

May 9, 2022

2022 Strategy to Save Reproductive Rights: Publication of the Equal Rights Amendment

1. President Biden immediately directs publication of the Equal Rights Amendment (“ERA”) as the 28th Amendment as required by [1 U.S.C §106\(b\)](#).
2. Subsequently, but before the issuance of a final decision, the parties in *Dobbs v. Jackson Women’s Health Organization* seek leave from U.S. Supreme Court (“SCOTUS”) to file supplemental briefs pursuant to [Supreme Court Rule 25.6](#) as a result of new authorities.
3. The burden of proof then shifts to the state and SCOTUS, tasked with no longer accepting sex discrimination by the state, will be required to apply the **strict scrutiny standard of review** making it exponentially more difficult to eviscerate women’s reproductive rights and the related Civil Rights framework.

Legal Analysis: Equal Rights Amendment Status and Impact on *Dobbs*

The Equal Rights Amendment (“ERA”) became [the 28th Amendment to the Constitution on January 27, 2020 when Virginia became the 38th state to ratify the ERA](#). On January 27, 2022, after the two-year waiting period to give the states time to comply, the ERA became the law of the land.

The [28th Amendment](#) provides:

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.

However, the ERA has yet to be published in the Constitution [because the Trump Administration blocked publication](#), inserting its political views into the Constitutional amendment process where the sole role of the Executive Branch is the ministerial act of receiving the ratifications and publishing a revised Constitution.

In 2011, prior to the ratification of the ERA, [Justice Scalia noted](#):

Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that is what it meant. Nobody ever voted for that. If the current society wants to outlaw

discrimination by sex hey, we have things called legislatures and they enact things called laws.

Justice Scalia, a textualist/originalist like the majority of the current SCOTUS, disregarded the precedents that, beginning in 1971, applied the Equal Protection clause of the 14th Amendment to sex-based discrimination, albeit at the lesser “intermediate scrutiny” standard of review, and looked solely to the words in the Constitution.

In the [draft Dobbs opinion](#), the SCOTUS majority makes clear it agrees with Justice Scalia when it (1) states “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision,” (2) denies the implicit application of the 14th Amendment’s Due Process Clause, and (3) applies the lowest standard of review – the rational basis standard. (Draft Opinion at p. 5.)

However, in the draft *Dobbs* Opinion, the SCOTUS majority noted:

When one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. (Draft Opinion at p. 36)

That is exactly what has been done. The Constitution has been amended by the ERA to create a Constitutional framework that would prevent the travesty set forth in the draft *Dobbs* opinion.

Although not germane to the issue of publication, there are arguments against the ERA’s validity – specifically (1) the time limit for ratification expired, so the last three ratifications are invalid, and (2) that five states rescinded their ratification. However, there are no words in the Constitution to support either Congressional time limits or rescission, to which hundreds of Constitutional Scholars agree. Importantly, the draft *Dobbs* opinion makes clear that SCOTUS will look to the actual words of the Constitution, which would include the 28th Amendment.

It should be noted that Senators Blumenthal, Klobuchar, Cortez Masto and Congresswomen Maloney and Spier have [urged the Biden Administration to publish the ERA](#).

In contrast, [Senators Portman, Romney and Johnson](#), as well as [Senators Lankford \(who is supporting a federal ban on abortion\), Graham, Hyde-Smith, Lee, Boozman, Daines and Moran](#) wrote to the U.S. Archivist and demanded that he not publish the ERA. It appears that they too recognize the impact the ERA has on challenges to *Roe v. Wade*.