Is the Equal Rights Amendment Relevant in the 21st Century?

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(This article will be published in an upcoming special edition of *Frontiers – A Journal of Women Studies*, Ohio State University, and printed by the University of Nebraska Press. Guest Editor of the special edition is Laura Mattoon D'Amore, Ph.D. , Roger Williams University.)

Yet women, on the whole, are not men's legal equals or, by most standards, men's social equals.
Catharine A. MacKinnon, Toward a Renewed Equal Rights Amendment: Now More than Ever[1]

The language of the 1972 Equal Rights Amendment as ratified by 35 states:

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 article shall take effect two years after the date of ratification.

As to the question posed in the title, whether an Equal Rights Amendment (ERA) to the U.S. Constitution has any relevancy in the 21st century, the answer from women's rights advocates that should logically follow is, 'Yes, a constitutional guarantee of equality of rights for women and men, prohibiting governments from discriminating on the basis of sex, is still crucially important.'

The unfortunate truth is that despite a series of important legislative gains and court rulings over the last half century prohibiting discrimination and improving economic opportunity, women remain second-class citizens. Our status has been only modestly improved by such gains which are subject to revision or repeal at any point by a simple majority vote.

Women are still disproportionately poor, suffer from widespread gender-based violence, endure extensive regulation of our reproductive lives, experience sex-based pay discrimination in all occupational categories, are sexually-harassed and subjected to biased consideration in hiring and promotion, subjected to discriminatory treatment by employers in pregnancy and motherhood, among numerous other practices that seek to subjugate women.

Women's rights advocates say that adoption of a sex-equality amendment is necessary to protect gains made over the past forty-plus years, plus build on progress we have made. Many of those advances are coming under increasing attacks from the growing strength of arch-conservative politicians at state and national levels. Since the 2014 mid-term election, thirty state legislatures, the U.S. House of Representatives, and the Senate now have substantial conservative Republican majorities that have

[1] See generally Catharine A. MacKinnon, "Toward A Renewed Equal Rights Amendment: Now More Than Ever, *Harvard Journal of Law & Gender*, Vol. 37 (2013-2014), 569.

passed hundreds of laws greatly restricting women's access to reproductive health care.[2] Plus, conservative lawmakers have refused to expand health insurance coverage under the Affordable Care Act, opposed equal pay laws and minimum wage increase measures, opposed paid sick and family leave, cut state funding for public sector employment where many woman are employed, repealed worker protections that benefit women and have passed numerous socially-regressive laws which disproportionately harm women and their families. With the U.S. Senate now under conservative control, it is less likely that legislation addressing gender or economic inequality will be advanced.

In spite of a discouraging political landscape, the general public supports a sex-equality amendment. Several public opinion polls have found large majorities in favor of the amendment, with the most recent being a 2012 poll for Daily Kos/Service Employees International Union (SEIU) which asked, "Do you think the Constitution should guarantee equal rights for men and women, or not?", with 91 percent responded in favor of that guarantee.[3]

Without the Equal Rights Amendment there is no clear guarantee that rights protected by the Constitution are accorded to all citizens irrespective of sex. Currently, there is a differential legal standing which assumes that men hold rights, but women must still prove that they have rights. The ERA would eliminate that different legal standing and, consequently, shift the burden of proof to the party accused of discrimination. Without a constitutional amendment clarifying women's legal standing, women will continue to have to wage extended, costly and challenging political and legal battles for equal rights.

In the rationality-review structure, discrimination on the basis of sex does not call for a *strict judicial scrutiny* – only a lesser standard of *intermediate or skeptical scrutiny* -- because sex is not a *suspect classification*. This is a critical shortcoming. Under an ERA, when government laws and policies treat women and men differently, these would have to meet the highest standard of justification – that is, proving a *compelling state interest* – in order to be found constitutional. Prohibition of sex discrimination is not as strongly enforceable as the prohibition of race discrimination. An ERA would ensure uniformity and consistency in sex discrimination cases, helping clarify for the sometimes confused lower courts how to deal with sex discrimination claims.

More than a few constitutional law experts have asserted that the Equal Protection Clause of the 14th Amendment serves in place of a sex-equality amendment. Critics point out that the Equal Protection Clause has not been interpreted to protect against sex discrimination in the way that the ERA would be able to do. Both the Equal Protection Clause and Title VII of the 1964 Civil Rights Act's sex discrimination prohibition are limited in their effectiveness for women because only an intermediate standard of

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[2] NARAL Pro-Choice America, *Who Decides? 2013 Edition*, "Key Findings: Threats to Choice, Cumulative Number of Statewide Measures Enacted Since 1995," 4, http://www.prochoiceamerica.org/assets/download-files/2014-who-decides.pdf

[3] The Equal Rights Amendment – Unfinished Business for the Constitution, FAQ, http://equalrightsamendment.org/faq.htm

scrutiny is applied in sex discrimination challenges. Additionally, the equal protection requirement calls for proof of intentional discrimination – something that is very difficult to establish in court.

The Equal Rights Amendment could make a difference in the following areas:

Equal Pay – The gender wage gap – the 21.7 percent spread between men's and women's median annual earnings as full-time, year round workers -- has been painfully slow in closing: at the current glacial pace, women's and men's pay will not be equal until 2058. It may take even longer for the gap to close for African American women (36 percent) and Latinas (31.9 percent) as compared to white men's median weekly earnings.[4] The ERA could help move pay equity legislation that has been stuck in Congress for several years and provide a more effective tool for sex -based employment discrimination litigation. It may also exert a positive influence in helping to raise pay in the numerous occupational categories where wages are low simply because these occupations are traditionally and primarily held by women, such as retail clerks, home health aides, nursing aides, waitresses, and many others .

Title IX – An ERA could enhance and solidify Title IX protections that promote equal opportunity in academics and athletics programs which suffer from inadequate implementation and have been weakened under various administrations. It could also have an impact on unequal educational resources in sex-segregated in public schools and athletic programs, stereotyped barriers to career and technical education, sexual harassment and campus sexual assault. [5]

LGBTQIA Equal Rights – Gay rights advocates argued that prohibitions against same-sex marriage were a form of sex discrimination because one party is denied marriage to another because of that individual's sex. [6] Unfortunately, in the landmark Supreme Court ruling in *Obergefell v. Hodges* same-sex marriage case, "the majority opinion avoided any determination that discrimination on the basis of sexual orientation is subject to any form of heightened judicial scrutiny (such as strict or intermediate), or that homosexuals or bisexuals (of any gender) are a protected class."[7]

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.

Reproductive Rights – Although opinion is divided on the question, an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care and contraception. Denial of legal and appropriate medical care for women – and only women – is sex

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[4] Ariane Hegewisch and Heidi Hartman, "The Gender Wage Gap: 2014, Earnings Differences by Race and Ethnicity," Institute for Women's Policy Research, March, 2015, http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2014-earnings-differences-by-race-and-ethnicity

[5] See generally Title IX at 40 – Working to Ensure Gender Equity in Education, Washington, D.C, National Coalition of Women and Girls in Education, 2012. http://ncwge.org/TitleIX40/TitleIX-print.pdf

[6] See generally Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, *New York University Law Review*, Vol. 69-197, (May, 1994): 197-287.

[7] Obergefell v. Hodges, https://en.wikipedia.org/wiki/Obergefell_v._Hodges

discrimination and a powerful ERA should recognize and prohibit that most harmful of discriminatory actions.

Discrimination in Insurance – Auto insurers currently charge fixed semi-annual premiums that cost women more on average per mile than men for insuring their cars.[8] Life insurers charge women more for annuities that on retirement pay identical benefits to both women and men. [9] A strong ERA would enable – and require – state insurance regulators to end these sex-based discriminatory practices by private insurance companies against their women customers.

Pregnancy Discrimination – Even though a federal law, the Pregnancy Discrimination Act (PDA), was passed in 1978 prohibiting discrimination against pregnant women on the job and directing employers to make reasonable accommodation, many fail to do so and courts often ignore or misinterpret the law.[10] The Supreme Court decision in the case of *Young V. UPS*[11] did make clear to employers that pregnancy is not a reason to discriminate. But the Court failed to clarify what "reasonable accommodation" in different workplace contexts would be for pregnant workers . The ERA could bolster the effectiveness of the PDA.

Military Policy – Historically, women have been prevented from advancement in the military due to exclusion from combat assignments and other factors. The ban on women serving in ground combat units was rescinded by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff in January , 2013,[12] but some restrictions against women in different branches of the military remain. Advocates for military women say that once the ERA is enacted the military will have to comply with the law and structure its policies, procedures, and protocols to meet the needs of women soldiers in providing career advancement, pay, retirement compensation, training, and providing for medical services particular to the women's physiology.[13] This would include access to abortion care for servicewomen and their dependents. The ERA may even help curb the epidemic of sexual assault which disproportionately affects women in the military.

Broad Impact of an ERA - The leaders of the National Organization for Women have said that an ERA must advance the rights of all women, including women of color and LGBTQIA persons, and it must provide the power to more effectively seek redress for women's economic marginalization and reverse the accelerating trend of restricted access to reproductive health care.

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[8] Patrick Butler, Twiss Butler and Laurie L. Williams, "Sex-Divided Mileage, Accident, and Insurance Cost Data Show that Auto Insurers Overcharge Most Women," *Journal of Insurance Regulation*, 6, Part I, 243-84 and Part II, (1988) 373-420.

[9] Elizabeth Shilton,"Insuring Inequality: Sex-Based Mortality Tables and Women's Retirement Income," *37 Queen's L.J.* 383 (2011-2012)

[10] Emily Martin, Written Testimony, Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities, U.S. Equal Employment Opportunity Commission meeting, February 15, 2012, http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm

[11] http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf

[12] http://servicewomen.org/women-in-combat/

[13] Jacqueline Nantier-Hopewell, Remarks Delivered at National NOW Conference, Re-energizing the ERA and Putting Diversity at the Center workshop, June 27, 2014.

On our list of desired advances: a significant and rapid reduction in the wage gap; a recognized right to abortion care that is not limited by medically-unnecessary restrictive laws; improved contraceptive access and other reproductive health care services that overcome so-called conscience refusals; better funding to prevent violence against women and to better protect survivors; a vigorous prevention of pregnancy discrimination; full recognition of same sex marriage in all states; prohibition of all forms of discrimination against LGBTQIA individuals; and, a clearer prohibition against sex-based discrimination in the hiring, pay and promotion of women.

Curbing Violence Against Women - The full effect of equal rights for women and men cannot be attained as long as one sex is the target of violent threats and actions. Violence against women remains a pervasive form of intimidation and a constant reinforcement of women's second class status; approximately 1.3 million women are victims of physical assault each year but this is likely only one-quarter of the actual number.[14] In 2012, the number of women murdered by men (single victim/single offender) reported to the FBI was 1,706.[15] It is the ultimate feminist goal that women will someday be able to live in a gender violence-free society. The problem will be with us as long as governments permit gender-based violence to continue by underfunding programs to protect victims and fail to properly punish perpetrators. Rape and sexual assault persist at high levels –one out of every six women has been a victim of attempted or completed rape [16] -- often with ineffective responses by law enforcement and judicial bias against victims. Hundreds of thousands of forensic rape kits go untested despite many millions of federal dollars made available to law enforcement authorities. [17]

Advocates hope that an ERA could help underscore arguments for improved funding of the Violence Against Women Act (VAWA) which in its 20 year history has never been funded sufficiently to meet documented need.[18] An estimate based on an annual one-day census of shelters suggests that more than three million individuals seeking help have to be turned away each year for lack of adequate staffing and resources. [19]

Attaining Reproductive Justice - During the 1972 ERA ratification campaign, several prominent women's leaders denied that an ERA would apply to abortion rights. But a number of feminist legal scholars and influential leaders have urged that abortion rights be integrated with sex equality and the ERA. In 1985, Ruth Bader Ginsburg, now one of three Supreme Court female justices, wrote that, in separating abortion from sex equality, "[T]he Court's *Roe* position is weakened, I believe, by the opinion's

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[14] National Coalition Against Domestic Violence, "Domestic Violence Facts," http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf

[15] Violence Policy Center, *When Men Murder Women*, September, 2014, http://www.vpc.org/studies/wmmw2014.pdf

[16] Rape, Abuse and Incest National Network, "Who are the Victims," https://www.rainn.org/get-information/statistics/sexual-assault-victims

[17] Laura Bassett, "House Approves Funding boost for Rape Kit Testing," http://www.huffingtonpost.com/2014/05/29/house-approves-additional_n_5412475.html

[18] National Network to End Domestic Violence, "Census: Domestic Violence Counts," http://nnedv.org/resources/census.html

[19] Testimony of Terry O'Neill, President, National Organization for women, A Hearing before the Senate Committee on the Judiciary, July 13, 2011, The Violence Against Women Act – Building on Seventeen Years of Accomplishment

concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[20]

Even U.S. Sen. Orrin Hatch (R-Utah), an opponent of abortion rights, wrote in 1983, "Since abortions, by their nature, are limited to women, those laws which relate to abortions are "suspect" in the same manner as are laws that directly classify men and women in a different manner." [21] Hatch further wrote, "Under the Equal Rights Amendment, however, even the small amount of state authority remaining over abortion would probably be eliminated. The absolutist mandate of the Amendment would likely transform any state restriction on abortion into an unconstitutional exercise in violation of the 'equality of rights' guarantee of the ERA."[22]

With 835 measures restricting women's reproductive rights adopted by the states since 1995[23], in addition to those passed at the federal level, many women's reproductive rights advocates have come to realize that denial of reproductive health care targeting only women is a form of sex discrimination. As women's access is limited by a further narrowing of abortion rights and perhaps an outright ban upheld by the conservative majority on the U.S. Supreme Court, the issue is all the more urgent. Denial of access to reproductive health care *is* sex discrimination; women's rights activists can help define it as such to enable a broader interpretation of the Equal Rights Amendment.

For many women, inequality is driven by two fundamental engines: political control of women's reproductive capacities and limited economic opportunities. Denial of access to abortion is sex discrimination as it denies women – and only women --control over their reproductive lives which in turn affects women's financial stability and affects important life decisions. Denial of access to abortion care prevents women's from maintaining bodily autonomy, without which there can be no sex equality.

According to an analysis of the 2012 census data, more than one in seven women – nearly 17.8 million -- lived in poverty, and nearly 7.8 million of them lived in extreme poverty , with incomes below half the poverty level. The poverty rates for black, Hispanic, and Native American women were more than three times higher than for white non-Hispanic men.[24] This high poverty rate for women -- and especially for women of color – is the result of the complex of barriers to equality involving occupational segregation in low-paying jobs, lack of access to reproductive health care, unaffordable child care and other purposeful social policies that disadvantage women.

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[20] Ruth Bader Ginsburg, "Some thoughts on Autonomy and Equality in relation to *Roe v. Wade*," *North Carolina Law Review Rev.* 63-375 (1985): 386.

[21] Orrin G. Hatch, *The Equal Rights Amendment: Myths and Realities* (Savant Press, 1983), 47.

[22] Ibid., 48.

[23] NARAL Pro-Choice America, *Who Decides?*, The Status of Women's Reproductive Rights in the United States, 24th Edition,Kry Findings: Threats to Choice, http://www.prochoiceamerica.org/government-and-you/state-governments/key-findings-threats-to-choice.html

[24] Joan Entmacher, Katherine Gallagher Robbins, Julie Vogtman, and Lauren Frohlich, *Insecure and Unequal- Poverty and Income Among Women and Families 2000-2012*, National Women's Law Center, 2013, http://www.nwlc.org/nwlc-analysis-2013-census-poverty-data

Limitations of Our Legal System - Feminist legal theorist and University of Michigan law Professor Catharine A. MacKinnon notes that an equal rights amendment cannot halt all the institutionalized social practices by which women are disadvantaged, exploited and abused by the men. The inequality that most women experience is not the result of sex-based discrimination, per se, but is due to a hierarchal ordering by gender that allocates material resources and social status: men have more, women have less.[25] Because of the limitations of our legal system where essentially women have to first be equal to men (that is, experience a situation or condition that is comparable to one that men might experience) in order to prove discrimination, the ERA strictly interpreted would have distinct limitations.

New language proposed in Rep. Carolyn Maloney's (D- New York) Equal Rights Amendment legislation (H.J. Res. 52, 114th Congress) offers a better approach to identifying inequality and facilitating corrective action, perhaps even for expanding women's reproductive rights. Rep. Maloney adds a simple sentence to Section 1 of the traditional language: **Women shall have equal rights in the United States and every place subject to its jurisdiction.**

Prof. MacKinnon points out that, ""Women shall have equal rights, "could if correctly interpreted, remedy the effective shut out from the legal system most women still face today in these two fundamental engines of sex inequality in a way that existing law, interpreted as it has been, is intrinsically incapable of doing."[26] The language identifies who is being discriminated against and heightens the possibility of guaranteeing rights to all women even when the discrimination against them isn't directly based on sex, MacKinnon explains. The new language states a positive right to women's equality and places the responsibility for assuring equal rights for women on governments. We agree with Prof. MacKinnon in that this seems a far better path to equality than a negatively-framed ERA which makes it necessary for women to first be equal to men to prove discrimination.[27]

But, as Prof. MacKinnon concludes and we agree either the traditional or Rep. Maloney's newer language can spur new legislation and policy to remedy inequalities and could have a political impact that would change the way that laws are interpreted. Moreover, an ERA could serve to warn those who would attempt to roll back laws and policies advancing women's equality.

A strong women's equality amendment remains a crucially important need. With the benefit of many decades of experience in dealing with the deficiencies of our legal and political systems, women's rights activists have a clearer understanding of what is required in a powerful equal rights amendment. It is up to the next generation of activists to further an equality agenda by organizing, lobbying and certainly, to achieve full ratification of the Equal Rights Amendment. Combining the knowledge of an older generation with the energy of a new one – and a public that is on our side – the path to a strong Equal Rights Amendment in the U.S. Constitution is in sight.

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[25] See generally Catharine A. Mackinnon, "Unthinking ERA Thinking," *Women's Lives Under Men's Laws*, (Cambridge, Massachusetts and London: Belknap Press of Harvard University Press, 2005): 13-21.
[26] Catharine A MacKinnon, "Toward a Renewed Equal Rights Amendment: Now More Than Ever," *Harvard Journal of Law & Gender 37* (2013-2014): 570
[27] Ibid, 259-579.