

NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS

ERA Task Force

THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS

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The proposed Equal Rights Amendment (ERA) to the United States Constitution is a political and cultural inkblot, onto which many people project their greatest hopes or deepest fears about the changing status of women.

Since it was first introduced in Congress in 1923, the ERA has been the object of both enthusiastic support and fervid opposition. Interpretations of its intent and potential impact have been varied and sometimes contradictory.

The following answers to frequently asked questions about the ERA are provided to encourage evaluation of the amendment on the basis of facts rather than misrepresentations. For more information, see www.equalrightsamendment.org. "The Equal Rights Amendment: Unfinished Business for the Constitution," a 17-minute educational DVD, is also available through this website.

1. What is the complete text of the Equal Rights Amendment?

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.

2. Why is an Equal Rights Amendment to the U.S. Constitution necessary?

The Equal Rights Amendment would provide a fundamental legal remedy against sex discrimination for both women and men. It would guarantee that the rights affirmed by the U.S. Constitution are held equally by all citizens without regard to sex.

The ERA would clarify the legal status of sex discrimination for the courts, where decisions still deal inconsistently with such claims. For the first time, sex would be considered a suspect classification, as race currently is. Governmental actions that treat males or females differently as a class would be subject to strict judicial scrutiny and would have to meet the highest level of justification – a necessary relation to a compelling state interest – in order to be upheld as constitutional.

To actual or potential offenders who would try to write, enforce, or adjudicate laws inequitably, the ERA would send a strong preemptive message – the Constitution has zero tolerance for sex discrimination under the law.

3. Why has the ERA recently been referred to as the Women's Equality Amendment?

The ERA is sometimes called the Women's Equality Amendment to emphasize that women have historically been guaranteed fewer rights than men, and that equality can be achieved by raising women's legal rights to the same level of constitutional protection as men's.

As its sex-neutral language makes clear, however, the ERA's guarantee of equal rights would protect both women as a class and men as a class against sex discrimination under the law.

4. What is the political history of the ERA?

The Equal Rights Amendment was written in 1923 by Alice Paul, a leader of the woman suffrage movement and a lawyer. It was introduced in Congress in the same year and subsequently reintroduced in every Congressional session for half a century.

On March 22, 1972, the ERA finally passed the Senate and the House of Representatives by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline was later extended by Congress to June 30, 1982. When this deadline expired, only 35 of the necessary 38 states (the constitutionally required three-fourths) had ratified the ERA. It is therefore not yet included in the U.S. Constitution.

The Equal Rights Amendment has been reintroduced in every session of Congress since 1982. In the 111th Congress (2009-2010), ERA ratification bills were introduced as *S.J.Res. 41* (lead sponsor, Senator Robert Menendez, D-NJ) and *H.J.Res. 61* (lead sponsors, Representative Carolyn Maloney, D-NY, and Representative Judy Biggert, R-IL). ERA ratification bills have not yet been introduced in the 112th Congress (2011-2012).

In March 2011, Representative Tammy Baldwin (D-WI) introduced *H.J.Res. 47*, which would remove the ERA's ratification deadline and make it part of the Constitution when three more states ratify.

5. Which 15 states have not ratified the ERA?

The 15 states whose legislatures have not ratified the Equal Rights Amendment are Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

6. Why are these 15 states still being asked to ratify the ERA under a "three-state strategy," even though the 1982 deadline has passed?

Since 1995, ERA supporters have advocated for passage of ERA ratification bills in a number of the "unratified" states. Such bills have been introduced in one or more legislative sessions in eight of these states (Arizona, Arkansas, Florida, Illinois, Mississippi, Missouri, Oklahoma, and Virginia).

While no state has passed an ERA bill in both houses of its legislature, ERA bills have advanced legislatively in some of those states. The Illinois House (but not the Senate) passed an ERA ratification bill in 2003. In February 2011, the Virginia Senate passed a resolution ratifying the Equal Rights Amendment, but the House of Delegates twice tabled its companion bill in committee.

The three-state strategy was developed following ratification of the Constitution's 27th Amendment in 1992, more than 203 years after its passage by Congress in 1789. Acceptance of that ratification period as sufficiently contemporaneous has led some ERA supporters to argue that Congress has the power to maintain the legal viability of the ERA's existing 35 state ratifications. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the

14th and 15th Amendments shows that rescissions (legislative votes retracting ratifications) are not valid. Therefore, Congress may be able to accept state ratifications that occur after 1982 and keep the existing 35 ratifications alive.

The legal analysis for this strategy is explained in “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States” by Allison Held *et al.* in *William & Mary Journal of Women and the Law*, Spring 1997. The Library of Congress’s Congressional Research Service analyzed this article and concluded that acceptance of the Madison Amendment does have implications for the three-state strategy, and that the issue is more of a political question than a constitutional one.

From 1994 to 2008, Representative Robert Andrews (NJ) was the lead sponsor of a resolution stating that when an additional three states ratify the ERA, the House of Representatives shall take any necessary action to verify that ratification has been achieved. In 2011, he joined lead sponsor Representative Tammy Baldwin (WI) in support of *H.J.Res. 47*, which would specifically remove the ERA’s ratification deadline and make it part of the Constitution when three more states ratify.

In general, ERA supporters believe that both strategies should be pursued in the effort to put the ERA into the Constitution.

7. Do some states have state ERAs or other guarantees of equal rights on the basis of sex?

Only a federal Equal Rights Amendment can provide U.S. citizens with the highest and broadest level of legal protection against sex discrimination. However, the constitutions of 22 states – Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming – provide either inclusive or partial guarantees of equal rights on the basis of sex.

(As a point of historical comparison, by the time the 19th Amendment guaranteeing women’s right to vote was added to the Constitution in 1920, one-quarter of the states had enacted state-level guarantees of that right.)

States guarantee equal rights on the basis of sex in various ways. Some (e.g., Utah, Wyoming) entered the Union in the 1890s with constitutions that affirm equal rights for male and female citizens. Some (e.g., Colorado, Hawaii) amended their constitutions in the 1970s with language virtually identical to the federal ERA. Some (e.g., New Jersey, Florida) have language in their state constitution that implicitly or explicitly includes both males and females in their affirmation of rights. Some states place certain restrictions on their equal rights guarantees: e.g., California specifies equal employment and education rights, Louisiana prohibits “arbitrary and unreasonable” sex discrimination, and Rhode Island excludes application to abortion rights.

Ironically, five states with state-level equal rights amendments or guarantees (Florida, Illinois, Louisiana, Utah, and Virginia) have not ratified the federal ERA.

State-level equal rights jurisprudence over many decades has produced a solid body of evidence about the prospective impact of a federal ERA and has refuted many of the extreme claims of ERA opponents. Further information on state ERAs is available in “State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination” by Linda J. Wharton, Esq., in *Rutgers Law Journal* (Volume 36, Issue 4, 2006).

8. *Since the 14th Amendment guarantees all citizens equal protection of the laws, why do we still need the ERA?*

The 14th Amendment was ratified in 1868, after the Civil War, to deal with race discrimination. In referring to the electorate, it added the word "male" to the Constitution for the first time. Even with the 14th Amendment in the Constitution, women had to fight a long and hard political battle to have their right to vote guaranteed through the 19th Amendment in 1920.

It was not until 1971, in *Reed v. Reed*, that the Supreme Court applied the 14th Amendment for the first time to prohibit sex discrimination, in that case because the circumstances did not meet a rational-basis test. However, in that and subsequent decisions (*Craig v. Boren*, 1976; *United States v. Commonwealth of Virginia*, 1996), the Court declined to elevate sex discrimination claims to the strict scrutiny standard of review that the 14th Amendment requires for certain suspect classifications, such as race, religion, and national origin.

The Court now applies heightened (so-called "skeptical") scrutiny in cases of sex discrimination and requires extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. However, such claims can still be evaluated under an intermediate standard of review, which requires only that such classifications must substantially advance an important governmental objective (rather than bear a necessary relation to a compelling state interest, as strict scrutiny requires).

The ERA would require courts to go beyond the current application of the 14th Amendment by adding sex to the list of suspect classifications protected by the highest level of strict judicial review.

In September 2010, Supreme Court Justice Antonin Scalia stated his belief that the Constitution does not protect against sex discrimination. This remark has provoked widespread public reaction, citing his position as clear evidence of the need for an Equal Rights Amendment to the Constitution.

9. *Aren't there adequate legal protections against sex discrimination in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, court decisions based on the 14th Amendment, and more?*

Without the ERA in the Constitution, the statutes and case law that have produced major advances in women's rights since the middle of the last century are vulnerable to being ignored, weakened, or reversed. By a simple majority, Congress can amend or repeal anti-discrimination laws, the Administration can negligently enforce such laws, and the Supreme Court can use the intermediate standard of review to permit certain regressive forms of sex discrimination.

Ratification of the ERA would also improve the United States' global credibility in the area of sex discrimination. Many other countries have in their governing documents, however imperfectly implemented, an affirmation of legal equality of the sexes. Ironically, some of those constitutions – in Japan and Afghanistan, for example – were written under the direction of the United States government.

The ERA is necessary to make our own Constitution conform with the promise engraved over the entrance of the Supreme Court: "Equal Justice Under Law."

10. *How has the ERA been related to reproductive rights?*

The repeated claim of opponents that the ERA would require government to allow "abortion on demand" is a clear misrepresentation of existing laws and court decisions at both federal and state levels.

In federal courts, including the Supreme Court, a number of restrictive laws dealing with contraception and abortion have been invalidated since the mid-20th century based on application of the constitutional principles of the right of privacy and the due process clause of the 14th Amendment. The

principles of equal protection or equal rights have so far not been applied to such cases at the federal level.

The presence or absence of a state ERA or equal protection guarantee does not necessarily correlate with a state's legal climate for reproductive rights. For example, despite Pennsylvania's state ERA, the state Supreme Court decided that restrictions on Medicaid funding of abortions were constitutional. The U.S. Supreme Court in separate litigation (*Planned Parenthood v. Casey*, 1992) upheld Pennsylvania's restrictions on the abortion procedure under the federal due process clause. Missouri enforces significant restrictions on abortion despite its state constitution's equal protection clause.

State equal rights amendments have been cited in a few state court decisions (e.g., in Connecticut and New Mexico) regarding a very specific issue – whether a state that provides funding to low-income Medicaid-eligible women for childbirth expenses should also be required to fund medically necessary abortions for women in that government program. Those courts ruled that the state must fund both pregnancy-related procedures if it funds either, in order to prevent the government from using fiscal pressure to exert a chilling influence on a woman's exercise of her constitutional right to make medical decisions about her pregnancy. The New Jersey Supreme Court issued a similar decision based on the right of privacy and equal protection, with no reference to its state constitution's equal rights guarantee.

State court decisions on reproductive rights are not conclusive evidence of how federal courts would decide such cases. For example, while some state courts have required Medicaid funding of medically necessary abortions, the U.S. Supreme Court has upheld the constitutionality of the federal "Hyde Amendment," which has for decades prohibited the federal government from funding most or all Medicaid abortions, even many that are medically necessary.

11. How has the ERA been related to discrimination based on sexual orientation and the issue of same-sex marriage?

Opponents claim that the ERA would require government to permit same-sex marriage, but the U.S. Supreme Court has never defined discrimination on the basis of sexual orientation as a form of sex-based discrimination. The Defense of Marriage Act currently prohibits the federal government from recognizing same-sex marriages and denies federal benefits to spouses in such marriages. Even without an ERA, a lawsuit was filed in March 2009 to have that law overturned on equal protection grounds.

At the state level, where most laws dealing with marriage are passed and adjudicated, the legal status of same-sex marriage is not correlated with whether or not a state has an equal rights amendment. Recent developments indicate that state laws and court decisions are evolving toward acceptance of the principle of equal marriage rights without regard to sexual orientation.

Some states with ERAs have maintained the legal definition of marriage as a union between a man and a woman. In 2006, the Washington Supreme Court ruled that a state law limiting marriage to one man and one woman does not violate the state constitution. Alaska and Hawaii amended their constitutions to declare marriage a contract between a man and a woman. A Maryland statute stating that "[o]nly a marriage between a man and a woman is valid" has survived a legal challenge. Florida voters in 2008 amended the state constitution to ban same-sex marriage.

Other states with ERAs have legalized same-sex civil unions or marriages. The Supreme Court of New Jersey ruled under state equal protection guarantees that same-sex couples must be afforded the same access to the benefits of marriage as opposite-sex couples, and the Legislature responded by legalizing civil unions. The Supreme Court of Massachusetts held that limiting marriage to opposite-sex couples violated the individual liberty and equality guarantees of the state constitution. In 2005, Connecticut became the first state to legalize civil unions without a prior court decision, and in 2008 the state Supreme Court ruled that same-sex couples have the right to marry. In 2009, New Hampshire

passed a same-sex marriage bill, and, pursuant to a state Supreme Court decision, Iowa became the first state outside of New England to legalize same-sex marriage.

In California, a state with an ERA, the state Supreme Court legalized same-sex marriage in 2008 under the principles of privacy, due process, and equal protection, but then upheld a voter-passed Proposition 8 to ban same-sex marriage. In August 2010, a U.S. District Judge ruled that Proposition 8 is unconstitutional, and the case will almost certainly go to the Supreme Court.

Vermont is a state without an ERA but with legal same-sex marriage. Ironically, a 1986 vote to add an ERA to the state constitution failed in large part because of opponents' claims that it would legitimize same-sex unions. Nevertheless, in 1999 the Vermont Supreme Court decided under the common benefits clause of the state constitution that same-sex couples must be provided the benefits and protections of marriage in the form of civil unions, and the Legislature responded by passing a civil union statute in 2000. In 2009, the Legislature passed a same-sex marriage bill over the governor's veto.

12. How has the ERA been related to single-sex institutions?

Even without an ERA in the Constitution, Supreme Court decisions in recent decades have increasingly limited the constitutionality of public single-sex institutions.

In 1972, the Court found in *Mississippi University for Women v. Hogan* that Mississippi's policy of refusing to admit males to its all-female School of Nursing was unconstitutional. Justice Sandra Day O'Connor wrote in the majority decision that a gender-based classification may be justified as compensatory only if members of the benefited sex have actually suffered a disadvantage related to it.

In the Court's 1996 *United States v. Commonwealth of Virginia* decision, which prohibited the use of public funds for then all-male Virginia Military Institute unless it admitted women, the majority opinion written by Justice Ruth Bader Ginsburg stated that sex-based classifications may be used to compensate the disadvantaged class "for particular economic disabilities [they have] suffered," to promote equal employment opportunity, and to advance full development of the talent and capacities of all citizens. Such classifications may not be used, however, to create or perpetuate the legal, social, and economic inferiority of the traditionally disadvantaged class, in this case women.

Thus, single-sex institutions whose aim is to perpetuate the historic dominance of one sex over the other are already unconstitutional, while single-sex institutions that work to overcome past discrimination are constitutional now and, if the courts choose, could remain so under an ERA.

13. How has the ERA been related to women in the military?

Women have participated in every war our country has ever fought, and they now hold top-level positions in all branches of the military, as well as in government defense and national security institutions. They are fighting and dying in combat, and the armed services could not operate effectively without their participation. However, without an ERA, their equal access to military career ladders and their protection against sex discrimination are not guaranteed.

The issue of the draft is often raised as an argument against the ERA. In fact, the lack of an ERA in the Constitution does not protect women against involuntary military service. Congress already has the power to draft women as well as men, and the Senate debated the possibility of drafting nurses in preparation for a possible invasion of Japan in World War II.

Traditionally and at present, only males are required to register for the draft. After removing its troops from Vietnam in 1973, the United States shifted to an all-volunteer military and has not since that time conscripted registered men into service. In 1981, in *Rostker v. Goldberg*, the Supreme Court upheld the constitutionality of a male-only draft registration.

In recent years, however, Department of Defense planning memos and Congressional bills dealing with the draft or national service have included both men and women in the system. With or without an ERA in the Constitution, it is virtually certain that a reactivated male-only draft would be legally challenged as a form of sex discrimination, and would likely be found unconstitutional.

Congress could respond by developing a system of national service that would balance equality on the basis of sex with the functional status of individuals. The system could include both military and civilian placements, and exemptions could be granted as always to those unqualified to serve for reasons of physical inability, parental status, or other relevant characteristics.

Since there is presently no imminent prospect of reinstating the draft and no way to know what its requirements would be if it were reactivated, a discussion about the ERA's relation to it is primarily theoretical. However, the immediate practical value of putting the ERA into the Constitution would be to guarantee equal treatment for the women who voluntarily serve in the military and to provide them with the "equal justice under law" that they are risking and sometimes sacrificing their lives to defend.

14. Would the ERA adversely affect existing benefits and protections that women now receive (e.g., alimony, child custody, Social Security payments, etc.)?

Most family law is written, administered, and adjudicated at the state level, and court decisions in states with ERAs show that the benefits opponents claim women would lose are not in fact unconstitutional if they are provided in a sex-neutral manner based on function rather than on stereotyped sex roles. That same principle would apply to laws and benefits (e.g., Social Security) at the federal level.

Legislators would have two years after the federal ERA is ratified to amend sex-based classifications in any laws that might be vulnerable to challenge as unconstitutional. Those laws can be brought into conformity with the ERA by substituting sex-neutral categories (e.g., "primary caregiver" instead of "mother") to achieve their objectives.

Courts have for many years been moving in the direction of sex-neutral standards in family court decisions, and legislatures have been writing laws with more attention to sex-neutral language and intent. It is unlikely that the ERA would cause a noticeable acceleration of those trends.

15. Does the ERA shift power from the states to the federal government?

Opponents have called Section 2 of the ERA ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") a "federal power grab." In fact, that clause, with some variation in wording, appears in eight other amendments, beginning with the 13th Amendment in 1865.

The ERA would not transfer jurisdiction of any laws from the states to the federal government. It would simply be one more legal principle among many others in the U.S. Constitution by which the courts evaluate the constitutionality of governmental actions.

16. What level of public support exists for a constitutional guarantee of equal rights for women and men?

An Opinion Research Corporation poll commissioned in 2001 by the ERA Campaign Network of Princeton, NJ shows that nearly all U.S. adults – 96% – believe that male and female citizens should have equal rights. The vast majority – 88% – also believe that the U.S. Constitution should make it clear that these rights are supposed to be equal. However, nearly three-quarters of the respondents – 72% – mistakenly assume that the Constitution already includes such a guarantee.

By presenting these three questions without specifically mentioning the Equal Rights Amendment, the survey filtered out the negative effect of misrepresentations of the ERA by its opponents.

It is clear that the citizens of the United States overwhelmingly support a constitutional guarantee of equal rights on the basis of sex, and ratification of the Equal Rights Amendment will achieve that goal.

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