THE NEED FOR RATIFICATION OF THE EQUAL RIGHTS AMENDMENT: MORE RIGHTS THAN NONE, BUT STILL NOT EQUAL

Margaret Stansell*

On March 31st, 1776, Abigail Adams wrote to her husband John, "Remember the ladies."[1] Spoiler alert: John, and the rest of the founding fathers, did not. Abigail Adams knew the beginning of a new nation presented an opportunity for women to have more rights than ever before. How disappointed she must have been four months later when she learned that "All men are created equal," and women were left out of the equation altogether. From its inception, the United States has relegated women to second class citizenship. After all, women were denied the right to vote until more than one hundred years after Abigail's request to a future President. Women have long known laws that discriminated against them were unjust, leading to centuries of activism, lobbying, and fighting for equality. Although women's rights have improved in the two hundred years since Abigail's letter, legal equality is still just out of reach.

Over the past two centuries, equal rights have slowly climbed stairs, starting on the bottom step in 1776 and arriving on the middle step where they wait today. Standing in the middle of the staircase means that women have more rights today than ever before but also that more rights do not yet equate to equal rights. Full equal rights sit at the top of the staircase and women will never have "enough" rights until they have equal rights. The Equal Rights Amendment is necessary for American women to secure full rights and legal protection from sex-based discrimination.[2]

First proposed in the 1920s, the Equal Rights Amendment (ERA) has generally been regarded as controversial for its goal of ending discrimination based on sex in the United States.[3] The text and possible consequences of the ERA were a major political issue in 1972 when the amendment was first sent to the states for ratification.[4] The pushback leveraged against the ERA eventually led to its supposed defeat in the 1980s.[5] Opponent female activists argued that women

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* Margaret Stansell is a 2022 Juris Doctor Candidate at the University of Missouri – Kansas City School of Law. She holds a Bachelor of Arts Degree in Political Science, also from UMKC. Margaret would like to thank Professor Levit and Kathleen Kegley for their support throughout the writing process and answering all questions with knowledge and kindness. She would like to thank her parents and many siblings for their love that has allowed her to pursue her dreams. Finally, she would like to thank the entire Law Review staff for their hard work.

[1] *Abigail Adams Urges Husband to "Remember The Ladies"*, HISTORY.COM (Oct. 22, 2009), https://www.history.com/this-day-in-history/abigail-adams-urges-husband-to-remember-the-ladies.

[2] *See* Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 955 (2019) (ratification of the Equal Rights Amendment would "shut down any potential for abuse in the form of future alterations of the precedent").

[3] *See* Tara Law, *Virginia Just Became the 38th State to Pass the Equal Rights Amendment. Here's What to Know About the History of the ERA*, TIME (Jan. 15, 2020, 4:51 PM), https://time.com/5657997/equal-rights-amendment-history/.

[4] *See id.*

[5] Gerard M. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 639 (2019); Alex Cohen & Wilfred U. Codington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUSTICE (Jan. 23, 2020), https://www.brennancenter.org/our-

enjoyed their place in society as it was and wanted to keep their "privileges."[6] The ERA has also raised unanswered questions about the amendment ratification process. The future of the amendment currently rests on the interpretation of Congress's Article V powers. As recently as January of 2020, the ERA was still making headlines as the focus of Congressional action when the House of Representatives voted to remove the amendment's ratification deadline.[7]

This effort to revive the amendment has been questioned by many legal scholars, activists, and politicians. One problem is whether Congress even has the power to remove the ERA's ratification deadline, and if so, by what vote. Another is whether the requisite number of states that have ratified the ERA. By some calculations, this number is thirty-eight, meeting the requisite number for ratification.[8] Some states that have previously ratified the amendment, however, have voted to rescind their votes, which would leave the ratifying states at only thirty-three.[9]

Part I of this Comment discusses how Congress may indeed have the power to extend their previous ratification deadline and why states also have the right to rescind a previous ratification or rejection of the amendment. Once the path to ratification is clearly defined, the constitutional controversy may be resolved. Based on constitutional and policy analysis, Part I proposes that first, Congress does have the power to set a deadline on constitutional amendments; second, a deadline in the proposing clause of an amendment may be changed by majority vote in both houses of Congress; third, a state may rescind its ratification at any time before the requisite thirty-eight states ratify the amendment; and fourth, if the Senate votes by a simple majority to remove the ERA's ratification deadline and thirty-eight states vote to ratify the amendment, then it will become part of the Constitution.

Part II focuses on the benefits of the Equal Rights Amendment and, most importantly, why the ERA is still necessary for women to gain full equal rights and liberties. Some have claimed that the amendment is unnecessary given the rise of statutory and constitutional protections such as intermediate scrutiny, Title VII of the Civil Rights Act, and other laws.[10] However, this viewpoint fails to recognize and acknowledge facts like the wage gap, discriminatory policies in the workplace, and the difficulty of proving sex discrimination without a facially discriminatory

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work/research-reports/equal-rights-amendment-explained (discussing that though the Republican Party used to be supporters of the ERA, from the 1970s onward, the GOP has been the party of vocal ERA opponents).

[6] *See* Douglas Martin, *Phyllis Schlafly, 'First Lady' of a Political March to the Right, Dies at 92*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html.

[7] Sheryl Gay Stolberg, *House Votes to Extend Deadline to Ratify Equal Rights Amendment*, N.Y. TIMES (Jan. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/equal-rights-amendment.html.

[8] *Id.*

[9] *Id.* Five states (Idaho, Kentucky, Nebraska, South Dakota, and Tennessee) have rescinded ratification of the Equal Rights Amendment.

[10] *See, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001).

policy.[11] Furthermore, approaching equality between the sexes through piecemeal laws and inconsistent application of protections has created loopholes through which sex-based discrimination can continue to hinder women. Part II examines why the Equal Rights Amendment must be ratified by discussing the shortcomings of intermediate scrutiny and the efficacy of current laws that prohibit sex-based discrimination.

Throughout these discussions, this Comment aims to illustrate how the Equal Rights Amendment is still viable, necessary, and must be ratified to secure legal equality on the basis of sex.

I. CONSTITUTIONAL VIABILITY OF THE EQUAL RIGHTS AMENDMENT

A. The Amendment Process—Short, Sweet, and Lacking Guidance

The process for amending the United States Constitution proscribed by Article V does not address issues of ratification deadlines or recissions of ratifications.[12] There are two primary ways in which an amendment may be proposed – by Congress or by the states calling a convention.[13] The relevant text of Article V details the amendment process:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution . . . which . . . shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states.[14]

Though Article V is short and sweet, it lacks specific guidelines for issues such as deadlines for ratification, duration for an amendment to be ratified, or instances in which a state may change its vote on an amendment.[15] The Constitution does not address these issues or signal which branch of government has the power to answer these questions. Over time, the United States Supreme Court has been somewhat divided on these concerns. The Court has ruled on the issue of deadlines in the textual body of an amendment but not in the proposing

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[11] *See* Kim Elsesser, *On Equal Pay Day, What Is The Real Gender Pay Gap?*, FORBES (Mar. 30, 2020, 2:59 PM), https://www.forbes.com/sites/kimelsesser/2020/03/30/on-equal-pay-day-what-is-the-real-gender-pay-gap/#61dc77da28ba (using an adjusted gender pay gap also ignores discrimination in employment); *see also* Sarah M. Stephens, *At The End Of Our Article III Rope: Why We Still Need The Equal Rights Amendment*, 80 BROOKLYN L. REV. 397, 416 (2015). "Most laws that have a disparate impact on women are the product of subtle attitudes and entrenched stereotypes about gender roles . . ." *Id.* The entrenchment of sex discrimination has led to discriminatory practices with neutral language, which is difficult to prove in court. *Id.*

[12] U.S. CONST. art. V.

[13] Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 10 YALE L.J. 677, 681-82 (1993) (noting the second way of proposing an amendment by state convention has never happened).

[14] U.S. CONST. art. V.

[15] *Id.*

clause.[16] The Court has determined it may properly decide the constitutionality of some issues surrounding amendment procedures, but has also held that others are better left to the political process.[17] Since the Constitution makes no mention of either of these issues in Article V, it provides little guidance as to how the ERA might navigate them.

B. The Confusing History of the Equal Rights Amendment

Though many people remember the 1970s as the era of the Equal Rights Amendment, the amendment was first proposed in Congress in 1923, only three years after suffragists achieved the ratification of the Nineteenth Amendment.[18] In 1971, the Equal Rights Amendment was proposed once again and this time finally passed both houses of Congress to be submitted to the states in March of 1972.[19] The text of the ERA is firm and direct, prohibiting sex discrimination entirely:

> SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. SECTION 3. This amendment shall take effect two years after the date of ratification.[20]

During the 1970s, the ERA had many supporters and opponents as thirty-five states ratified the amendment during the first six years.[21] Unfortunately, after the initial push in 1972, the ratifications slowed by 1978, and time began to run out.[22] When the ERA was submitted to the states, it contained a seven-year deadline for ratification.[23] This deadline appeared in the proposing clause of the amendment for each house of Congress, but as shown above, it was not in the textual body of the amendment.[24] This is an important distinction between the ERA and the Eighteenth

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[16] Dillon v. Gloss, 256 U.S. 368, 376 (1921).

[17] *See* Coleman v. Miller, 307 U.S. 433, 450 (1939).

[18] *Women's Rights: Equal Rights Amendment*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/women/era (last visited Nov. 8, 2020).

[19] *See* Roberta W. Francis, *After 38 States Ratify The Equal Rights Amendment, What Next?*, ALICE PAUL INST. (Dec. 2019), https://www.alicepaul.org/wp-content/uploads/2019/12/ERA-After-The-38th-State-Ratifies.pdf.

[20] 86 STAT. 1523 (1972) (proposed Amendment to the U.S. Constitution [Equality of rights without regard to sex]).

[21] Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. OF WOMEN & L. 113, 117 (1997).

[22] *Id.* at 116.

[23] Dayana C. Wright, *Great Variety of Relevant Conditions, Political, Social and Economic: The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V*, 28 WM. & MARY BILL OF RTS. J. 45, 62-63 (2019) (The Eighteenth Amendment was the first to impose a deadline for ratification which was set at seven years. Subsequent amendments sometimes contained deadlines and sometimes did not, purely from if one was proposed and voted on by Congress for that particular amendment).

[24] Magliocca, *supra* note 5, at 637.

Amendment, which will be discussed in the next section.[25] In 1978, right before the 1979 deadline, Congress voted to extend the ratification deadline another three years to 1982.[26] However, when the 1982 deadline came and went without ratification from the final three states, the amendment was believed to be effectively dead.

Another debate surrounding the ERA depends on how many states' ratifications are still in force. Though the count of states that ratified the amendment in total is thirty-eight, five states have rescinded their ratifications; Idaho, Kentucky, Nebraska, South Dakota, and Tennessee.[27] Rescission is a process not specifically laid out in Article V or codified in any law, but has been practiced as far back as the Reconstruction amendments.[28] A rescission occurs when a state legislature convenes, before an amendment presented to the states has been added to the Constitution, and votes to not ratify an amendment it had previously ratified. The withdrawal of support for the amendment before it has been added to the Constitution is used by states to essentially change their mind on the issue.[29] South Dakota specifically rescinded its ratification when Congress voted to extend the ratification deadline, believing that Congress did not have that power.[30] South Dakota's protest meant to tell Congress that changing the deadline but not allowing states to rescind ratification inhibits the process.[31] Instead, the state argued that Congress allow states the ability to change their mind later as Congress has.[32]

Despite the rescissions and the supposed death of the ERA in the 1980s, the subsequent four decades saw three more states ratify the amendment.[33] If the rescinding states' actions are constitutional, the accurate count of ratifying states would be thirty-three. In other words, if the rescissions are valid, then the amendment needs five more states to reach the three-fourths requirement mandated by Article V.[34] Accepting rescissions as valid is the only logical way to also accept ratification after rejection as valid. Without the ability to continue to vote and revote on a matter before full ratification, the states would be essentially limited to only one shot to decide what to do about the amendment.

In 2020, right after Virginia became the thirty-eighth and seemingly final state needed to ratify the ERA, the House of Representatives voted to remove the

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[25] *See infra* Section I.F.

[26] *See* Held et al., *supra* note 21, at 117.

[27] *See* Chloe Foussianes, *Why the Equal Rights Amendment Still Hasn't Been Adopted, Nearly a Century After It Was First Written*, TOWN & COUNTRY (Apr. 19, 2020), https://www.townandcountrymag.com/leisure/arts-and-culture/a32066474/equal-rights-amendment-mrs-america-era-timeline-now/.

[28] *See* Grover Rees III, *Rescinding Ratification of Proposed Constitutional Amendments - A Question for the Court*, 37 LA. L. REV. 896, 896 (1977).

[29] *See id.* at 898.

[30] *See* Magliocca, *supra* note 5, at 654.

[31] *See id.*

[32] *See id.*

[33] Sarah Rankin, *Attorneys General Seek Summary Judgment in ERA Lawsuit*, ASSOCIATED PRESS (Aug. 19, 2020), https://apnews.com/article/22c3f8095a526288962ae42b06079f32.

[34] *Id.*

1982 ratification deadline completely.[35] But this is only half of the action needed, and the Republican-controlled Senate was not expected to take up its own vote on the matter.[36] The obstacles to ratification are: whether Congress can extend the ratification deadline; whether a subsequent Congress almost forty years later can completely remove that same deadline; and whether a state can rescind ratification. At the time of this publication, three states have sued the Trump administration arguing the ERA should be added to the Constitution now that Virginia has ratified the amendment.[37] On the other side, three other states (Alabama, Louisiana, and South Dakota) have filed suits to have the rescissions declared valid.[38] This means the amendment is presently in the same holding pattern it has been for decades – lacking enough votes and hindered by an overdue deadline.

C. The Few Precedential Cases on the Constitutional Amendment Process

The Supreme Court's rulings on the constitutional amendment process point to the authority of Congress to proscribe and promulgate amendments. Though seemingly unrelated, when read together these cases create a pathway for the ERA. Issues such as the deadline of the amendment only appearing in the proposing clause and the rescissions of previous ratifications are unique to the ERA and can make prediction of a ruling difficult. However, as these cases will show, the most likely path for the amendment's ratification is removal of the deadline by Congress and ratification of at least thirty-eight states with no rescissions.

The Court first addressed the issue of ratification deadlines in *Dillon v. Gloss*.[39] In *Dillon*, the defendant, who was charged with violations of the National Prohibition Act, argued that the Eighteenth Amendment was unconstitutionally ratified.[40] The Eighteenth Amendment's validity was challenged on the assertion that Congress did not have the power to set a deadline for ratification and therefore the amendment was not properly added to the Constitution.[41] Since this was also the first amendment to include a deadline for ratification, whether Congress properly had the power was a valid concern.[42]

Dillon held that a deadline for ratification is constitutional and that Congress has a wide range of power under Article V to decide how to propose

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[35] Stolberg, *supra* note 7.

[36] *E.R.A. Ratification: Likely Dead on Arrival in the Senate*, BALT. SUN (Feb. 13, 2020, 4:20 PM), https://www.baltimoresun.com/opinion/editorial/bs-ed-0216-era-ratification-20200213-kzp6yfftunbxrai42wdykwdt5i-story.html.

[37] Jess Bravin, *States Seek Ruling on Equal Rights Amendment Ratification Deadline*, WALL ST. J. (Jan. 13, 2020, 4:29 PM), https://www.wsj.com/articles/states-seek-ruling-on-equal-rights-amendment-ratification-deadline-11580419781 (Nevada, Illinois, and Virginia – the most recent ratifications – sued to have their votes counted).

[38] *Id.*

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

[40] *See id.* at 370-71.

[41] *See id.*

[42] *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 407 (1983).

amendments to the states.[43] The Court in *Dillon* also held that an amendment must be passed in a "reasonable time" from when it was proposed.[44] The "reasonable time" standard did not include a specific number of years or test for determining reasonable length, only that Congress has the power, "within reasonable limits," to set a ratification deadline.[45]

Unlike the ERA, though, the deadline of the Eighteenth Amendment was in the text of the amendment itself, not the proposing clause.[46] A deadline within the textual body of an amendment means that the exact wording of the amendment includes this deadline, and once this wording is submitted to the states it cannot be changed.[47] A proposing clause, on the other hand, is merely the text used to propose the amendment to each house of Congress – put simply, this text is not in the actual wording of the amendment and is not presented to the states as part of the amendment.[48] Congress frequently switches between setting a deadline in the textual body of an amendment or in the proposing clause of amendments, which illuminates the legal significance of the decision.[49]

Less than two decades later in *Coleman v. Miller*, the Supreme Court's discussion of ratification deadlines provided a bit more guidance for analyzing future amendments. In *Coleman*, the Kansas state legislature voted to ratify an amendment it had originally rejected in 1925.[50] The senators who had voted against the amendment sought to have the ratification reversed due to the previous rejection of the amendment, and argued too much time had passed, raising the issue of how the Court should rule when an amendment does not contain a ratification deadline.[51]

The Court held that whether Congress has a power to set a ratification deadline of "reasonable time" is a question best answered by Congress itself.[52] Therefore, whatever time limit Congress decides thus meets the reasonableness standard.[53] In this decision, the Court presents the standard of "Congressional promulgation," which says Congress has the power to decide that an amendment has both been passed within a "reasonable time" and whether the ratifications have all been proper.[54]

Coleman suggests that even after three-fourths of the states have adopted an amendment, Congress decides if the amendment has been properly passed and meets the "reasonable time" requirement set forth in *Dillon*.[55] *Coleman* further points to the idea that a state's rejection then ratification, or ratification then

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[43] *See Dillon*, 256 U.S. at 376.
[44] *Id.* at 375-76.
[45] *Id.* at 375-76.
[46] U.S. CONST. amend. XVIII, § 3 (Section 3 of the amendment text sets a time limit of 7 years).
[47] *See* Dellinger, *supra* note 42, at 409.
[48] *See* Held et al., *supra* note 21, at 130.
[49] *See* Wright, *supra* note 23, at 67-68.
[50] Coleman v. Miller, 307 U.S. 433 (1939).
[51] *Id.*
[52] *Id.* at 454.
[53] *Id.*
[54] *Id.*
[55] *See id.*; *see also Dillon*, 256 U.S. at 375.

rescission, is also for Congress to validate.[56] In the case of the Reconstruction Amendments, when states rescinded ratifications of the Fourteenth and Fifteenth Amendments, once three-fourths of the states had "ratified," Congress chose to ignore the rescissions and declared the amendments ratified anyways.[57] This precedent has come up in many cases regarding the ERA, and research on the passage of amendments, but has yet to be used again.

Other cases preceding *Coleman*, such as *Hollingsworth v. Virginia* and *Hawke v. Smith*, also set forth the precedent that Congress is the final arbiter of amendments, and that Article V gives the legislature the power to propose amendments to the states how Congress sees fit.[58] In *Hollingsworth*, the Eleventh Amendment was challenged as not having been ratified properly because it was not signed by the President.[59] *Hollingsworth* established that an amendment does not need to go to the President to be signed like other bills, thus keeping the executive out of the amendment process formally.[60] In *Hawke*, the Court held that when an amendment is sent to the states for ratification, Congress may also dictate to the states what process they must use to effect ratification.[61] This holding struck down an Ohio state constitutional amendment requiring a federal amendment be passed in both the legislature and by public vote.[62] However, the public vote had not yet happened when Congress declared the Eighteenth Amendment ratified because the Ohio legislature had ratified the amendment in the way Congress had prescribed.[63] Thus, the Court held that the referendum requirement was unconstitutional, and ratification was achieved when the Ohio legislature passed the amendment.[64]

Another case, *Leser v. Garnett*, helped women's rights when it solidified that a federal amendment can override contradictory state constitutional provisions.[65] In *Leser*, petitioners from the state of Maryland argued that since the state Constitution gave voting rights only to men, and since the state had not passed the Nineteenth Amendment, there was no duty to give women suffrage.[66] Petitioners also argued that when certain state constitutions prohibited women's suffrage, these states could not properly vote on the Nineteenth Amendment.[67] The

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[56] *See* Dellinger, *supra* note 42, at 396.
[57] *See* Francis, *supra* note 19.
[58] Hollingsworth v. Virginia, 3 U.S. 378 (1798); Hawke v. Smith, 253 U.S. 221 (1920).
[59] *Hollingsworth*, 3 U.S. at 382.
[60] *Id.*
[61] Hawke v. Smith, 253 U.S. 221, 227 (1920) (must be one of the two listed in Article V).
[62] *See id.* at 226-27.
[63] *See id.* at 225. (Thirty-six other states had also ratified the Eighteenth Amendment, meeting the three-fourths requirement).
[64] *See id.* at 231.
[65] Leser v. Garnett, 258 U.S. 130 (1922).
[66] *See id.* at 135-36.
[67] *Id.* at 137.

Court held that ratifying a federal amendment is a federal act and therefore state constitutions cannot preclude a state legislature from voting on it.[68]

Leser, combined with the other cases, supports the precedent that the Article V amendment power is almost fully held by Congress. This power is further evidenced in the passage of the Reconstruction Amendments, the decisions of Congress when and where to implement an amendment deadline, and the power of Congress to declare an amendment ratified. Though the issues of recission and deadlines are not spelled out within Article V, the Court has held that Congress still holds power to decide these issues.

1. Modern Cases on the Equal Rights Amendment's State Rescissions

Recent cases on the Equal Rights Amendment have not been ruled on by the Supreme Court but point to the likelihood that states have the right to rescind ratification. In *Idaho v. Freeman*, the state of Idaho sought to have its rescission of ratification of the Equal Rights Amendment upheld as constitutional.[69] The United States District Court for the District of Idaho held that before an amendment has reached three-fourths of the required states and has been deemed fully ratified by Congress, a state may rescind its ratification vote.[70] Though the ruling in this case was later vacated, the idea was not argued against or thought invalid.

Proponents of the ERA have pointed to the controversy of state ratification rescissions surrounding the Reconstruction Amendments to support disallowing rescissions.[71] As an example, Ohio and New Jersey both initially ratified the Fourteenth Amendment before rescinding their votes.[72] Despite this, both states were included in the official list of ratifying states.[73] This can be explained through the dicta in *Coleman*, which established that Congress must be the one to finalize an amendment and determine a ratification's validity.[74] Therefore, in 1868 when Congress adopted a resolution that the necessary three-fourths of the states had ratified the amendment, including those that tried to rescind, Congress essentially declared these rescissions invalid.[75] The *Coleman* Court stated that "efficacy of ratifications by state legislatures" was a political question and therefore, Congress has the power of promulgation of amendments.[76]

These cases help to overcome the idea that rescission of any kind is unconstitutional. Though it might technically be easier to pass the ERA if states were not constitutionally allowed to rescind ratification, the unfortunate truth is that states likely do hold the right to rescind. This right lasts until an amendment is fully added to the Constitution. Furthermore, as recently as June of 2020, the

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[68] *Id.*
[69] Idaho v. Freeman, 529 F. Supp. 1107, 1111 (D. Idaho 1981) (*vacated on other grounds*).
[70] *See id.* at 1148-49.
[71] *See* Francis, *supra* note 19.
[72] *Id.*
[73] *Id.*
[74] *See* Coleman v. Miller, 307 U.S. 433, 454 (1939).
[75] *Id.* at 448.
[76] *Id.* at 450.

United States District Court for the District of Columbia has ruled in the above-mentioned cases regarding the ERA.[77]

In *Virginia v. Ferriero*, Illinois, Nevada, and Nebraska sued David Ferriero, the Archivist of the United States.[78] These states claimed that thirty-eight states had ratified the ERA, and therefore the Archivist was required to certify the amendment and add it to the Constitution.[79] Five other states (Alabama, Louisiana, Nebraska, South Dakota, and Tennessee) then filed petitions to intervene as defendants, claiming the ERA had not been ratified because five states, including three of the moving states, had rescinded their ratifications.[80] The court in *Virginia* permitted the intervention, holding that these states had as much of a right to ensure that their votes on ratification were properly counted as the plaintiff states.[81] While *Virginia* is not a definitive ruling on the subject, recognizing a legally sufficient interest in the case to garner Article III standing heavily suggests that the rescinding states have the right of rescission and that rescission counts as a "no" vote as much as rejection of the amendment.[82]

Reversal of both rejection and ratification is an idea more in tune with the political process and the idea that subsequent generations have the ability to change laws and constitutional provisions of views to which they no longer ascribe.[83]

D. The Ancient Congressional Pay Amendment

The certification of amendments is further complicated by the role of the Archivist and the ratification of the most recent amendment, which happened sporadically over two centuries. First proposed with the original Bill of Rights amendments, the Congressional Pay Amendment, also known as the Twenty-Seventh Amendment, was ratified in 1991.[84] Until the addition of the Congressional Pay Amendment, precedential cases such as *Dillon* and *Coleman* applied to the amendment process more obviously. In *Dillon* and *Coleman*, the major issue was reasonable time between an amendment being sent to the states and the states ratifying that amendment.[85] Certainly, at this point, no one had

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[77] *See* Bravin, *supra* note 37. (The last three states to ratify the ERA were Illinois, Nevada, and Virginia).

[78] Virginia v. Ferriero, 466 F. Supp. 3d 253, 254 (D.D.C. Jun. 12, 2020).

[79] *See id.*

[80] *See id.* (Nebraska, South Dakota, and Tennessee had rescinded their ratifications).

[81] *See id.* at 255-56. *See also* U.S. CONST. amend. XXVII.

[82] *See Virginia*, 466 F. Supp. 3d at 257 (citing State of Alaska v. U.S. Dep't of Transp. 868 F.2d 441, 444 (D.C. Cir. 1989) (holding that preemptive effect of federal law is an injury under Article III of the Constitution)).

[83] *See* Robert M. Rhodes & Michael P. Mabile, *Ratification of Proposed Federal Constitutional Amendments--The States May Rescind*, 45 TENN. L. REV. 703, 725-26 (1978).

[84] Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 498 (1992).

[85] *See* Coleman v. Miller, 307 U.S. 433, 454 (1939); *see also* Dillon v. Gloss, 256 U.S. 368, 375-76 (1921).

thought a reasonable time could be two centuries, yet in 1992, that seemed to become the case.

Between 1984 and 1992, during a resurgence of concern for Congressmembers' power to give themselves immediate raises, thirty-two states ratified the amendment first proposed in 1789.[86] This would mean that for thirty-two of the required thirty-eight states there was some sort of consensus in both timing and ratification.[87] However, for the other six states, ratification had happened during very different time periods. Based on *Dillon*, ratification over such a long period of time would have been a problem. The *Dillon* Court stated: "We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time."[88] *Dillon* also suggests that a ratification between states separated by "many years" is no longer effective.[89]

Coleman conversely holds that Congress has the final say to determine whether an amendment has been ratified once thirty-eight states have voted in the affirmative.[90] Since 1984, though, this job has been statutorily within the hands of the Archivist, who certifies an amendment once it reaches the three-fourths requirement of Article V.[91] Archivist Don Wilson certified the Twenty-Seventh Amendment, officially adding it to the Constitution the day before Congress met to discuss its validity.[92]

When the Twenty-Seventh Amendment was certified, some members of Congress voiced their concerns that the Archivist should ask them for approval.[93] But Wilson claimed this was unnecessary, saying that once the thirty-eighth state ratified the amendment, it became part of the Constitution, and his certification was merely a formality.[94] Nevertheless, both houses of Congress later passed their own resolutions declaring the Twenty-Seventh Amendment valid.[95] It remains unclear if *Coleman's* dicta that Congress's role in certifying amendments has been fully delegated to the Archivist.

Though the story of the Twenty-Seventh Amendment may be an interesting episode in history, the questions it addresses about the amendment process may point to the viability of the ERA after all. Rules such as "reasonable time" from *Dillon* now seem obsolete. Similarly, a declaration of validity from the Archivist could be the functional equivalent of congressional promulgation, as

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[86] *See* Bernstein, *supra* note 84, at 538.
[87] *See id.* at 550-51.
[88] *Dillon*, 256 U.S. at 374.
[89] *Id.*
[90] *See Coleman*, 307 U.S. at 454.
[91] *See* Bernstein, *supra* note 84, at 540; 1 U.S.C. § 106b.
[92] *See* Bernstein, *supra* note 84, at 540.
[93] *See* Jessie Kratz, *The Historian's Notebook: The National Archives' Role in Amending the Constitution*, 49 PROLOGUE 32 (2017).
[94] *See id.*
[95] *See id.*

required by Coleman. Further, it does seem rather nonsensical that the ERA had to die after ten years and the Twenty-Seventh Amendment has lived over 200 years.

E. Theories of Constitutionality and Amendability

Some helpful theories regarding the amendment process that have been developed by Professor Michael Paulsen and other scholars are: the Contemporaneous Consensus Model, the Congressional Power Approach, and the Concurrent Approach.[96] These approaches, discussed by Paulsen after the passing of the Congressional Pay Amendment, use the extraordinary passing of this amendment to look at the precedential cases.[97] In the case of the Congressional Pay Amendment, despite the long period of time from proposal to ratification, all requirements had been met upon the thirty-eighth state's ratification, and the amendment became law.[98] The Contemporaneous Consensus Model, which relies on *Dillon* and *Coleman,* requires that all states and Congress agree and act within the same time period.[99] Contemporaneous consensus, though, was not needed for the Twenty-Seventh Amendment and therefore may not be necessary for subsequent amendments.[100]

Another approach can be described simply as congressional promulgation, or the Congressional Power Approach, which rests on the ruling in *Coleman* that it is up to Congress to decide when an amendment has been properly ratified.[101] This approach seemingly has the most judicial support but has been criticized by some constitutional theorists as "unpredictable."[102] This approach is problematic because each amendment's situation is uncertain until Congress chooses to validate it, and this approach makes it difficult to determine how any state's action towards an amendment will be treated in the end. The role of the Archivist also further complicates this approach; congressional promulgation may be unnecessary if the ratification is declared and the amendment is added by the Archivist rather than Congress.[103] The role of the Archivist, though, demonstrates how the everchanging political process and cases like *Coleman* have established that proposed constitutional amendments are political acts.

An interesting idea from the Congressional Power approach arises if Congress states that ratification cannot be rescinded in the text of the amendment.[104] If Congress has the power to promulgate amendments, it likely has the power to change those proposing clauses in a subsequent Congress. The last approach is the Concurrent Approach. This approach follows the text of Article V but also allows states to rescind ratification. It also states that Congressional votes

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[96] *See* Paulsen, *supra* note 13, at 681-82.
[97] *See generally id.*
[98] *The Ageless Twenty-Seventh Amendment*, N.Y. TIMES (May 16, 1992), https://www.nytimes.com/1992/05/16/opinion/the-ageless-27th-amendment.html.
[99] *See* Paulsen, *supra* note 13, at 685-86.
[100] *See* Bernstein, *supra* note 84, at 550.
[101] *See* Dellinger, *supra* note 42, at 390.
[102] *Id.* at 396.
[103] *See* Kratz, *supra* note 93.
[104] *See* Dellinger, *supra* note 42, at 410.

to change a deadline in an amendment result in an entirely new amendment if done by a supermajority.[105] Paulsen illustrates this as the only approach that can explain the Twenty-Seventh Amendment,[106] but it is ill-suited for the ERA.

The viability of the ERA differs completely from the Twenty-Seventh Amendment because it contains a ratification deadline. The future of the ERA rests partly in the fact that the amendment's deadline is in the proposing clause, not the text of the amendment.[107] Proponents of the theory that a proposing clause is not subject to the same rules as the actual text of an amendment point to the congressional hearing debate about the extension of the ERA's deadline.[108] This difference would mean that the deadline need only be extended or repealed by a simple majority in each house of Congress, avoiding the harder supermajority vote.[109] If this occurred, then the resolution by the House of Representatives to remove the ratification deadline is half the action; a majority vote in the Senate would still be required.[110] However, this resolution died in the Senate at the end of the 116th Congress, and the resolution will now need to be proposed and passed again until both houses in the same Congress agree. The Equal Rights Amendment may then still be viable if both houses were to vote to remove the deadline by simple majority.

F. Viability of the Equal Rights Amendment

Feminists also suggest two strategies for reaching the goal of adding the Equal Rights Amendment to the Constitution: the fresh start proposal and the "three state strategy."[111] These approaches discuss whether the supporters of the amendment should propose a new equal rights amendment altogether or should push for more states to ratify the current Equal Rights Amendment.[112] The "fresh start" approach was seemingly supported by Justice Ruth Bader Ginsburg and others who argue that the issues have become too complicated and proposing a new amendment would be more straightforward.[113]

Proposing a new ERA means new wording could be drafted and could make the amendment match current views regarding sex, sexuality, and gender that were not as prevalent in the 1970s.[114] The current wording of the Equal Rights Amendment protects only on the "basis of sex," which until recently only referred to discrimination based on biological sex, not sexuality or gender identity.[115]

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[105] *See* Paulsen, *supra* note 13, at 722.
[106] *See id.* at 723.
[107] Held et al., *supra* note 21, at 130.
[108] *See id.* at 117.
[109] *See* Wright, *supra* note 23, at 74.
[110] *See id.*
[111] Alexandria C. Dean, *One State Away: The Need for Ratification of the Equal Rights Amendment in a Justice Kavanaugh, Conservative Court Era*, 10 WAKE FOREST J. L. & POL'Y S.S. 1, 5 (2019).
[112] *See id.*
[113] *See id.*
[114] *See id.*
[115] 86 STAT. 1523 (1972) (Proposed Amendment to the U.S. Constitution [Equality of rights without regard to sex]).

However, proposing a new amendment may not be necessary to include sexuality and gender in the Equal Rights Amendment since the recent Supreme Court decision of *Bostock v. Clayton County*.

In *Bostock*, decided in June of 2020, the Court held in a landmark decision that discrimination on the basis of sex included discrimination based on one's sexual preference or gender identity.[116] The Court held that under Title VII, any proof that a person's sex as part of the determination in firing decisions is grounds for violation based on sex discrimination.[117] This means that firing an employee for not being attracted to a certain sex or for not identifying as a certain sex is sex discrimination.[118] *Bostock's* expansion of the Court's definition of "sex" could potentially be applied to the current text of the Equal Rights Amendment, therefore negating one of the arguments to propose a new amendment.

The second approach, the "three state strategy," ignores the ratification deadline and argues that the focus should be on getting enough states to meet the three-fourths requirement of the original Equal Rights Amendment.[119] However, this approach does not account for Congress removing the deadline or the rescission of five states.[120] The approach was obviously crafted before Nevada, Illinois, and Virginia brought the current ratifications up to its contested thirty-eight. This strategy does not go nearly in depth enough with the issues of the current ERA.

Based on the precedent cases, past amendment processes, and the issues surrounding the Equal Rights Amendment, there is hope for the current ERA to become the Twenty-Eighth Amendment. That hope, however, lies in a complete understanding of the complexities of the Amendment's standing. Congress has the right to set a deadline on an amendment but only for a "reasonable time" and within "reasonable limits," using the language of *Dillon*.[121] Congress's authority to set a deadline on an amendment also gives it the ability to change that deadline as long as the deadline is in the proposing clause of the amendment, not in the text of the amendment.[122] A deadline in the proposing clause carries the same standard of voting as a regular statutory provision and therefore may be removed by a subsequent Congress by majority vote in each house.[123]

Furthermore, a state may rescind its ratification, and Congress must declare the rescission either valid or invalid because Congress has the final say in promulgating an amendment once the Article V process has been completed.[124] Therefore, the two hurdles left are removing the ratification deadline by a simple majority of both the House of Representatives and the Senate, and passing the amendment in five more states. Any of the five states who have rescinded could also vote to validly ratify again. Once the deadline is removed and the number of

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[116] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1736 (2020).
[117] *See id.*
[118] *See id.*
[119] *See* Dean, *supra* note 111.
[120] *Id.*
[121] *See* Dillon v. Gloss, 256 U.S. 368, 368 (1921).
[122] *See* Held et al., *supra* note 21.
[123] *See id.*
[124] *See* Coleman v. Miller, 307 U.S. 433, 454 (1939).

ratifications reaches thirty-eight without rescissions, Congress and the Archivist must certify the amendment (notwithstanding the possibility of disagreement). Though this solution may seem convoluted and may lead one to ask why not just start over, going back to the beginning would only prolong and complicate the process further.

Until the Senate votes to remove the ratification deadline or more states introduce and pass the amendment, further guidance and answers must come from the Court. The cases currently against the Archivist demanding that the Equal Rights Amendment be added to the Constitution may produce a ruling that changes the understanding of the amendment's viability once again.[125]

II. THE CASE FOR THE EQUAL RIGHTS AMENDMENT

Though strides have been made in the past four decades to expand sex discrimination protections, without a constitutional amendment, equal rights will not be attained. As with other social justice issues that stem from the antiquated and historically white male-centric infrastructure of the United States, many still attempt to diminish the reality of sexism by claiming it is no longer a problem. Those who claim that current federal laws, intermediate scrutiny, and state level ERAs result in a "de facto ERA" make one crucial, glaring mistake: a "de facto ERA" is innately not an Equal Rights Amendment.[126] Without the full force of a constitutional amendment, the effect of one will neither be felt nor implemented by a patchwork of laws.[127]

The current patchwork used to prohibit sex-based discrimination leaves many holes. Women in the United States still face the reality of being treated as lesser in the workplace, education, society, and by the law.[128] Until equal rights between the sexes are fully enshrined in the Constitution, women will not have full rights. Intermediate scrutiny and the current laws prohibiting sex-based discrimination leave much to be desired and exemplify why the Equal Rights Amendment must still be ratified.

A. The Shortcomings of Intermediate Scrutiny

One of the strongest arguments for the Equal Rights Amendment is that it will elevate "sex" to a suspect class requiring strict scrutiny.[129] Though

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[125] *See* Bravin, *supra* note 37.

[126] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1333 (2006).

[127] *See* Murphy, *supra* note 2, at 957.

[128] *See* Kim Parker & Cary Funk, *Gender Discrimination Cmes in Many Forms for Today's Working Women*, PEW RESEARCH CTR (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/. This nationally conducted survey of working men and women in the United States found that 42% of women have faced discrimination at work because of their gender, one in four women had earned less than a man for the same work, and women were three times as likely as men to experience sexual harassment at work. *Id.*

[129] Stephens, *supra* note 11, at 412.

intermediate scrutiny is considered the most expansive extension of equal rights, using a lesser standard of review in the courts is just that – not enough.[130] In *United States v. Virginia*, intermediate scrutiny was given a heightened standard, though this was still not as inflexible as strict scrutiny.[131] Without a constitutional amendment ensuring strict scrutiny, the judicial creation of intermediate scrutiny may be rolled back by a subsequent Court.[132] Scholars note the Equal Protection Clause of the Fourteenth Amendment originally protected race discrimination only.[133] Sex (as well as sexual orientation and gender identity), like race, is an "immutable characteristic" over which one has no control and is therefore just as deserving of strict scrutiny.[134]

This development of jurisprudence to promote equality of the sexes has been given the misnomer "de facto ERA" based on the idea that it essentially accomplishes the goals of the Equal Rights Amendment.[135] Though intermediate scrutiny arguably advances some ERA objectives, it is not a sufficient alternative to the complete protection that the ERA would offer. Being "essentially" the ERA, it is still quite obviously not actually the ERA and therefore creates loopholes that hinder equality. Without the full weight of the Equal Rights Amendment, discrimination on the basis of sex will neither be prohibited on all facets nor protected by a strict scrutiny standard.

B. Current Federal Laws that Prohibit Sex-Based Discrimination

Piecemeal federal laws prohibiting sex discrimination do not provide enough protection without the Equal Rights Amendment. Although efforts have been made and some steps have been taken to protect against sex discrimination in the half-century since the Equal Rights Amendment was first sent to the states, equal rights are still just out of reach.[136] The architecture of separate laws regarding various subject matters to combat longstanding discrimination has established a system of loopholes rather than civil liberties.

1. Title VII—Employment Discrimination

The strict statute of limitations and cap on damages enumerated in Title VII often make recovery under the law ineffectual. The Civil Rights Act of 1964 was landmark legislation, best known for its prohibition of race discrimination in

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[130] Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 383 (2017).
[131] United States v. Virginia, 518 U.S. 515 (1996).
[132] *See* Murphy, *supra* note 2, at 951.
[133] *See id.*
[134] *See id; see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scurtiny*, 48 AM. J. LEGAL HIST. 355 (2006) (explaining the history of the strict scrutiny standard as being applied to suspect classifications such as race and national origin as well as first amendment issues and fundamental interests).
[135] *See generally* Siegel, *supra* note 126, at 1334-35.
[136] *See* Magliocca, *supra* note 5, at 659.

various situations.[137] The culmination of the Act's passage rests on the civil rights movement throughout the 1950s and 1960s, which focused on racial equality, not equality of the sexes.[138] In truth, Title VII of the bill originally did not include sex discrimination at all.[139] The Act, which prohibits discrimination based on race, religion, color, and national origin in public places, schools, and employment, did not include prohibition of sex discrimination until later on, and then only in the employment field.[140]

During debate on the House floor over the 1964 Civil Rights Act, civil rights opponent Representative Howard Smith proposed the amendment to add the word "sex" to Title VII.[141] Though Howard claims this was because of his support for women's rights, it has been cited as an attempt to derail the act as a whole and prevent its passage.[142] The inclusion of sex-based discrimination in the bill was at best an afterthought and at worst a tool to hinder equal rights altogether. The afterthought of women's rights was further evidenced by Executive Order 11246, issued by President Lyndon Johnson to enforce the Civil Rights Act of 1964, which again left out sex-based discrimination.[143] This problem of lack of enforcement for Title VII's protection from discrimination on the basis of sex would not be rectified until Executive Order 11357, three years later.[144]

Even when the Executive Order was issued to enforce the provision and create the Equal Employment Opportunity Commission (EEOC), Title VII still has several issues that make the law confusing, strict, and insufficient. First, Title VII has a strict deadline for filing a claim.[145] A claimant must file charges with the EEOC within 180 days after the incident occurred.[146] In some instances, this 180-day period has applied to discriminatory pay incidents in which the employee did not know discrimination had occurred.[147] In *Ledbetter v. Goodyear*, this time limit kept the plaintiff from receiving back pay from the employment discrimination suit she initially won.[148] To combat this issue, Congress passed the Lilly Ledbetter Fair

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[137] Carolyn L. Wheeler, *Women's Work Is Never Done*, 36 ST. LOUIS U. PUB. L. REV. 59, 71 (2017).
[138] *The Civil Rights Act of 1964*, UNIV. VA. MILLER CTR., https://millercenter.org/the-presidency/educational-resources/the-civil-rights-act-of-1964 (last visited Nov. 15, 2020).
[139] *See* Renalia Dubose, *Compliance Requires Inspection: The Failure of Gender Equal Pay Efforts in the United States*, 68 MERCER L. REV. 445, 451 (2017).
[140] Allen Fisher, *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/women/1964-civil-rights-act#:~:text=The%20Civil%20Rights%20Act%20of%201964%20prohibited%20discrimination%20based%20on,places%2C%20schools%2C%20and%20employment.&text=After%20the%20bill%20was%20passed,would%20enforce%20the%20new%20laws (last visited Nov. 15, 2020).
[141] *See id.*
[142] *See id.*
[143] *See id.*
[144] *See id.*
[145] *See* Dubose, *supra* note 139, at 452.
[146] *Time Limits for Filing a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/time-limits-filing-charge#:~:text=In%20general%2C%20you%20need%20to,discrimination%20on%20the%20same%20basis (last visited Nov. 15, 2020)
[147] *See* Dubose, *supra* note 139, at 451.
[148] *See id.*; *see also* Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 618, 629 (2007) (holding Ledbetter's claim was untimely because it was made over 180 days after the discriminatory pay

Pay Act of 2009, clarifying that the 180-day limit restarts each time there is an instance of discrimination.[149] Still, this stringent statute of limitations hinders victims of discrimination from enforcing their legal rights. In the last five years, on average, 17.4% of sex discrimination claims filed with the EEOC were concluded due to "Administrative Closures" of the claim rather than a resolution based on the merits.[150] These administrative closures of cases include "lack of jurisdiction due to untimeliness."[151]

The second major problem with Title VII is the cap on damages. Until the Civil Rights Act of 1991, women suing for sex discrimination in the workplace could only recover "equitable relief such as back pay, reinstatement, and injunctive relief."[152] With the passage of the 1991 Act, this was changed to allow women to recover damages but with outrageously low caps that have not been raised since.[153] These caps are on a scale based on how many employees the defendant employer has, starting at a cap of $50,000 dollars for employers with 15-100 employees and maxing out at $300,000 for employers with more than 500 employees.[154] This cap on damages to never allow more than $300,000, even with the possibility of a huge company and malicious discrimination, codifies in United States law that sex discrimination in employment is never worth more, despite what may be extensive and enduring damages to women in the employment realm.[155]

Title VII sits on the middle step of the staircase of equal rights. Allowing women to sue for sex discrimination in the workplace, while also boxing them in with both procedural and substantive limitations, makes attaining compensation more difficult. Title VII is a perfect example of how women may have more rights but still not equal rights, and fewer than equal rights is not enough.

2. Title IX—Education Discrimination

Though sex discrimination protection initially only pertained to the employment field, Title IX was enacted to prohibit sex discrimination in education.[156] Implemented in 1972, Title IX prohibits discrimination on the basis

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decision and subsequent pay decisions that carried forward the discriminatory one did not restart the 180-day clock).

[149] *See* Dubose, *supra* note 139, at 452.

[150] *Sex-Based Charges (Charges Filed with EEOC) FY 1997-FY 2019*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/sex-based-charges-charges-filed-eeoc-fy-1997-fy-2019 (last visited Nov. 15, 2020).

[151] *Definitions of Terms*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 2020), https://www.eeoc.gov/statistics/definitions-terms.

[152] Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J. L. & FEMINISM 249, 250 (2014).

[153] *See id.*; 42 U.S.C § 1981a(b)(3)(A-D) (2020).

[154] § 1981a(b)(3)(A-D); *Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination#:~:text=Limits%20On%20Compensatory%20%26%20Punitive%20Damages&text=These%20limits%20vary%20depending%20on,employees%2C%20the%20limit%20is%20%24200%2C000 (last visited Nov. 15, 2020).

[155] *See* Zehrt, *supra* note 152, at 300.

[156] *See* Allison Renfrew, *The Building Blocks of Reform: Strengthening Office of Civil Rights to*

of sex in education programs and activities operated by recipients of federal financial assistance.[157] Similar to Title VII, this Act also falls short of its goal, and in recent years its protections have even been rolled back by the Department of Education.[158] One of the issues Title IX is meant to address is sexual assault and harassment on campus, a major problem at universities in the United States.[159]

Beginning August 14, 2020, universities are required to comply with new Title IX regulations set out by the Secretary of Education and the Trump administration which will have detrimental effects on victims of assault.[160] Most importantly, the new rules are likely to hurt victims and make it harder to bring a case of sexual assault on campus. The rules now allow victims to be cross-examined, and they narrow the definition of sexual harassment to "any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access."[161] This is in stark contrast with the Obama administration's efforts to combat sexual assault and harassment on campus and ensure that universities were held accountable.[162]

Despite the Obama administration's goals of protecting students, Title IX was still often inconsistently applied and incorrectly interpreted.[163] Without a constitutional amendment that fully enshrines the right to be free of sex discrimination, current piecemeal federal legislation is up to political whims, cramped judicial interpretations, and mismanagement.[164] Title IX is unfortunately another example of how individual sex discrimination laws do not provide the same amount of protection afforded by a full constitutional amendment.

3. The Equal Pay Act

The Equal Rights Amendment should be ratified because the gender wage gap in America still shows that women on average only earn eighty cents to every dollar a man earns.[165] This gap gets even wider when broken down by race or

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Achieve Title IX's Objectives, 117 PENN ST. L. REV. 563, 567-68 (2012).

[157] 20 U.S.C. § 1681 (2020).

[158] *See* Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

[159] *See* Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 126 (2016).

[160] *See* Anderson, *supra* note 158.

[161] *See id.*

[162] *See* Pappas, *supra* note 159, at 128-29.

[163] *See id.* at 130-31.

[164] *See* Renfrew, *supra* note 156, at 578-79 (Title IX lacks "clear and consistent standards" arising from its own patchwork of decisions); Diane Heckman, *Title IX at Forty: Batter Up: A Look at the Supreme Court's Lineup, Including the Interaction with the New Chief Umpire on the Bench, As Title IX Marks Its Fortieth Anniversary*, 22 MARQ. SPORTS L. REV. 461, 482 (2012). The Equal Rights Amendment, had it been ratified, would have made sex a suspect class requiring intermediate scrutiny. *See generally id.*

[165] *See* Elise Gould, Jessica Schieder, & Kathleen Geier, *What Is the Gender Pay Gap and Is It Real?*, ECON. POL'Y INST. (October 20, 2016), https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/.

ethnicity.[166] One may assume that this wage gap would be illegal because of the Equal Pay Act and wonder how it has persisted despite the Act's passage in 1963.[167] This shows the very problem with the Equal Pay Act – it is and has always been anemic in its protections and therefore has not fixed the problem at all.[168] Even though the wage gap has improved since 1963 when women only made 59% of what men did, the change is not attributable to the Equal Pay Act itself.[169] The Equal Pay Act requires "substantially equal pay for equal work" which sets a difficult standard for proving that one worker is paid less because of their sex.[170] As it is now, the Equal Pay Act does require equal pay but only in jobs that are basically exactly the same; small differences can be used as an excuse for pay discrepancy when it is actually just a clever way to avoid paying women the same as men.[171]

Title VII, Title IX, and the Equal Pay Act are only a few examples in which laws enacted to prohibit sex discrimination have fallen short. Intermediate scrutiny in the courts has also tried to address the problem of sex discrimination, but without a full constitutional ERA, the goals simply cannot be achieved thoroughly and sufficiently. Passage of the Equal Rights Amendment would remedy these short comings by elevating sex discrimination to strict scrutiny and enacting one overall prohibition of sex discrimination instead of an ineffective patchwork of laws.

III. CONCLUSION

As the law stands now, in disconnected pieces, without a clear picture of how to navigate and prohibit sex-based discrimination, women are still not afforded equal rights and thus need the ERA to be ratified. If Congress were to vote by a simple majority in both houses to remove the deadline and thirty-eight states, without any rescissions, were to ratify the Amendment, then the Constitution would finally ensure *all* are created equal, not just men. On the staircase to equal rights, though women stand on a higher step than before, until action can be taken to fully ratify the ERA, women will remain as they have, always somewhere below full equal rights. As this Comment has shown, the Equal Rights Amendment is still very much alive and closer to ratification than legal death.

The story of the ERA does not have to be one of defeat. Women in the United States do not have equal rights yet, but there can still be an optimistic outlook for the future. As Dr. Martin Luther King Jr. pronounced: "We shall overcome because the arc of the moral universe is long but it bends toward

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[166] *See id.* ("Relative to white non-Hispanic men, black and Hispanic women workers are paid only 65 cents and 58 cents on the dollar, respectively.").
[167] *See* Dubose, *supra* note 139, at 449, 454-55.
[168] *See id.* at 450.
[169] *See* Carolyn L. Wheeler, *Women's Work Is Never Done*, 36 ST. LOUIS U. PUB. L. REV. 59, 68 (2017).
[170] *See id.* at 67.
[171] *See* Dubose, *supra* note 139, at 455-56.

justice."[172] Only two steps need to be taken now to effect ratification: passage of the ERA by five more states, and removal of the deadline in both houses of Congress by majority vote. Ratification of the Equal Rights Amendment will finally happen when the people of the United States make clear to their states and Congress that fewer than equal rights are not enough.

[172] Dr. Martin Luther King Jr., Address at the National Cathedral: Remaining Awake Through a Great Revolution (Mar. 31, 1968).

A NOTE OF GRATITUDE TO OUR SUPPORTERS

The *UMKC Law Review* would like to acknowledge the support of the following law firms, without whom the distribution of this issue to all United States District Court Judges would not have been possible:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

STEPHEN R. BOUGH, DISTRICT JUDGE

To My Judicial Colleagues and Fellow Members of the Legal Profession:

While the prevalence of multidistrict litigation ("MDL") is by no means a secret, even as a federal judge I was surprised to learn that 50% of all federal civil cases are part of an MDL. Some of the biggest, most complex, and intellectually challenging legal issues are part of an MDL. Due in part to the challenges and opportunities presented, many of the nation's best plaintiff lawyers, defense counsel, and federal judges are often attracted to this area of law.

Even though half of all federal civil cases may be part of an MDL, many are surprised to learn there is little statutory or appellate caselaw to guide lawyers and judges through the process. Just one small statute, 28 U.S.C. § 1407, allows "civil actions involving one or more common questions of fact" to "be transferred to any district for coordinated or consolidated pretrial proceedings." Even the Judicial Panel on Multidistrict Litigation only has eleven rules. Almost no cases result in circuit level opinions because the suits are either settled or remanded back to the originating court. Additionally, because many of the lawyers involved in MDLs are repeat players, breaking into the club of leadership appointees can be extremely difficult for newcomers. That leaves many judges, lawyers, litigants, and the general public in the dark when it comes to understanding the inner workings of the MDL process.

The University of Missouri-Kansas City Law Review, under the leadership of Dean Nancy Levit and Editor-in-Chief Sarah Stevens, proposed a novel solution: gather together the best and the brightest plaintiff lawyers, defense counsel, and federal judges to write accessible articles on the most crucial MDL topics. Before you is the final result of that vision: this *Multidistrict Litigation: Judicial and Practitioner Perspectives* Symposium issue. From the easy-to-comprehend introduction to the MDL process – pictures are always helpful – to an insightful conclusion, we were able to assemble a fantastic group of writers with real-world wisdom. Our gratitude belongs to the firms whose support enabled the UMKC School of Law to put a copy of this issue on the desk of every United States District Court Judge. A sincere thank you to: Lanier Law Firm; Robbins Geller Rudman & Dowd; Sharp Law; Shook, Hardy & Bacon; Stueve Siegel Hanson; and Wagstaff & Cartmell.

We are confident the wisdom contained within this Symposium issue will help all participants, whether behind or before the bench, gain a better understanding of MDLs and how this unique litigation device can be effectively used to administer justice. We hope that you enjoy this written Symposium as much as we have enjoyed putting it together.

Sincerely,

Stephen R. Bough

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University of Missouri-Kansas City School of Law
500 East 52nd Street
Kansas City, Missouri 64110

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