffiths that a deadline was a "minor nonsubstantive" addition.[6] While Griffiths said that seven years was "ample," she predicted that the states would ratify the ERA "in record time."[7]

She was wrong. While 30 state legislatures passed resolutions ratifying the 1972 ERA within a year, only five more did so by the deadline—and five of those ratifying states rescinded their approval.[8] Even with 39 months added by a congressional resolution, the ratification tally stayed at 35 states and five rescissions—short of the 38 needed for ratification. The Congressional Research Service has repeatedly acknowledged that as a result, "the ERA formally died on June 30, 1982."[9]

Supporters of the ERA have responded to this failure with three strategies.

1. They have tried to resuscitate the 1972 ERA—as if it were still pending before the states—with the goal of completing its ratification process.

2. They have introduced new resolutions with the goal of once again proposing the original ERA.

3. They have introduced resolutions with the goal of proposing a new ERA that would use a new method of enforcement to implement a novel concept of "equality."

This *Legal Memorandum* evaluates these strategies and explains why they will fail.

Strategy No. 1: Resuscitate the 1972 Equal Rights Amendment

In 1921, two years before the first ERA resolution was introduced in Congress, the Supreme Court of the United States upheld Congress's authority, "keeping within reasonable limits, to fix a definite period for the

ratification"[10] of a proposed constitutional amendment. Fifty years later, after the Senate failed to approve an ERA resolution that lacked a deadline, Representative Griffiths agreed to add one in order to "gain united support for the amendment."[11] Both houses of Congress then overwhelmingly approved the 1972 ERA.[12]

The validity of the 1972 ERA's ratification deadline was unquestioned, including by ERA supporters. In April 1977, while the measure was still pending before the states, the U.S. Commission on Civil Rights published a report titled *Sex Bias in the U.S. Code*, co-authored by then-Professor Ruth Bader Ginsburg.[13] The report explained that ratification of the ERA by the requisite number of states "must occur within 7 years" of its March 1972[14] proposal by Congress and that it would become part of the Constitution only if ratification "is completed by 1979."[15]

The last state to ratify the 1972 ERA was Indiana in January 1977. Later that year, fearing that the number of ratifying states would fall short, Representative Elizabeth Holtzman (D–NY) introduced a resolution to extend the ratification deadline until June 30, 1982. While Congress had previously set a ratification deadline when proposing a constitutional amendment, it had never attempted to extend one. After extensive Senate and House hearings,[16] both chambers passed the resolution, but by far less than the Constitution's two-thirds threshold for proposing an amendment.

Although controversial, this effort revealed ERA supporters' recognition that, like the original deadline, the extended deadline of June 30, 1982, was binding. The President's Advisory Committee for Women's 1980 report, for example, observed that three more states "must ratify the ERA *by that date* if it is to become an amendment to the Constitution."[17] Five days before the extended deadline, *The Washington Post* reported that the National Organization for Women "concede[d] defeat" and "officially ended its...battle to win ratification of the Equal Rights Amendment."[18]

That position changed for an unlikely reason. In May 1992, more than 200 years after it was proposed, the so-called Madison Amendment became part of the Constitution when the three-fourths ratification threshold was finally reached.[19] Some ERA supporters suggested that if two centuries was not too long for the Madison Amendment, two decades should not be too long for the 1972 ERA. Insisting that the 35 ratifications—but not the five rescissions—remained valid, they launched the "three-state strategy"[20] to finish the ratification process. Representative Robert Andrews (D–NJ) took the first step in 1994 by introducing a resolution that would require the House to "take any legislative action necessary to verify the ratification of the Equal Rights Amendment" when "legislatures of an additional three States" ratify it.[21]

Three scholars outlined the legal foundation for the three-state strategy in a 1997 article, making two deeply flawed arguments.

First, they argued that the ERA is "properly before the states for ratification in light of the recent ratification of the Madison Amendment."[22] A proposed constitutional amendment, however, remains pending before the states until three-fourths of the states ratify it or until a ratification deadline passes, whichever comes first. The Madison Amendment and the 1972 ERA, therefore, could not have been more different. The Madison Amendment remained pending before the states because it had no ratification deadline. The 1972 ERA, by contrast, was no longer pending before the states the moment its deadline passed with insufficient ratifications.

Second, these scholars argued that the 1972 ERA's ratification deadline was invalid because it appeared in the resolution's proposing clause rather than in the text of the amendment itself. Congress, they claimed, has only the power to "impose reasonable time limits within the text of an amendment,"[23] rendering a deadline in the proposing clause "inconsequential."[24] The idea that the validity of a ratification deadline depends on its location within the joint resolution proposing an amendment, however, was completely unknown before the 1990s. Congress has proposed, and the states have ratified, amendments with a deadline in either location. The Eighteenth and the Twentieth through Twenty-Second Amendments, for example, have seven-year ratification deadlines in their text, while the deadlines for the Twenty-Third through Twenty-Sixth Amendments appeared in the resolution's proposing clauses. The House's practical reason for considering the switch was simply to avoid "unnecessary cluttering up of the Constitution,"[25] and the change went practically unnoticed. "The House report [on the proposed Twenty-Third Amendment] did not note that for the first time Congress had shifted the seven-year limit from the text of the amendment to the [proposing clause]. Similarly, neither the House nor Senate debates on the [Twenty-Third through Twenty-Sixth] amendments observed the fact that the seven-year limitation had shifted."[26]

ERA supporters' claim that a ratification deadline in a resolution's proposing clause "is not a part of the amendment ratified by the States"[27] misconstrues the action that Congress and state legislatures take when proposing and ratifying constitutional amendments. They do not vote on an amendment's text in isolation, but on a resolution that includes that text and a proposing clause. In 25 states, the legislature adopted a ratification resolution that "quoted H.J. Res. 208 in its entirety, including the language referring to the seven year ratification period."[28] Five other states adopted

resolutions that "did not quote H.J. Res. 208 in its entirety, but during the ratification process included reference to the seven year time limit for ratification."[29]

Since a ratification deadline's location has no bearing on its validity, the only issue is whether Congress had authority to set a ratification deadline when it proposed the 1972 ERA. The only federal court to directly address the issue, in litigation brought by Idaho and Arizona, concluded that Congress had authority to set, but not to extend, the original deadline.[30] The Supreme Court dismissed the case "as moot" after "consideration of the memorandum"[31] by the Acting U.S. Solicitor General explaining that "the Amendment has failed of adoption."[32] In other words, the Supreme Court dismissed a case to resolve whether the ERA deadline extension had been valid when adopted because the 1972 ERA was no longer pending before the states. Even with the deadline extension, it had failed.

As a result, resolutions purporting to ratify the 1972 ERA adopted by the legislatures of Nevada (2017), Illinois (2018), and Virginia (2020)[33] could not have any legal effect. States cannot ratify a proposed amendment that is not pending before them. The U.S. Department of Justice's Office of Legal Counsel concluded in January 2020 that "Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States."[34] Based on that advice, the Archivist of the United States declined to certify that the 1972 ERA is part of the Constitution.[35]

Three lawsuits subsequently sought to resolve the ratification issue in the courts.

- ***Alabama v. Ferriero.*** On December 16, 2019, before the Virginia legislature voted on ERA ratification, three states filed suit claiming that the Archivist's continued "possession of the States' ratification documents" and acceptance of such documents from Nevada and Illinois were unconstitutional.[36] "The ERA," they argued, "cannot be ratified because the congressional deadline for ratification has expired.... Both the original congressional deadline and the state rescissions are valid and enforceable." These states ended this litigation to become intervening defendants in the subsequent lawsuit brought by Illinois, Nevada, and Virginia.

- ***Equal Means Equal v. Ferriero.*** On January 7, 2020, two advocacy organizations and a Massachusetts resident filed suit "to ensure that

the Archivist properly records Virginia's ratification and the ERA's ratification."[37] They argued that the 1972 ERA's ratification deadline was "unconstitutional" because it was "untethered to the ERA" and that, therefore, the ERA "can be ratified despite the extra-textual deadline." The U.S. District Court dismissed the lawsuit because the plaintiffs lacked standing,[38] and the U.S. Court of Appeals affirmed that decision on June 29, 2021.[39]

- ***Virginia v. Ferriero.*** The three states claiming to have completed the 1972 ERA's ratification—Illinois, Nevada, and Virginia—filed suit on January 30, 2020.[40] In March 2021, U.S. District Judge Rudolph Contreras dismissed this lawsuit for two reasons. First, since ratification does not require the Archivist's certification, his refusal to certify and publish the 1972 ERA as the Twenty-Eighth Amendment has "no legal effect" and, therefore, "does not cause Plaintiffs any concrete injury." Second, "even if Plaintiffs had standing, Congress set deadlines for ratifying the ERA that expired long ago. Plaintiffs' ratifications came too late to count."[41]

The strategy of resuscitating the 1972 ERA never had any chance of success because that measure is not merely dormant; it is dead. Congress has authority to impose a ratification deadline and that deadline is binding whether Congress places it in the resolution's proposing clause or the proposed amendment's text. The states can no longer ratify the 1972 ERA because it no longer exists.

Strategy No. 2: Reintroduce the Original Equal Rights Amendment

A newly elected Congress convenes on January 3 following each biannual federal election and has two annual sessions.[42] The current 117th Congress, for example, began on January 3, 2021, and will last until January 3, 2023. Legislative business, such as an introduced bill or resolution, dies or expires when each Congress finally adjourns.[43] This is why ERA supporters introduced "fresh-start"[44] resolutions to propose the ERA in every Congress until one passed in 1972, and continued doing so after the 1972 ERA failed. Trying once again to propose and ratify the original ERA will fail for the same reasons.

This *Legal Memorandum* distinguishes between the "original" ERA and the "new" ERA. The original ERA appeared in two versions, the first

introduced from the 68th Congress (1923–1924) to the 77th Congress (1941–1942). It read: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[45] The House[46] and Senate[47] each held multiple hearings on this version.

The 1972 ERA was an example of the second version of the original ERA, which was introduced from the 78th Congress (1943–1944) to the 112th Congress (2011–2012) in the House and to the present in the Senate. It read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This wording resembled the Nineteenth Amendment, ratified in 1920, which states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex." This version of the original ERA also included provisions, added to address "resistance"[48] expressed in earlier hearings, such as a ratification deadline and enforcement authority given to both Congress and the states "within their respective jurisdictions."

These two versions can both be called the "original" ERA because, while different in form, supporters and opponents viewed them as the same in substance. In fact, the House Judiciary Committee did not bother holding a hearing when the first resolutions with the revised text were introduced in 1945.[49]

The American Nurses Association summarized opposition to the original ERA in a 1956 House hearing: Its "risks" are "much greater than [its] promise."[50] The ERA once promised to achieve legal equality between men and women, but legislatures and courts have done so without the ERA. Its risks remained, including the likelihood that it would be repurposed for a very different—and much more controversial—agenda. This is why the 1972 ERA failed and why failure is even *more* likely should Congress propose the original ERA again.

"Allowing for Differences." ERA supporters and opponents agreed on the general goal of eliminating "discriminations," or laws, rules, and regulations that applied only to women or applied differently to men. ERA supporters, led by the NWP, insisted that *every* legal distinction between men and women was an unlawful discrimination.[51] They argued that a constitutional amendment was the only way to achieve "identical legal status"[52] between men and women by permanently eliminating all federal and state discriminations.[53]

In contrast, the National League of Women Voters (NLWV) argued that "distinctions based on sex are not necessarily discriminations"[54] and, therefore, treating men and women "identically is not necessarily to treat them equally."[55] The "root of our problem," they said, is "allowing for differences."[56] The Director of the U.S. Department of Labor's Women's Bureau agreed. The

goal, she said, should be "achieving an equality which takes into account the differences between men and women."[57] ERA opponents rejected the "blanket method"[58] of a constitutional amendment in favor of a legislative approach, which they often called "specific bills for specific ills,"[59] that could distinguish legitimate distinctions from unlawful discriminations.

The ERA's Promise Has Been Realized. ERA supporters offered a promise that, they maintained, only the ERA could fulfill. Without this explicit constitutional command, they claimed, legislatures would never eliminate discriminations and courts would never interpret the Constitution to require equality between men and women. Both parts of this promise, however, were being realized long before Congress proposed the 1972 ERA.

- **Legislative Action.** Documenting legislative progress on eliminating discriminations began with the first Senate ERA hearing in 1929. Representing more than a dozen organizations opposing the ERA, the NLWV submitted a list of 175 state laws, passed in 38 states during the previous decade, to remove discriminations.[60] Three years later, the NWP itself acknowledged "great progress" among state legislatures in eliminating discriminations.[61] Its own analysis listed 20 categories of legislative action across the country to eliminate discrimination against women[62] and conceded that the "whole trend of legislation is toward equality."[63] At a January 1945 hearing, the NWP submitted a report further documenting "the progress already made in equalizing laws which formerly applied to one sex only"[64] and again acknowledged that "the trend toward the complete equalization of the laws is unmistakable."[65]

  This legislative trend continued while the 1972 ERA was pending before the states. In March 1979, as the original ratification period drew to a close, the U.S. Commission on Civil Rights issued a report documenting this progress in areas such as holding public office, serving on juries or as guardians and estate executors, domestic relations, education, practicing a professional career, equal pay for equal work, maternity leave, retirement, and the criminal law.[66]

- **Judicial Decisions.** The second part of the ERA's promise was also being realized without it. Representative Griffiths herself admitted that applying the Fourteenth Amendment's guarantee of equal protection to sex-based classifications would "interpret away the

entire effect of the [ERA]."[67] If that happened, she said, there would "not really be any difference" between the existing Constitution and the ERA.[68] The House Judiciary Committee report on the 1972 ERA agreed that this would render the ERA "unnecessary."[69] The only argument ERA supporters could make was that, as Griffiths predicted, this "is never going to happen."[70]

Representative Griffiths was wrong. The 1965 Citizens Advisory Council on the Status of Women noted that federal courts had begun applying the Fourteenth Amendment to sex-based classifications.[71] The Supreme Court rapidly moved its equal protection jurisprudence in that direction before Congress proposed the 1972 ERA,[72] while it was pending before the states,[73] and since its failure.[74]

In a 1997 interview, Justice Ginsburg said that "[t]here is no practical difference between what has evolved and the ERA."[75] Liberal scholars and prominent ERA supporters agree.Professor David Strauss, for example, wrote in 2001 that "it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted."[76] One year later,Professor Michael Dorf concluded that while the ERA has not become part of the Constitution's text, we have a "de facto ERA in the Court's equal protection jurisprudence."[77] Jessica Neuwirth, co-president of the ERA Coalition, similarly concedes that the "principle of sex equality is one that has largely been established as a fundamental right."[78]

Legislatures and courts were fulfilling the ERA's promise without the ERA.

The ERA's Risks Are Greater Than Ever. ERA opponents not only argued that it was unnecessary to achieve legal equality between men and women, but also that using a constitutional amendment—as opposed to legislation—for this purpose carried inherent risks. The ERA's indeterminate and confusing language, they warned, could be used in many unforeseen ways and, in the process, likely undermine the Constitution's distribution of powers between the federal and state governments.

Legal experts and scholars repeatedly affirmed this conclusion. In the Senate's first ERA hearing in 1929, for example, Leon Green, Dean of the Northwestern University School of Law, submitted a letter stating his "full agreement with the League of Women Voters in its opposition to the proposed equal-rights amendment.... No one could possibly determine what the amendment means."[79] In 1945, Professor Paul Freund submitted an

analysis, endorsed by deans and professors at more than 20 major law schools,[80] concluding that the ERA "would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States.... The range of such litigation is too great to be readily foreseen."[81]

Dozens of congressional hearings and decades of examination and debate never achieved consensus—even among ERA supporters—about its meaning and application. Professor Thomas I. Emerson, despite "wholeheartedly" supporting the ERA, testified in a 1971 House hearing that there was no agreement on "the basic principles of law which the amendment expresses" or "the main ways in which it will affect existing laws and practices."[82] There had yet to be, Emerson said, "a clear theory of the amendment and its application."[83] Several developments since the mid-1940s magnified the problem posed by the ERA's indeterminate text.

International Norms. The ERA was drawn off course as supporters began to associate it with international equality norms expressed in the form of human rights agreements. By participating in these agreements, including declarations and treaties, nations not only joined statements, but also made commitments to promote certain objectives. Advocates immediately argued that keeping these commitments required proposing and ratifying the ERA.

- **United Nations Charter (1945).** Article II of the United Nations Charter states that its purposes include "promot[ing]...fundamental freedoms without distinction as to race, sex, language or religion."[84] Less than two months after the Senate voted 89–2 to ratify the charter, the Judiciary Committee received a letter from former Attorney General Homer Cummings that the ERA "is entirely in harmony with the provisions of the Charter of the United Nations."[85] In a March 1948 House hearing,[86] the United Nations Citizenship League even insisted that ratifying the ERA would be necessary for the United States to "carry out its pledges made in the Charter."[87]

- **Universal Declaration of Human Rights (1948).** The U.N. Commission on the Status of Women helped craft the Universal Declaration of Human Rights, adopted as Resolution 217 by the U.N. General Assembly on December 10, 1948. Its preamble refers to the U.N. Charter's recognition of "the equal rights of men and women," and Article 2 affirms that everyone is entitled to "all the rights and freedoms set forth in this Declaration, without distinctions of any kind," including sex.[88]

- **Declaration on the Elimination of Discrimination Against Women (1967).** The U.N. General Assembly unanimously adopted this declaration as Resolution 2263 on November 7, 1967.[89] It states that nations shall take "all appropriate measures" to implement "the principle of equality of men and women," including embodying the principle "in the constitution or otherwise guaranteed by law."[90] The declaration asserts that the "principle of equality of rights of men and women demands implementation in all States in accordance with the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights."[91]

Women's Conferences. ERA advocates also used international and domestic conferences to associate the ERA with a new agenda. The World Conference of the International Women's Year, for example, took place in Mexico City from June 16 to July 2, 1975, and its declaration reminded nations of the many "specific commitments"[92] that accompanied subscribing to the U.N. Charter. These included the necessity that men and women "have equal rights and responsibilities in the family."[93] The conference's World Plan of Action[94] asserted that domestic laws should be revised "in the light of...internationally accepted standards"[95] and brought "into conformity with the relevant international instruments."[96]

The National Women's Conference, which took place in November 1977,[97] was the boldest step to date in redirecting the ERA. Its *Declaration of American Women* asserted that equality remained thwarted by "laws, social customs and prejudices [that] continue to keep a majority of women in an inferior position without full control of our lives and bodies."[98] The conference's National Plan of Action[99] called for ratification of the ERA and endorsed not only "reproductive freedom"[100] in general, but also taxpayer funding of "all methods of family planning."[101] The plan also called for legislation to eliminate "discrimination on the basis of sexual and affectational preference including, but not limited to, employment, housing, public accommodations, credit, public facilities, government funding, and the military."[102]

Presidential Commissions. President Jimmy Carter created the National Advisory Committee for Women in April 1978 while the ERA was pending before the states. Its purpose was to advise him regarding "initiatives needed to promote full equality for American women...including recommendations of the 1977 National Women's Conference."[103] At its first meeting on January 12, 1979, co-chairs Representative Bella Abzug (D–NY) and Carmen Delgado Votaw said that the ERA was the "foundation on

which all our proposals rest."[104] These proposals included lifting the Carter Administration's ban on Medicaid payments for abortion and resisting "the continued erosion of the Constitutional right to reproductive freedom and the developing attack within Congress on family planning programs as a whole."[105]

Post-Failure Hearings. Contrary to ERA supporters' predictions, legislatures and courts were steadily fulfilling the ERA's promise of legal equality between men and women without it. Detached from that purpose, and with no consensus about its meaning or application, the ERA became associated with a wide-ranging, and increasingly controversial, agenda with domestic and even international dimensions. With its risks so far exceeding its promise, no state ratified the 1972 ERA after January 1977. Following its failure, extensive Senate and House hearings during the 98th Congress (1983–1984) not only highlighted why it failed, but also exposed how the campaign to repurpose the ERA had not yet reached its limits.

The Senate Judiciary Subcommittee on the Constitution held 11 hearings on Senate Joint Resolution 10, introduced by Senator Paul Tsongas (D–MA) with language identical to the failed 1972 ERA. The first hearing made clear why it failed. Noting that "the proposed amendment died on June 30, 1982,"[106] Senator Dennis DeConcini (D–AZ) focused on the ERA's promise, observing that "the United States has long been moving toward equality of rights without the ERA."[107] Subcommittee chairman Orrin Hatch (R–UT) focused on the ERA's risks,[108] stating that no one "has the slightest idea of what it really means."[109]

One thing, however, was clear. The 1972 ERA and the Tsongas resolution then before the Senate applied only to government action: "Equality of rights under the law shall not be denied or abridged *by the United States or by any State* on account of sex." Representative Griffiths had repeatedly emphasized that it "would restrict only government action, and would not apply to purely private action."[110] That distinction was critical because an increasing share of remaining sex discrimination resulted from private, rather than government, action.

In these 1983 Senate hearings, however, ERA supporters repeatedly claimed that it would address a growing list of issues or problems unrelated to any government action. Senator Edward Kennedy (D–MA), for example, said that the ERA was necessary because "women earn only 59 cents for every dollar earned by men."[111] Hatch asked Tsongas, the ERA's Senate sponsor, to "[t]ell me what the equal rights amendment will do about that,"[112] but Tsongas could provide no explanation.

The most significant hearing in this series occurred on January 24, 1984, examining the ERA's impact on abortion rights. As noted above, ERA supporters had been explicitly connecting it to abortion rights for at least a decade. In 1975, the National Women's Conference directly linked the ERA with "reproductive freedom" and, four years later, the National Advisory Committee for Women said that the ERA would require taxpayer funding of abortion. This public record belies the attempt by ERA supporters in these post-failure hearings to downplay or even deny that connection altogether. ERA supporters, for example, stressed that *Roe v. Wade* grounded the right to abortion in the "constitutional right to privacy"[113] rather than equal protection. While an accurate observation by itself, its implication that the Court would never change its foundational constitutional theory, or could not use equal protection to advance abortion rights in other ways, was obviously false.

In fact, feminist scholars had been arguing for years that equal protection would be more useful than privacy as a constitutional foundation for abortion rights. In the 1984 William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law, for example, then-Judge Ruth Bader Ginsburg argued that "the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[114] She repeated this critique in the 1993 James Madison Lecture on Constitutional Law at New York University School of Law: "The *Roe* decision might have been less of a storm center had it...homed in more precisely on the women's equality dimension of the issue."[115]

The ERA could have a profound impact on abortion rights whether *Roe* remained the constitutional foundation for the right to abortion or was abandoned at some point in the future. Courts could, for example, require that if the government subsidized the cost of medical procedures, they must include abortion. Professor John Noonan explained in this hearing how such an application could, in turn, "mandate the Federal and State funding of abortion"[116] as ERA supporters were already advocating. Noonan also believed that the ERA would "threaten the tax exemption of most of the religious schools and colleges of the United States" that oppose abortion and "discourage abortion among their students on religious grounds."[117]

The hearing record also includes a letter from Professor Lynn Wardle outlining three separate lines of reasoning by which the ERA could be interpreted to "set in concrete the judicially-created doctrine of abortion-on-demand and could result in mandatory public funding for nontherapeutic abortions."[118] He reminded the subcommittee that, in *Roe*,

the Supreme Court created the right to abortion "even without an amendment written and promoted by the advocates of greater abortion rights."[119] The ERA would be such an amendment.

Disparate Impact Discrimination. These hearings revealed another new objective for the ERA. For six decades, since the ERA's first introduction in 1923, supporters and opponents shared a common understanding of the kind, if not the extent, of discrimination they targeted. These were statutes, regulations, or policies that, in the words of the ERA, discriminated "on account of sex"; that is, they actually treated men and women differently.

Emerson and his co-authors held the same view in a 1971 *Yale Law Journal* article that soon became widely considered the definitive explanation of the ERA.[120] This article described legal structures designed to "create a separate legal status for women"[121] and argued that the solution was to eliminate "*any* differentiation in legal treatment on the basis of sex."[122] The problem they highlighted was "separate" or "different treatment," or "a dual system of rights and responsibilities."[123] The solution they advocated was "changes in the legal structure...to achieve a unified system of equality."[124] The "basic principle of the Equal Rights Amendment," therefore, is that "the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other."[125]

In other words, whether a law is discriminatory depends on the content of the law itself rather than speculation about its implementation or effect in different contexts or at different times. Emerson and his colleagues explained that the law may "make different rules for some people than for others on the basis of the activity they are engaged in or the function they perform."[126] Doing so would be permissible "even if there were no women who presently were qualified."[127] The issue is whether the law "use[s] sex as a basis for differential treatment."[128]

But when Emerson testified in 1983, after the 1972 ERA's failure, he changed course and argued that, although its language had not changed, the ERA would prohibit not only intentional discrimination but also so-called "disparate impact" discrimination. The Supreme Court defined this new category to include government practices "that are fair in form, but discriminatory in operation."[129] While the 1972 ERA had been pending before the states, the Court held that Title VII of the Civil Rights Act, but not the Fourteenth Amendment, covered disparate impact discrimination.[130] The equal protection clause still requires evidence of a "'purpose to discriminate.'"[131] The Fourteenth Amendment "guarantees equal laws, not equal results."[132] Ironically, while the Supreme Court went further than ERA supporters predicted in applying the Fourteenth Amendment to intentional sex-based

discrimination, ERA supporters responded that it would go further than the Supreme Court ever had by also prohibiting disparate impact discrimination. Doing so would create the constitutional anomaly of providing more robust protection against discrimination based on sex than on race.

Even after 10 years of debate before the states, the original ERA failed because its purpose was being achieved without it and its supporters made clear their intention to repurpose and reinterpret it to promote a very different agenda. Any attempt to again propose the original ERA will suffer the same fate.

Strategy No. 3: Propose the New Equal Rights Amendment

The 1972 ERA died two deaths.

- Its *procedural* death occurred when its ratification deadline passed with fewer ratifying states than the Constitution requires. At that point, the 1972 ERA ceased to exist—foreclosing the strategy of completing its ratification process.

- Its *substantive* death occurred over time as its promise vanished and its risks multiplied, foreclosing the strategy of again attempting to propose and ratify the original ERA.

The third strategy in response to the 1972 ERA's failure is to seek support for a "new ERA" based on an entirely different concept of women's rights—and implemented by a novel enforcement method. Representative Carolyn Maloney (D–NY) has introduced the new ERA in each of the last five Congresses. The most recent, House Joint Resolution 28, introduced in February 2021, reads:

> Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article. This amendment shall take effect two years after the date of ratification.

A New Concept of Rights. Since Alice Paul first drafted it, and for the next 90 years, the original ERA embodied the familiar concept of legal equality between men and women. The first version

began: "Men and women shall have equal rights...." The second version states: "Equality of rights under the law shall not be denied or abridged...on account of sex." Supporters and opponents understood that, while somewhat different in form, these two versions were the same in substance.

Terms such as "equal" and "equality" denote comparison or relation, referring to similarity of status, treatment, or condition between or among multiple parties. The *Cambridge Dictionary* defines "equality" as "the right of different groups of people to have a similar social position and receive the same treatment."[133] Professor Nicholas Capaldi writes that "equality is, by definition, an adjectival relation between entities."[134] More than a century ago, the Supreme Court held that the constitutional idea of equal protection means that "all persons similarly circumstanced should be treated alike."[135] Whether someone is equal or is being treated equally can be determined only in relation to some referent.

The opening sentence of the new ERA introduces a different concept: "Women shall have equal rights in the United States and every place subject to its jurisdiction." While it still uses the word "equal," this language cannot mean equal rights between men and women. That traditional concept is represented by the new ERA's second sentence. Traditional principles for interpreting written texts, such as the Constitution and statutes, counsel that one provision should not be given a meaning that simply duplicates another.[136] ERA advocates confirm this new concept. Feminist scholar Catharine MacKinnon, for example, writes that Representative Maloney's "new proposal heightens the possibility of guaranteeing rights to all women *even when the discrimination against them isn't exclusively based on sex*."[137] At a 2018 symposium hosted by the Brennan Center for Justice, Jessica Neuwirth explained that the new ERA's opening line is "an affirmative statement of rights that broadens the amendment to more readily cover substantive equality, as well as legal equality."[138] Rather than promoting "equality," therefore, this new language would be a source of open-ended authority for courts to create virtually any sort of substantive "rights" for women alone.

Professor Julie Suk also affirms that the new ERA changes its concept of rights.[139] While the 1972 ERA "prohibited discrimination on grounds of sex by government,"[140] she proposes the goal of securing "a right *to* egalitarian institutions rather than a right *against* discrimination."[141] As noted above, ERA advocates began associating it with international equality norms in the 1940s. Suk goes further, using "global constitutionalism" to fashion an agenda for "substantive equality."[142]

This agenda includes addressing "pay inequity,"[143] violence against women,[144] and "women's underrepresentation in positions of decision-making power"[145] in areas such as politics, business, and Hollywood. Suk writes that the "new text of the ERA, introduced in 2013, appears to be a closer fit to the ERA movement's political agenda"[146] and "provides a better legal apparatus for the policy goals of reducing post-industrial gender inequality."[147]

The new ERA, therefore, would add a concept of *women's* rights—that is, undefined substantive or positive rights exclusive to women—to the ERA's traditional concept of *equal* rights between men and women. Rather than build upon the ERA of the past, however, this innovation actually contradicts it. Previous generations of ERA advocates repeatedly rejected the idea that it would provide substantive rights that belonged only to women. In the 1931 hearing on Senate Joint Resolution 52, for example, the NWP vice chairman denied that they were "asking for any special rights. We are not asking for anything but the same opportunity [as men] to be human beings in this land of ours."[148]

A New Enforcement Method. ERA opponents had long warned that it would undermine federalism by transforming state legislative matters into federal legislative and judicial ones. In the first House ERA hearing in 1925, for example, the NLWV argued that the ERA would exceed "the wildest dreams of the most advanced advocates of the extension of Federal power."[149] Similarly, in a 1932 hearing, the group said that the ERA's "broad grant of power to Congress is not in accord with our Federal principle under which the States have the right to...pass the laws they think appropriate."[150]

Attempting to address this concern, the second version of the original ERA empowered both Congress and the states to enforce the ERA "within their respective jurisdictions." Opponents were not satisfied, insisting that the second version of the original ERA would undermine federalism as much as the first.[151] In a February 1947 editorial titled "The Road to Equality," *The Washington Post* opined that even with this revised enforcement language, the ERA would be "peculiarly obnoxious to state governments" because it would be "such a destructive invasion of their legislative domain."[152] And in the first hearing after the 1972 ERA's failure, Senator Hatch said that the American people are entitled to know the ERA's "impact on the balance of constitutional authority between Congress and the States, the legislative and the judicial."[153]

The new ERA would introduce not only a new concept of rights, but also a method of enforcing it unknown to either existing constitutional amendments or previous ERA proposals. The new ERA would give enforcement authority to both Congress and the states—but without the caveat of "within their respective jurisdiction." Seven of the eight current constitutional

amendments with enforcement language give authority to Congress alone. The Eighteenth Amendment, which introduced Prohibition, gave "concurrent" enforcement authority to "Congress and the several States" but was repealed by the Twenty-First Amendment, which ended Prohibition. Does dropping "in their respective jurisdictions" mean that the states and Congress would have identical authority to enforce the new ERA? In other words, could Congress enforce the new ERA against the states regarding matters within state jurisdiction—and vice versa?

A Different Agenda. The original ERA was examined publicly and in dozens of congressional hearings. Supporters and opponents, scholars and commentators, as well as legislators and activists explored and actively debated its language, meaning, and application. *The new ERA, however, has received no scrutiny at all*. In fact, its supporters hardly acknowledge that it is a new proposal or differs from "the ERA" of the past. When Representative Maloney introduced the new ERA on March 21, 2021, for example, her press release described her as "the lead cosponsor of the Equal Rights Amendment since the 105th Congress in 1997"[154]—as if it had not changed since then.

The agenda that ERA supporters envision, however, continues to expand. The National Organization for Women, for example, has published an article about why the ERA is relevant in the 21st century. "The Equal Rights Amendment," they argue, "could make a difference" in areas such as "LGBTQIA equal rights"[155] and "curbing violence against women" and would "provide the power to more effectively seek redress for women's economic marginalization."[156]

Three House ERA-related hearings since Representative Maloney began introducing the new ERA reflect the current strategy of describing an even more radical agenda without even suggesting that the ERA has changed. On June 6, 2018, when Republicans controlled the House of Representatives, Representative Maloney and Representative Jackie Speier (D–CA), who has introduced resolutions to retroactively remove the 1972 ERA's ratification deadline, held what they called a "shadow hearing." While House Joint Resolution 33, with the new ERA text, was the only ERA resolution introduced during the 115th Congress, no one in this hearing even acknowledged its new language, new concept of rights, or novel enforcement method.

In this shadow hearing, Representative Jerrold Nadler (D–NY) "promised a 'real' hearing, should the Democrats retake control of the House."[157] They did in the 2018 election, and a subcommittee held a hearing titled "Equal Rights Amendment" on April 30, 2019, three months after Representative Maloney again introduced the new ERA. Chairman Steve Cohen

(D–TN) said that the hearing's purpose was to consider "the ERA" that had been "approved by both the House and Senate nearly half a century ago." *That* ERA, however, had not been introduced in the House since 2012. Professor Kathleen Sullivan's written testimony focused solely on the 1972 ERA and Congress' ability to remove its ratification deadline. Again, no one said anything about the *new* ERA.

In these hearings, supporters described purposes for the ERA beyond anything that had ever been considered in the past. Actress Alyssa Milano, for example, testified in 2018 that the ERA was needed because of the "injustices women suffer every day in our relationships" and in "our streets," as well as in the health care system and the workplace. She discussed sexual harassment and said that the ERA would ensure that "men who abuse women" will be held accountable by the justice system. The ERA, Milano said, "would guarantee that these women would be protected by the full force of federal law"[158] and would "require states to enforce laws against gender violence." She did not explain how the ERA, or any constitutional amendment for that matter, could address such issues.

In the 2019 hearing, Representative Cohen said that the ERA was needed because "women still are not paid equal wages for equal work" and to address problems such as "gender-based violence." Representative Maloney's claim that "[w]e cannot enforce equal pay for equal work unless the ERA is in the Constitution banning discrimination" was particularly baffling because the Equal Employment Opportunity Commission has long been actively enforcing the Equal Pay Act without the ERA. Representative Maloney also described the problem of female genital mutilation, Nevada State Senator Pat Spearman (D) discussed the "blaming and shaming" of female crime victims, and actress Patricia Arquette focused on untested rape kits, the "gender pay gap," and "the only rising mortality rate in the developed world." Arquette described poor black women in Alabama dying of cervical cancer, her own sexual assault, date rape, and what she called "layers of bias" against women. None of these ERA supporters, however, attempted to explain how the ERA could be used to address any of these problems.

Representative Maloney's press release following her introduction of the new ERA in February 2021 also indicated the breadth of its agenda. Recall that the 1977 National Women's Conference connected the original ERA to eliminating "discrimination on the basis of sexual and affectational preference." Her release went even further, stating that "[w]ith the ERA, we secure equality under the law for women and all marginalized genders."[159]

The third hearing occurred on October 21, 2021, but not before the Judiciary Committee, which has jurisdiction over constitutional amendments. Instead, this hearing was held by the House Committee on Oversight and Reform, which Representative Maloney chairs in the 117th Congress. In addition to an unusual venue for this hearing, its ratio of majority to minority witnesses was a lopsided six-to-one.[160] Nonetheless, this hearing followed the same pattern as the others in two important respects.

First, witnesses spoke only of "the ERA" as if the resolution currently pending before the House would propose the same amendment that Congress sent to the states in 1972. Eleanor Smeal, president of the Feminist Majority Foundation, began her statement by reading what she said was "the complete text of the ERA."[161] What she read, however, was the text of the 1972 ERA rather than the ERA that Representative Maloney, who chaired this hearing, introduced earlier this year. The ERA that Smeal referred to has not been introduced in the House of Representatives for nearly a decade.

Second, witnesses discussed issues and problems that women face that no constitutional amendment, including the ERA, could address or solve. For example:

- Carol Jenkins, president of the ERA Coalition, said that the ERA "would be a Constitutional support for many issues that often affect women more than men, including intimate partner violence, sexual assault, paid leave, and equal pay.... Enacting the Equal Rights Amendment would give women, and particularly women of color, a tool to fight for what they have earned: full pay equity."[162]
- Actress Alyssa Milano claimed that that the ERA is needed to address unnamed "gender-driven injustices" and that "anyone who is not a cisgender man" lacks "Constitutional protections" without the ERA.[163]
- Bamby Salcedo, president of the TransLatin@ Coalition, insisted that the ERA would "ensure no discrimination against all people, poor, indigenous, Black, Trans, Women ALL PEOPLES!" and will heal "intergenerational wounds generated against the most marginalized."[164]

Milano's claim in this hearing that the 1972 ERA's ratification deadline was "cynically imposed...as a poison pill"[165] is pure fiction. As noted, ERA supporters had acknowledged since the 1940s that a ratification deadline was a "customary" feature of resolutions to propose constitutional amendments and would be "perfectly all right"[166] for the ERA. Representative Griffiths, the 1972 ERA's sponsor, argued that including the deadline would help "gain united support for the amendment,"[167] and ERA supporters readily supported her decision.[168]

An Even Stronger Abortion Connection. In these 2018 and 2019 hearings, ERA supporters readily made claims about its application and impact that exceeded even the most ambitious advocates of the past. At the same time, they denied any connection to abortion rights even though the public record on that issue had been building for four decades. Representative Maloney, for example, flatly insisted in the 2019 hearing that "the Equal Rights Amendment has absolutely nothing to do with abortion.... It has nothing to do with abortion."[169] This claim contradicts not only a public record dating back to the 1970s, but also forceful positions by ERA advocates in statements and articles submitted for the record *in that very hearing*. The National Organization for Women, for example, asserted not only that "[a]n ERA—properly interpreted—could negate hundreds of laws that have been passed restricting access to abortion and contraception,"[170] but also that the new ERA could "facilitate...expanding reproductive rights" even further.[171] NARAL Pro-Choice America stated that "the ERA would reinforce the constitutional right to abortion...[and] require judges to strike down anti-abortion laws."

Representative Maloney's denial also contradicted claims of ERA supporters who have continued to assert its connection to abortion rights since she began introducing the new ERA. For example:

- A public statement by the president of the Feminist Majority Foundation on Women's Equality Day 2019 directly linked the ERA to the fight against abortion restrictions.[172]

- In May 2019, the American Civil Liberties Union sent a letter to the House Judiciary subcommittee explaining that "the Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion.... The Equal Rights Amendment could be an additional tool against further erosion of reproductive freedom."[173]

- The acting president of the Planned Parenthood Federation of America states flatly: "There are no equal rights for women without access to abortion, plain and simple."[174]

- Kelli Garcia, Senior Counsel at the National Women's Law Center, said after the 2019 House ERA hearing that the "ERA would help create a basis to challenge abortion restrictions."[175]

The ERA's impact on abortion rights is, in fact, one of the few issues regarding its impact on which many ERA supporters and opponents actually

agree. In 2007, two Republican House Judiciary Committee staff members wrote that "the reasoning underlying the Supreme Court's decision in *Harris v. McRae*, which upheld the Hyde Amendment, would not be sustainable if the federal ERA were adopted."[176] In 2008, feminist scholar Sabrina Miesowitz agreed, writing that "passage of a federal Equal Rights Amendment would require a review of the Hyde Amendment and the U.S. Supreme Court cases upholding it."[177]

The ERA's impact on abortion rights is no longer hypothetical. In its 1980 report, the President's Advisory Committee on Women recommended that examining the application of similar ERAs in state constitutions would be an "easy way" to understand the federal ERA's impact.[178] Feminist scholars have also endorsed the idea that state ERAs are "the best guide to determining the possible effect of a federal ERA"[179] and "the only realistic guides to possible interpretations of the federal ERA."[180] In a January 2020 analysis, the Center for American Progress cited court decisions interpreting and applying state ERAs, concluding that the ERA "could further buttress...existing constitutional protections" for abortion rights.[181] Examples include:

- **Connecticut.** The Connecticut Constitution provides: "No person shall be denied the equal protection of the law...because of...sex."[182] In *Doe v. Maher*,[183] the Connecticut Superior Court held that the standard for judicial review of sex classifications under our ERA is "strict scrutiny,"[184] the same standard that the Equal Protection Clause requires for racial classifications. Under this standard, the court said, using Medicaid funds for "medical expenses necessary to restore the male to health" but not for "therapeutic abortions that are not life-threatening"[185] violates the ERA.

- **New Mexico.** The New Mexico Constitution provides: "Equality of rights under law shall not be denied on account of the sex of any person."[186] In *New Mexico Right to Choose/NARAL v. Johnson*,[187] the New Mexico Supreme Court held that allowing Medicaid funds to pay for abortions only for specific reasons[188] violated the ERA."[189]

Results like these would be even more likely under the new ERA because it contains both women's rights language reflecting *Roe v. Wade*'s autonomy concept *and* equal rights language that abortion rights advocates have said would provide an even stronger alternative constitutional foundation.

Senator Hatch observed in the 1983 post-failure hearing that the ERA fared poorly in states where it received more thorough evaluation and scrutiny.[190] This would certainly be true for the new ERA, which departs even further from the original ERA that the states found unacceptable. The new ERA would inherit all the controversy of its predecessor and create much more deriving specifically from its novel language, new concept of equality, and different enforcement method.

Conclusion

The Equal Rights Amendment was born a century ago to address legal equality between men and women. Defying the predictions of ERA supporters, both legislatures and courts steadily required equality without the ERA. In 1937, Justice George Sutherland distinguished between actually amending the Constitution's text and effectively doing so "in the guise of interpretation"[191] of that text. This is exactly what the Supreme Court did, turning the Fourteenth Amendment into a "defacto ERA" by interpretation. With its purpose accomplished, the ERA' indeterminate and confusing language was ripe for enlistment in a very different, and more controversial, campaign.

None of the strategies responding to the 1972 ERA's failure will succeed. The 1972 ERA cannot be resuscitated, and its ratification completed, because it has not been pending before the states since its ratification deadline passed. Trying again to propose the original ERA will fail for the reasons it did before; the past few decades have both witnessed continued progress for women and revealed how ERA advocates want to use it for many other purposes—such as strengthening abortion rights and the rights of LGBTQ+ individuals. The new ERA will fail not only for the same reasons as its predecessor, but also because even minimal scrutiny will expose its new and radical concept of rights, its enforcement method that would undermine federalism in new ways, and its availability for an agenda most Americans do not support.

Thomas Jipping is Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at the Heritage Foundation.

Endnotes

1. A joint resolution is the legislative vehicle for consideration of constitutional amendments. Because the President has no role in the amendment process, joint resolutions for this purpose that are approved by two-thirds of the House and Senate are sent to the Office of the Federal Registrar for publication and transmittal to the governor of each state. See National Archives, Constitutional Amendment Process, https://www.archives.gov/federal-register/constitution. Joint resolutions introduced to propose constitutional amendments are listed in a database maintained by the National Archives and Records Administration. *See* National Archives, Amending America: Proposed Amendments to the United States Constitution, 1788 to 2014, https://www.archives.gov/open/dataset-amendments.html. Joint resolutions since 2014 may be found in the Library of Congress' legislative database at www.congress.gov.
2. *Equal Rights Amendment to the Constitution and Commission on the Legal Status of Women, Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 6 (1948) (statement of Representative Fadjo Cravens).
3. *Id.*
4. H.R. 208, 92nd Cong. (1971).
5. *Equal Rights for Men and Women 1971, Hearings Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92nd Cong. 155 (1971).
6. *Id*. at 275. On the House floor, Griffiths similarly defended the ratification deadline as "customary" and "perfectly proper." 117 Cong. Rec. 35814–15 (1971).
7. *Equal Rights for Men and Women 1971*, *supra* note 5, at 155. See also *id*. at 44 (The ERA will be ratified in "far less than 7 years.").
8. See Thomas H. Neale, Cong. Rsch. Serv., R42979, The Proposed Equal Rights Amendment: Contemporary Ratification Issues 16 (2019).
9. Congressional Research Service et al., The Constitution of the United States of America: Interpretation and Analysis (Washington, D.C.: Government Printing Office, 2017), S. Doc. No. 112–9, 112th Cong., 2nd Sess., Aug. 26, 2017, at 50, https://www.govinfo.gov/content/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf (accessed December 26, 2019). *See also* Thomas Jipping, *The 1972 ERA Can No Longer Be Ratified—Because It No Longer Exists*, Heritage Found. Legal Memorandum No. 259, Jan. 13, 2020, https://www.heritage.org/sites/default/files/2020-01/LM259.pdf.
10. Dillon v. Gloss, 256 U.S. 468,476 (1921).
11. *Equal Rights for Men and Women 1971*, *supra* note 5, at 41.
12. Martha Griffiths introduced House Joint Resolution 208 on January 26, 1971. The House voted 354–24 to pass the measure on October 12, 1971, and the Senate voted 84–8 to pass it on March 22, 1972.
13. U.S. Comm'n on Civil Rights, Sex Bias in the U.S. Code iii (1977), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12se9.pdf.
14. *Id*. at 6.
15. *Id*.
16. See *Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary,* 95th Cong. (1978); *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Congress (1979). For scholarly arguments supporting and opposing the extension, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919 (1979); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875 (1980).
17. President's Advisory Comm. for Women, Voices for Women 16 (1980), https://babel.hathitrust.org/cgi/pt?id=uiug.30112105193947&view=1up&seq=3 (emphasis added).
18. Joanne Omang, *NOW Concedes Defeat in ERA Battle, But Vows to Make Strong Comeback*, Wash. Post, June 25, 1982, https://wapo.st/3hF34zg.
19. Congress proposed a package of 12 amendments on September 15, 1789, including a provision—often called the Madison Amendment—to prevent a law that changed compensation for Members of Congress from going into effect "until an election of Representatives shall have intervened." In December 1791, the necessary 11 states (out of 14, after Vermont joined the Union in March 1791) ratified 10 of those amendments, which have since become known as the Bill of Rights. Only nine states, however, had ratified the Madison Amendment. In 1982, University of Texas–Austin sophomore Gregory Watson wrote a paper arguing that the Madison Amendment, which lacked a ratification deadline, could still be ratified. The "C" grade he received for that paper motivated him to start a campaign that achieved ratification by the 38th state in May 1992. The Archivist of the United States certified that the Twenty-Seventh Amendment was part of the Constitution on May 18, 1992. *See* Scott Bomboy, *How a College Term Paper Led to a Constitutional Amendment*, Const. Daily, May 7, 2021, https://constitutioncenter.org/blog/how-a-c-grade-college-term-paper-led-to-a-constitutional-amendment.
20. *See* Robert Black, *Could the Equal Rights Amendment Become a Reality?* Const. Daily, January 15, 2020, https://constitutioncenter.org/blog/could-the-equal-rights-amendment-become-a-reality.
21. *See* H.J. Res. 432, 103rd Cong. (1994), https://www.congress.gov/bill/103rd-congress/house-resolution/432/text (accessed Aug. 16, 2021).
22. Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly before the States*, 3 Wm. & Mary J. Women & L. 113,117 (1997).

23. *Id*. at 123.
24. *Id*.
25. *See* Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, Women's Rts. L. Rep. 214 (Summer 1978).
26. *Id*.
27. Held, Herndon & Stager, *supra* note 22, at 124.
28. *See* Senate Hearing, *supra* note 16, at 739. https://babel.hathitrust.org/cgi/pt?id=mdp.39015026756604&view=1up&seq=3&skin=2021.
29. *Id*. at 739–40.
30. *See* Idaho v. Freeman, 529 F.Supp. 1107 (D. Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982).
31. National Organization for Women v. Idaho, 459 U.S. 809 (1982).
32. National Organization for Women v. State of Idaho, Memorandum for the Administrator of General Services Suggesting Mootness, 1982, https://eagleforum.org/era/now-v-idaho-memo.html.
33. S.J.Res. 2 (Nevada 2017); S.J.Res.C.A. 4 (Illinois 2018); H.J.Res. 1 (Virginia 2020).
34. *See* Ratification of the Equal Rights Amendment, 44 Op. O.L.C. slip opinion at 2 (Jan. 6, 2020).
35. National Archives, NARA Press Statement on the Equal Rights Amendment, Jan. 8, 2020, https://www.archives.gov/press/press-releases-4.
36. Complaint at 22, Alabama, Louisiana, South Dakota v. Ferriero (N.D.Ala. 2019), https://www.archives.gov/files/press/press-releases/2020/alabama-v.-ferriero-era-complaint-as-filed.pdf.
37. Complaint at 2, Equal Means Equal, The Yellow Roses, Katherine Weitbrecht v. Ferriero (D.Mass 2020), https://www.archives.gov/files/press/press-releases/2020/equal-means-equal-v.-ferriero-era-complaint-01.07.2020.pdf.
38. Equal Means Equal et al. v. Ferrerio, 478 F. Supp. 3d 105 (D. Mass. 2020).
39. Equal Means Equal et al. v. Ferriero, No. 20–1802 (1st Cir. June 29, 2021), http://media.ca1.uscourts.gov/pdf.opinions/20-1802P-01A.pdf.
40. Complaint, *Commonwealth of Virginia et al. (D. D.C. 2020), https://ag.nv.gov/uploadedFiles/agnvgov/Content/News/PR/PR_Docs/2020/88084-Virginia-v-Ferriero-%20file-stamped%20complaint.pdf.*
41. Commonwealth of Virginia et al. v. Ferriero, 525 F.Supp.3d 36, 40 (D. D.C. 2021).
42. The Constitution provides: "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const., Amend. 20, § 2.
43. *See* Richard S. Beth and Jessica Tollestrup, Cong. Rsch. Serv., R42977, Session, Adjournments, and Recesses of Congress 15 (2013).
44. Neale, *supra* note 8, at 2,17.
45. S.J. Res. 21, 68th Cong. (1923), Cong. Rec., December 10, 1923, at 150; H.J. Res. 75, 68th Cong. (1923). *See* Neale, *supra* note 8, at 9.
46. *See, e.g., Equal Rights Amendment to the Constitution, Hearing Before the H. Comm. on the Judiciary*, 68th Cong. (1925); *Equal Rights Amendment to the Constitution, Hearing Before the H. Comm. on the Judiciary*, 72nd Cong. (1932).
47. *See, e.g., Equal Rights Amendment, Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. (1929); *Equal Rights for Men and Women, Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. (1938).
48. *See* S. Rep. No.267, 78th Cong. 2 (1943).
49. Instead, the committee collected and published statements by ERA supporters and opponents. *Amend the Constitution Relative to Equal Rights for Men and Women, Statements Submitted to Subcomm. No. 2 of the H. Comm. on the Judiciary*, 79th Cong. (1945). The committee's report on House Joint Resolution 49 acknowledged that the revised language was "similar or substantially similar" to the original. S. Rep. No. 907, 79th Cong., at 1 (1945). A Senate Judiciary subcommittee held a hearing on these second-version resolutions, but chairman Carl Hatch (D–NM) asked the witnesses to avoid "duplication" because "this subject has been discussed so many times before committees of the Senate." *Equal Rights Amendment, Hearings before a Subcomm. of the S. Comm. on the Judiciary*, 79th Cong. 1 (1945). At this hearing, Emma Guffey Miller, the first witness supporting the ERA, agreed that the hearing was "scarcely necessary" because "the matter had been gone over so many times." *Id*. at 3.
50. *Equal Rights, Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong. 60 (1956). *See also id*. at 44 (National Consumers League opposed the ERA not only "because it won't do the things that are claimed for it, but because of the things that it will do.").
51. *See* Hearing, *supra* note 46, at 30 (1925).
52. *Id*. at 44.
53. *Id*. at 30.

54. Hearing, *supra* note 2, at 171.
55. *Id*. at 172.
56. *Id*. *See also id*. at 202–03 (American Association of University Women posits that discriminations must be eliminated "where they are unjust, and maintained or extended where they are necessary for the good of society as a whole."); *id*. at 204 (Young Women's Christian Association opposed "unreasonable discrimination.").
57. *Id*. at 100.
58. Hearing, *supra* note 46, at 42 (1925) (statement of NLWV Treasurer Katherine Ludington).
59. *Id*. at 46. Similarly, Mary Koken, representing the Young Women's Christian Association, testified that instead of a constitutional amendment, "the inequalities [should] be removed separately and specifically" by legislation. *Id*. at 70. *See also* Hearing, *supra* note 47, at 74 (1938) (statement of Edith Valet Cook that "specific measures State by State are necessary to correct specific ills."); Hearing, *supra* note 50, at 266 (statement by American Civil Liberties Union); Hearing, *supra* note 5, at 226 (statement by Hotel and Restaurant Employees Union); Hearing, *supra* note 2, at 204 (statement of Young Women's Christian Association). During the House hearing on the 1972 ERA, the National Consumers League and National Council of Catholic Women supported a legislative approach that would seek "a specific remedy for a specific need."
60. Senate hearing, *supra* note 47, 70th Cong. 18–27 (1929).
61. House hearing, *supra* note 46, at 5.
62. *Id*. at 68–71.
63. *Id*. at 65.
64. Hearing, *supra* note 49, 79th Cong. 3 (1945).
65. *Id*.
66. U.S. Comm'n on Civil Rights, Women's Rights in the United States of America (1979).
67. Hearing, *supra* note 5, at 46.
68. *Id*.
69. H.R. Rep. No.92–359, at 2 (1971).
70. *The "Equal Rights" Amendment, Hearings before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 22 (1970).
71. Citizens' Advisory Council on the Status of Women, Report on Progress in 1965 on the Status of Women 39 (1965).
72. *See* Reed v. Reed, 404 U.S. 71,77 (1971) ("dissimilar treatment for men and women who are thus similarly situated…violates the Equal Protection Clause").
73. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976). *See also* Women's Rights in the United States of America, *supra* note 67, at 1 (concluding that the Fourteenth Amendment "guarantees women in all states the rights of citizens and prevents the states from discriminating against women by denying them legal rights because of their sex.").
74. *See* United States v. Virginia, 518 U.S. 515 (1996).
75. *See* Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. Times Mag., Oct. 5, 1997, § 6, at 60.
76. David Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1456,1476 (2001). *See also* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Penn. L. Rev. 419,502 (2001) (women's movement was able to do through the Equal Protection Clause "virtually everything the ERA would have accomplished had it been ratified and added to the Constitution.").
77. Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951,985 (2002).
78. Jessica Neuwirth, *Time for the Equal Rights Amendment*, 43 Harbinger 155,161 (2019), https://socialchangenyu.com/harbinger/time-for-the-equal-rights-amendment/.
79. Senate hearing, *supra* note 47, 75th Cong. 71 (1938).
80. Senate hearing, *supra* note 49, 79th Cong. 78 (1945).
81. *Id*. This analysis would be submitted in multiple House and Senate ERA hearings and the *Congressional Record*. *See, e.g*., Hearing, *supra* note 2, at 108–118; Hearing, *supra* note 49, at 64–67; Cong. Rec., Jan. 25, 1950, at 870.
82. Hearing, *supra* note 5, at 401.
83. *Id*. *See also* Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, at 888 ("a clear and cohesive position on the meaning and impact of the [ERA]…has not emerged from prior Congressional consideration.").
84. U.N. Charter art. 1, ¶ 1.

85. *See* Hearing, Senate hearing, *supra* note 50, at 18. *See also id*. at 6 (Emma Guffey Miller statement that the principle behind the ERA "was set forth in the United Nations' Charter as a standard for every civilized nation."); *id*. at 7–8 (statement of Mrs. Harvey W. Wiley, representing the General Federation of Women's Clubs, challenging labor unions endorsing the U.N. Charter to also support the ERA); *id*. at 11 (Alice Morgan Wright, representing the NWP, citing multiple U.N. Charter provisions asserting the "principle of equality"); *id*. at 43 (statement of Dr. Florence A. Armstrong, American Federation of Soroptimist Clubs); *id*. at 46 (Mrs. Helen Hunt West, for the NWP, noting that "Congress approved the principle in its recent vote on the United Nations Charter");
86. Hearing, *supra* note 2, at 1–3. Senator Arthur Capper (R–KS) testified in this hearing, arguing that the U.N. Charter "calls upon all member nations to recognize the equality of the sexes before the law." *Id*. at 36.
87. *Id*. at 37.
88. G.A. Res.217 (III) A, Universal Declaration of Human Rights (December 10, 1948), http://hrlibrary.umn.edu/instree/b1udhr.htm.
89. G.A. Res. 2263 (XII), Declaration on Elimination of Discrimination Against Women (November 7, 1967), https://www.refworld.org/docid/3b00f05938.html.
90. *Id*., art. II (a).
91. *Id*., art. XI.
92. World Conference of the International Women's Year, *Report of the World Conference of International Women's Year*, U.N. Doc. E/CONF.66/34, at 9 (June 19–July 2, 1975), http://www.un-documents.net/mex-dec.htm.
93. *Id*.
94. *Id*. at 8.
95. *Id*
96. *Id*.
97. National Women's Conference, Women on the Move (1977), https://babel.hathitrust.org/cgi/pt?id=uiug.30112056077446&view=1up&seq=5.
98. *Id*.
99. National Women's Conference, National Plan of Action (1977), https://babel.hathitrust.org/cgi/pt?id=uc1.318220242494l9&view=1up&seq=1.
100. *Id*. at 25.
101. *Id*.
102. *Id*. at 27.
103. Exec. Order No. 12,050, 43 Fed. Reg. 14431 (1978).
104. Statement to President Jimmy Carter 2 (Jan. 12, 1979), https://www.jimmycarterlibrary.gov/digital_library/sso/148878/103/SSO_148878_103_01.pdf. They noted Carter's "strong and successful effort to win ERA extension" and urged him to "stress the importance of the ERA in your forthcoming State of the Union message." He did so. Jimmy Carter, President of the United States, State of the Union Address (Jan. 23, 1979), https://www.jimmycarterlibrary.gov/assets/documents/speeches/su79jec.phtml.
105. In this meeting, Representative Abzug and Votaw also endorsed "the elimination of existing discrimination against persons because of their sexual orientation." Statement, *supra* note 104, at 10. A press release about the meeting further criticized the Carter Administration's proposed increase in the defense budget; called for a commission to "investigate military extravagance"; and again "urged the President to change his position" on Medicaid funding for abortion "and to restore the right to abortion services for military personnel, Peace Corps volunteers, and their dependents." Press Release, National Advisory Committee for Women, President Carter Challenged on Social Priorities by National Advisory Committee for Women (Jan. 13, 1979), https://www.jimmycarterlibrary.gov/digital_library/sso/148878/103/SSO_148878_103_01.pdf.
106. Statement, *supra* note 104, at 4.
107. *Id*. at 5.
108. *The Impact of the Equal Rights Amendment, Hearings before the Subcomm. on the Constitution of the S. Comm. on the Judiciary* 98th Cong., Pt. 1 at 2 (1983).
109. *Id*.
110. *See e.g.,* Hearing, *supra* note 5, at 40.
111. Hearing, *supra* note 108, at 9. By itself, this figure was at least two decades out of date, predating the 1963 Equal Pay Act. *See* Memorandum, Equal Pay in the Federal Government (Aug. 16, 2011), https://chcoc.gov/content/equal-pay-federal-government#:~:text=EEOC%20and%20OPM%20are%20committed%20to%20ensuring%20equal,be%20identical%2C%20but%20they%20must%20be%20substantially%20equal.
112. Hearing, *supra* note 108, at 36.
113. *Id*. at 499 (statement ofProfessor Ann Freedman).

114. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 386 (1985). *See also* Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized Abortion Instead of* Roe v. Wade, Time, Aug. 2, 2018, https://time.com/5354490/ruth-bader-ginsburg-roe-v-wade/.
115. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185,1200 (1992). *See also Equal Rights Amendment: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 98th Cong. 32 (1983) (statement by Professor Grover Rees that while *Roe v. Wade* held that the right to privacy included the right to abortion, "many of the academic articles that have been written suggesting better formulations or more plausible formulations for the abortion right have focused on equal protection.").
116. Hearing, *supra* note 108, at 456 (statement of Professor John Noonan).
117. *Id*.
118. *Id*. at 626
119. *Id*. at 627.
120. *See id*. at 23 (Hatch called it "the definitive work in understanding the equal rights amendment). Later in the hearing, Representative Henry Hyde (R–IL) also noted that this article is "frequently cited as the authoritative guide to the [ERA's] legal effects." *Id*. at 85. *See also Equal Rights Amendment: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 98th Cong. 23 (1983) (Professor Grover Rees referring to this as "the seminal article on the ERA"); *id*. at 35 (calling the Emerson article the "definitive source").
121. *Id*. at 873.
122. *Id*. (emphasis in original).
123. *Id*.
124. *Id*. at 874.
125. *Id*. at 889.
126. *Id*.
127. *Id*.
128. *Id*. at 891.
129. Griggs v. Duke Power Co., 401 U.S. 424,430 (1971).
130. *See, e.g.,* Washington v. Davis, 426 U.S. 226,236 (focusing on "differential impact" is permissible under Title VII, but "is not the constitutional rule").
131. *Id*., quoting Adkins v. Texas, 325 U.S. 398,403 (1945).
132. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
133. *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/equality.
134. Nicholas Capaldi, *The Meaning of Equality*, in Liberty and Equality(Tibor R. Machan ed. 2002). https://www.hoover.org/sites/default/files/uploads/documents/0817928626_1.pdf.
135. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412,415 (1920). *See also* Reed v. Reed, 404 U.S. at 77 (dissimilar treatment for "men and women who are... similarly situated"); Weinberger v. Wiesenfeld, 420 U.S. 636,653 (1975); Califano v. Goldfarb, 430 U.S. 199,207 (1977); United States v. Armstrong, 517 U.S. 456,461 (1996); Frontiero v. Richardson, 411 U.S. 677,688 (1973); Rostker v. Goldberg, 453 U.S. 57,79 (1981).
136. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174–79 (West Group, 2012). *See also* Larry M. Eig, Cong. Rsrch. Serv. 97–589, Statutory Construction: General Principles and Recent Trends 14–15 (Sept. 24, 2014).
137. Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 Harv. J. L. & Gender 569,578 (2014). The National Women's Law Center similarly says that, under the ERA, government action that affects "women or men in a unique way [would] be held to strict judicial scrutiny." National Women's Law Center, *The Right to Equality: Why We Need the ERA*, July 22, 2009, https://nwlc.org/blog/right-equality-why-we-need-era/.
138. Jessica Neuwirth, *Time for the Equal Rights Amendment,* 43 N.Y.U. Rev. Law & Soc. Change 155,161 (2019). *See also* Bonnie Grabenhofer and Jan Erickson, *Is the Equal Rights Amendment Relevant in the 21st Century?* at 7, https://now.org/wp-content/uploads/2015/09/Is-the-Equal-Rights-Amendment-Relevant-in-the-21st-Century.pdf (the new ERA "states a positive right...and places the responsibility for assuring [that right] on governments.").
139. Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 Yale J. L. & Fem. 381 (2017).
140. *Id*.
141. *Id*. at 384 (emphasis added).
142. *Id*. at 385.
143. *Id*. at 388.
144. *Id*. at 390.

145. *Id*. at 391.
146. *Id*. at 397.
147. *Id*. at 398.
148. *Equal Rights, Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 71st Cong. 16 (1931). *See also* Hearing, *supra* note 109, at 75 (statement by Marna Tucker: "I do not think that the ERA creates rights.").
149. Hearing, *supra* note 46, at 45 (1925).
150. Hearing, *supra* note 46, at 25 (1932). *See also id*. at 40 (NLWV analysis asking if, under the ERA, Congress would have authority to "pass laws in fields now reserved to the states" such as "property rights, marriage and divorce, guardianship of children, jury service, etc., etc.").
151. *See supra* notes 80–81 and accompanying text.
152. Senate hearing, *supra* note 2, 80th Cong. 103–104 (1948).
153. *Id*.
154. Press Release, Maloney, Reed Introduce Equal Rights Amendment (March 1, 2021), https://maloney.house.gov/media-center/press-releases/maloney-reed-introduce-equal-rights-amendment.
155. Grabenhofer and Erickson, *supra* note 140, at 3.
156. *Id*.
157. Quotations from this hearing are transcribed from the video which is available at https://www.youtube.com/watch?v=2J0rM3UZM40.
158. *Id*.
159. Use of the term "marginalized genders" is growing rapidly. The group Women for Political Change, for example, defines *historically marginalized gender identities* to include "all gender identities which have been systematically opposed by those in power throughout history." Women for Political Change, *Appendix – Glossary of Terms*, https://www.womenforpoliticalchange.org/appendix. At Newcastle University in the United Kingdom, the Students' Union appoints a Marginalised Genders Officer and defines the term as including "genders…that are looked down on, ignored, not taken seriously and most importantly, are seen as 'lesser' in society." *Marginalised Genders: Introducing Saffron*, September 24, 2016, https://www.nusu.co.uk/blogs/blog/gender/2016/09/24/Marginalised-Genders-Introducing-Saffron/. One article lists and defines 16 gender identities: Veronica Zambon, *What Are Some Different Types of Gender Identity?*, Medical News Today, November 5, 2020, https://www.medicalnewstoday.com/articles/types-of-gender-identity. *See also* Perri O. Blumberg, *A Comprehensive Gender Identity List, As Defined by Experts*, Women's Health, May 13, 2021, https://www.womenshealthmag.com/relationships/a36395721/gender-identity-list/.
160. Video of this hearing and written statements submitted by the witnesses may be found at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Jenkins%20Testimony.pdf.
161. *Id*. (statement of Eleanor Smeal).
162. *Id*. (statement of Carol Jenkins).
163. *Id*. (statement of Alyssa Milano).
164. *Id*. (statement of Bamby Salcedo).
165. *Id*. (statement of Alyssa Milano).
166. *See supra* note 2.
167. *See supra* note 11.
168. *See supra* notes 5–7.
169. *Id*. After the 2018 Brennan Center conference, Jessica Neuwirth similarly wrote that "the ERA is not about abortion." Neuwirth, *supra* note 140, at 161.
170. Grabenhofer and Erickson, *supra* note 138, at 3.
171. *Id*. at 7.
172. Feminist Majority Foundation, *The Feminist Majority Rallies Support for the ERA on Women's Equality Day*, Aug. 26, 2019, https://feminist.org/blog/index.php/2019/08/26/the-feminist-majority-rallies-support-for-the-era-on-womens-equality-day/.
173. American Civil Liberties Union, *ACLU Statement for the Equal Rights Amendment 2019*, May 8, 2019, https://www.aclu.org/letter/aclu-statement-equal-rights-amendment-2019.
174. *See* Eleanor Mueller and Alice Miranda Ollstein, *How the Debate Over the ERA Became a Fight Over Abortion*, Politico, Feb. 11, 2020, https://www.politico.com/news/2020/02/11/abortion-equal-rights-amendment-113505.
175. *See* Marie Solis, *Republicans Want to Make a Debate Over Discrimination Into an Abortion Battle*, Vice, May 1, 2019, https://www.vice.com/en_us/article/a3xv98/equal-rights-amendment-abortion-rights.
176. Paul Taylor & Philip G. Kiko, *The Lost Legislative History of the Equal Rights Amendment: Lessons from the Unpublished 1983 Markup by the House*

Judiciary Committee, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 341,349 (2007); Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & LAW 419,432 (2008); *id*. at 443 ("a federal ERA might provide a basis for reassessing the constitutionality of the Hyde Amendment's ban on Medicaid-funded abortion using an equality analysis.").

177. Sabrina Ariel Miesowitz, *ERA Is Still the Way*, 3 N.Y.U. J. LAW & LIB. 124,145 (2008). *See also* Sarah M. Stephens, *At the End of Our Article III Rope: We Still Need the Equal Rights Amendment*, 80 BROOKLYN L. REV. 397,419–21 (2015)
178. VOICES FOR WOMEN, *supra* note 17, at 17–18. *See also* Davis, supra note 169, at 432 (2008) ("state examples give us some real data about the impact of a federal ERA.").
179. Miesowitz, *supra* note 176, at 145.
180. Judith Avner, *Some Observations On State Equal Rights Amendments*, 3 YALE L. & POL. REV. 144,144,145 (1984).
181. Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, AMN. PROGRESS, Jan. 29, 2020, https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/.
182. Connecticut Constitution, Article 1, § 20.
183. 515 A.2d 134 (Super.Ct. 1986).
184. *Id*. at 161.
185. 515 A.2d at 159.
186. New Mexico Constitution, Article 2, § 18.
187. 975 P.2d 841 (N.M. 1998).
188. *Id*. at 844.
189. 975 P.2d at 844.
190. Hearing, *supra* note 108, at 2.
191. West Coast Hotel Co. v. Parrish, 300 U.S. 379,404 (Sutherland, J., dissenting).