

United States Court of Appeals for the Fourth Circuit Essay Contest

Is the Fourteenth Amendment's Equal Protection Clause sufficient to secure the rights of all citizens, or is the ERA necessary to promote gender equality?

The 14th Amendment to the U.S. Constitution was ratified in 1868 by 28 states. It was one of three Amendments passed during the Reconstruction era to abolish slavery and establish civil and legal rights for African Americans. By granting citizenship to all persons born or naturalized in the United States, including former slaves, and by guaranteeing all citizens “equal protection of the laws,” the 14th Amendment was enacted as a direct response to the 1857 *Dred Scott v. Sandford* decision, which found that African Americans were not citizens, and also the various harsh Black Codes inflicted on black people by southern states in the Jim Crow era.

While the Equal Protection Clause has been vitally important in fostering civil rights legislation and legal protections for African Americans over the years, the question often arises whether these 14 words in the 14th Amendment, are the appropriate and adequate legal tool to protect the rights of women and LGBTQ+ citizens? The short and clear answer is no.

While there definitely have been gains for women over the years, due to passing of laws such as Title VII and Title IX of the Civil Rights Act, inequality, discrimination, and harassment on the basis of sex and gender remain constant and overwhelming. Women today do not receive equal protection under the law, or equal opportunities, or equal justice. While making some slow improvement since the 1970’s, women still earn only 82 cents for every \$1 that men make.¹ Women, especially women of color, are more than 6% more likely to be poor than men.² In terms of sexual violence and harassment, in a 2018 survey, 82 percent of women reported experiencing sexual harassment in the workplace.³ 90 percent of all rape cases are against women, and

¹ See SHRM, *Gender Pay Gap Improvement Slowed During the Pandemic* (<https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/gender-pay-gap-improvement-slowed-during-the-pandemic.aspx>).

² See CAP, *The basic facts of American Poverty* (Aug. 3, 2020) (<https://www.americanprogress.org/article/basic-facts-women-poverty/>)

³ See National Public Radio, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment* (<https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>).

one in six women have reported attempted or completed rape.⁴ This does not even include the majority of sexual harassment and assault cases that go unreported. In terms of reproductive rights, in the face of the Supreme Court's likely overturn of *Roe v. Wade*, women are facing an avalanche of new laws enacted by the states to restrict, limit, and even eliminate their rights to abortion, contraception, and other reproductive health.⁵ Oklahoma just passed a law to outlaw nearly all abortions.⁶ There are many other examples of discrimination that women face every day on the basis of their gender and pregnancy status.⁷

So, what would an Equal Rights Amendment accomplish that the 14th Amendment has not, to help level the playing field and eliminate sexual disparity and harassment? Would it be just a meaningless symbolic gesture? The response is clearly to the contrary. The ERA would provide a rock solid footing for meaningful new laws and protections for women and the LGBTQ+ community.

Forty years ago, on March 22, 1972, 35 states ratified an ERA stating clearly that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁸ Unfortunately, this effort fell short by three states. Such a Constitutional amendment, if enacted today, would immediately and dramatically result in a handful of tangible benefits to women and the LGBTQ+ community. First, discrimination based on sex and gender would likely be subject to a strict scrutiny test, akin to race, which it currently is not.⁹ Accordingly, laws that would directly or indirectly discriminate on the basis of

⁴ See RAINN, *Victims of Sexual Violence: statistics* (<https://www.rainn.org/statistics/victims-sexual-violence>).

⁵ See NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?* (<https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>).

⁶ See New York Times (April 5, 2022), *Oklahoma Lawmakers Approve Near-Total Ban on Abortion* (<https://www.nytimes.com/2022/04/05/us/oklahoma-abortion-ban.html>).

⁷ See NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?* (<https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>).

⁸ See History.com, *Equal Rights Amendment Passed by Congress* (<https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress#:~:text=On%20March%2022%2C%201972%2C%20the,on%20the%20basis%20of%20sex.>)

⁹ See M. Wadwha, *Bringing Sex Discrimination Under Strict Scrutiny: The Need for an Equal Rights Amendment*

sex and gender would now be less likely to pass such stringent constitutional analysis. Second, the ERA would (or should, under reasonable court interpretation) impact state's powers to limit women's rights to seek abortions and other reproductive health care. Currently, the protections provided in *Roe v. Wade* arise under a perceived, but not written, right to privacy guaranteed by the Fourteenth Amendment. The ERA would make these rights more certain and indelible. Fourth, the ERA, with a little tweaking, would also include clear protections for LGBTQ+ people, who now are largely excluded from constitutional protections.¹⁰ Finally, as for the symbolic power of such an Amendment – this effect should not be underappreciated. Symbols mean something. We are a nation based on symbols of freedom and justice and equality. The ERA, as a symbol, would provide a needed boost for women and those of the LGBTQ+ community seeking to rally support and awareness for their cause of equality and fair treatment.

Accordingly, particularly as a response to the anticipated overturning of *Roe v. Wade*, the ERA should be brought back to life, clarified, modernized, passed by two-thirds of Congress, and sent to the states for ratification by at least 38 state legislatures, so that the citizens representing far more than *fifty percent* of this country may receive the privileges and protections that, as Benjamin Franklin added to the Declaration of Independence, are due, owing, and “self evident.”

Columbia Undergraduate Law Review (Dec. 29 2020)

(<https://www.culawreview.org/journal/bringing-sex-discrimination-under-strict-scrutiny-the-need-for-an-equal-rights-amendment>).

¹⁰ See NOW, *Is the Equal Rights Amendment Relevant in the 21st Century?*

(<https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>) (“The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.”)