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For more than 150 years, the Fourteenth Amendment has been the law of the land when it comes to inequality and discrimination disputes. The Equal Protection Clause reads “No state shall… deny to any person within its jurisdiction the equal protection of the laws” (US Const, amend. XIV, sec. 1).

Whether this applies to classifications based on race, sex, gender, age, or disability, that single paragraph has been used in many famous cases brought before the Supreme Court. But, in 1923, Alice Paul proposed the Equal Rights Amendment (ERA), believing that the Equal Protection Clause was not enough to protect the rights of women. The potential amendment reads “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex” (Colohan, 2018). Despite the similar language and wording, the main difference comes in the last four words: “on account of sex”. The Equal Rights Amendment is necessary to promote gender equality because its language is undeniable and specific, unlike the Equal Protection Clause. It will force courts to apply a higher level of scrutiny to gender discrimination cases and equalize policies and standards for gender equality across the country (in states both with and without their own ERA).

Written right after the Civil War, the original purpose of the Fourteenth Amendment was to keep states from discriminating against African American males. Today there has been much debate over how the amendment should be interpreted: using modern-day context or considering its intent when it was written. This argument is extremely politicized today, but it comes down to two sides, the originalists and the living constitutionalists. Originalists are typically more conservative and tend to be Republicans. They are more likely to consider the intent of an amendment when it was written and what it meant in that day and age. Living constitutionalists are usually more liberal and tend to be Democrats. They will often intepret amendments and the Constitution at large in a more modern context and consider the beliefs of the public today. Using the Equal Protection Clause as an example, an originalist judge would likely apply it more strictly to racial discrimination than any other kind of inequality. This is a particularly dangerous possibility today because of the majority of conservatives on the Supreme Court. When the court’s opinion on Roe v. Wade was leaked, it showed a loss of support for substantive due process, also based on the Fourteenth Amendment. This idea was based on a living Constitution view of the due process clause. Similarly, this court will be less likely to apply the Equal Protection Clause as extensively to sex and gender discrimination as it does to racial discrimination.

Under the current system, racial classifications and gender classifications are judged by two different tests: strict scrutiny and intermediate scrutiny. Strict scrutiny is applied to any claims of racial discrimination and puts the responsibility on the government to prove that the policy is “the least restrictive means available to achieve a compelling state interest” (Baldez, 248). Sex discrimination is examined under intermediate scrutiny, which requires that the law in question has to be “substantially related to the achievement of an important objective” (Baldez, 248). The most significant effect of the ratification of the ERA would be to apply strict scrutiny to all cases of sex discrimination. This would do a great deal to advance fights for the rights of both women and LGBTQIA people (Berry, 30) by significantly decreasing the amount of legal classifications based on sex or gender.

Because of intermediate scrutiny, judges have too much discretionary power. The precedent is not clear enough to create a true new system, so judges beneath the Supreme Court can allow their own ideology to determine how they rule. Some judges may choose to apply a standard more similar to strict scrutiny to gender discrimination cases, while others may apply more of a rational basis test (the standard beneath intermediate scrutiny) to the same case (Baldez, 249). This lack of consistency can be seen in states that have an ERA in their own constitution and those that do not have one. Clarifying the standard to be used will equalize policies across the country.

The main argument against the ERA is that it will have no effect at all and is therefore unnecessary. Some believe that all remaining issues of inequality are social issues and that the government has done all that it can. And so we examine the possible consequences of such an amendment. On the positive side, we could reduce gender and sex discrimination across the country through a higher legal standard and clarify policies in all states. When you consider negative consequences, there are few to come up with. If the worst-case scenario is that the amendment is “little more than the constitutional redundancy” that some believe, how can we not move forward with ratification? When the best-case scenario is so positive and the possible negative effects are minimal, this will be a step in the right direction. Even if it doesn’t cause all of the change that we hope for, anything is better than nothing.

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