

***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 generated both rabid support and fervid opposition. Interpretations of its intent and potential impact have been widely varying and even contradictory.

The answers to these frequently asked questions about the ERA encourage evaluation of the amendment based on facts rather than misinformation. In addition, a 17-minute educational documentary, "The Equal Rights Amendment: Unfinished Business for the Constitution," can be purchased or downloaded at www.equalrightsamendment.org.

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

The original ERA, first proposed in 1923, was known as the "Lucretia Mott Amendment." It stated:

"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."

In 1943, the original version was rewritten to the following wording (now called the "Alice Paul 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 their 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 – 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. *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 women's rights activist with three law degrees. It was introduced in Congress in the same year and subsequently reintroduced in every session of Congress for half a century.

In 1943 Paul rewrote the text to its current wording, modeled on the language of the 19th Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The 19th Amendment is the Constitution's only explicitly affirmed guarantee of equal rights for women, the right to vote.

On March 22, 1972, the 1943 version of 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 amendment. The ERA is therefore not yet a part of the U.S. Constitution.

In accordance with the traditional ratification process outlined in Article V of the Constitution, the Equal Rights Amendment has been reintroduced in every session of Congress since 1982. None of these bills has had a committee hearing or a floor vote. In the 115th Congress (2017-2018), the traditional ERA bills are *S.J.Res. 6* (lead sponsor, Senator Robert Menendez, D-NJ) and *H.J.Res. 33* (lead sponsor, Representative Carolyn Maloney, D-NY).

Beginning in the 113th Congress (2014-2015), the text of the ERA ratification bill in the House of Representatives has stated:

Section 1: Women shall have equal rights in the United States and every place subject to its jurisdiction. 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: Congress and the several States 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.

Section 1 specifically names women in the Constitution for the first time, and the addition of "and the several States" in Section 2 affirms that enforcement of the constitutional prohibition of sex discrimination is a function of both federal and state levels of government.

A second route to ERA ratification, a novel and unprecedented "three-state strategy," has been pursued since 1994, following the addition of the 27th (Madison) Amendment to the Constitution. (See Question 5 for more details.) Representative Robert Andrews (D-NJ) introduced a bill 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 Representative Tammy Baldwin (D-WI) in support of her bill to remove the ERA's ratification deadline and make it part of the Constitution when three more states ratify. The Senate companion bill to that legislation was introduced by Sen. Benjamin Cardin (D-MD). In the 115th Congress, these three-state strategy bills are *S.J. Res. 5* (Senator Cardin) and *H.J. Res. 53* (Representative Jackie Speier, D-CA).

Since 1995, ERA supporters have advocated for passage of ERA ratification bills in a number of the 15 "unratified" states. Such bills have been introduced in one or more legislative sessions in 12 of these states (Arizona, Arkansas, Florida, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Utah, and Virginia).

After more than two decades of advocacy based on the three-state strategy, Nevada on March 22, 2017 became the 36th state to ratify the ERA, 45 years to the day after Congress passed the amendment and sent it to the states for ratification. In May 2018, Illinois became the 37th state to ratify the ERA. With one more state needed to reach the required 38, no state legislatures are scheduled to have sessions that will provide an opportunity for voting on the ERA until 2019.

4. Which 15 states did not ratify the ERA by June 30, 1982?

The 15 states whose legislatures did not ratify the Equal Rights Amendment by the 1982 deadline are Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

5. Why are these states being asked to ratify the ERA even though the 1982 deadline has passed?

Political activity regarding ERA ratification is the result of a "three-state strategy" that was developed after the 1992 ratification of the 27th (Madison) Amendment to the Constitution more than 203 years after its 1789 passage by Congress. 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) have never been recognized as valid. Therefore, Congress may be able to accept the validity of 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” (Allison Held *et al.*, *William & Mary Journal of Women and the Law*, Spring 1997). The Library of Congress’s Congressional Research Service discussed this article in its 1996, 2014, and 2017 reports on the status of ERA ratification, and CRS analysts concluded that acceptance of the Madison Amendment does have implications for the three-state strategy. The issue, they said, is more of a political question than a constitutional one.

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6. *Can a state rescind or otherwise withdraw its ratification of a constitutional amendment that is still in the process of being ratified?*

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment. However, according to precedent and statutory language, a state rescission or other withdrawal of its ratification of a constitutional amendment is not accepted as valid.

For example, during the ratification process for the 14th Amendment, New Jersey and Ohio voted to rescind their ratifications after first voting yes, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment a month before the last necessary state ratified in 1870, but it was counted as one of the ratifying states. Tennessee, the final state needed to ratify the 19th Amendment guaranteeing women’s right to vote, approved the amendment by one vote on August 18, 1920. The Tennessee House then “non-concurred” on August 31, but the Secretary of State had already announced the amendment’s inclusion in the Constitution on August 26 (now celebrated as Women’s Equality Day).

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that “an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.... Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. The rule

that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments.”

Archivist of the United States David Ferriero wrote on October 25, 2012 to Representative Carolyn Maloney (NY), lead sponsor of the ERA in the House of Representatives, in response to her query about the validity of rescissions:

NARA’s [National Archives and Records Administration’s] website page “The Constitutional Amendment Process” (www.archives.gov/federal-register/constitution) . . . states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist’s] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state’s ratification is not accepted as valid.

These statements are derived from 1 U.S.C. 106b, which says that: “Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.” Under the authority granted by this statute, once NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by Congress. Once the process in 1 U.S.C. 106b is completed the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment.

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 24 states – Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, 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, four states with state-level equal rights amendments or guarantees (Florida, Louisiana, Utah, and Virginia) have not yet 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 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” (Linda J. Wharton, Esq., *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 over more than 70 years 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. However, in *Reed* and subsequent decisions (e.g., *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 the suspect classifications of race, religion, and national origin. Discrimination based on those categories must bear a necessary relation to a compelling state interest in order to be upheld as constitutional.

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, the intermediate standard of review for such claims requires only that such classifications must substantially advance an important governmental objective. 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 scrutiny.

In an interview reported in the January 2011 *California Lawyer*, the late Supreme Court Justice Antonin Scalia disregarded 40 years of 14th-Amendment precedent when he stated his belief that the Constitution does not protect against sex discrimination. This remark, which provoked widespread public reaction, has been cited as clear evidence of the need for an Equal Rights Amendment, in order to guarantee that all judges, regardless of their judicial or political philosophy, will interpret the Constitution to prohibit sex discrimination.

9. *Why has the ERA sometimes 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.

10. *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's equal protection principle, and other laws and court cases?*

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 even reversed. Congress can amend or repeal anti-discrimination laws by a simple majority, 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 with respect to sex discrimination. Many other countries affirm in their governing documents, however imperfectly implemented, 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 Constitution conform with the promise engraved over the entrance to the Supreme Court – “Equal Justice Under Law.”

11. *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 federal and state laws and court decisions.

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 not yet been applied to such cases at the federal level.

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 of those pregnancy-related procedures if it funds either one, 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.

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.

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, including many that are medically necessary.

Recent Supreme Court decisions on reproductive rights (e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 2014) have raised concerns about the vulnerability of women's choices regarding contraception as well as abortion under a Court dominated by conservative Justices. An Equal Rights Amendment in the Constitution would almost certainly affect such deliberations in the future.

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

Opponents of the ERA have long claimed that it would require government to uphold same-sex marriage and other so-called "gay rights," but discrimination on the basis of sexual orientation has not traditionally been treated legally by courts as a form of sex-based discrimination protected by an equal rights guarantee.

Even without an ERA in the Constitution, laws and court decisions have rapidly evolved over the past two decades toward legalizing same-sex marriage and overturning discrimination on the basis of sexuality, based primarily on equal protection and individual liberty principles. At the state level, where most laws dealing with marriage are passed and adjudicated, laws, court decisions, and voter referendums increasingly supported the principle of equal marriage rights for same-sex couples, with or without the existence of a state ERA.

In *U.S. v. Windsor* (2013), the Supreme Court declared unconstitutional a 1996 federal Defense of Marriage Act (DOMA), which prohibited the federal government from recognizing same-sex marriages and denied federal benefits to spouses in such marriages. The 5-4 majority ruled that DOMA violated the Constitution's equal liberty and equal protection guarantees.

In June 2015, by a 5-4 decision in *Obergefell v. Hodges*, the Supreme Court conclusively recognized a constitutional right to same-sex marriage and required the states to permit same-sex couples to exercise that right. The decision rested primarily on the Constitution's due-process and equal protection clauses, not on equal rights legal analysis.

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

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

In 1982, 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.

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

Approximately 15% of U.S. military personnel are women. Women have participated in every war our country has ever fought, beginning with the American Revolution, and they have held top-level positions in all branches of the military, as well as in government administration of defense and national security. They are fighting and dying in combat, and the armed services could not operate effectively without their participation.

However, without an ERA, women's equal access to military career ladders and their protection against sex discrimination in their chosen profession 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 with the Selective Service System. After removing troops from Vietnam in 1973, the United States shifted to an all-volunteer military and has not since that time drafted registered men into active 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.

The Department of Defense's 2015 decision to open all combat positions to women has resurrected the public debate about whether a future draft would include women. It is virtually certain that a reactivated male-only draft system would be legally challenged as a form of sex discrimination, and it would most likely be found unconstitutional, with or without an ERA in the Constitution. Draftees would continue to be examined for "mental, physical, and moral fitness" and other grounds for exemption (e.g., student status, parental status) before being deferred, exempted, or inducted into military service. Since there is 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 even sacrificing their lives to defend.

15. 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. Court decisions in states with ERAs show that the benefits that opponents claim women would lose are not in fact lost. They remain constitutional if they are provided in a sex-neutral manner based on function rather than on an assumption of stereotyped sex roles. That same principle would apply to laws and benefits (e.g., Social Security) at the federal level.

Based on the text of the ERA, legislators would have two years after the amendment is ratified to change sex-based classifications in 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 increased attention to sex-neutral language and intent. It is unlikely that the ERA would have a significant impact on those trends.

16. 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, sometimes including the states as well, 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.

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

According to a 2016 poll commissioned by the national ERA Coalition, 94% of Americans support an amendment to the Constitution to guarantee equal rights for men and women. This support reached as high as 99% among 18-to-24-year-olds, African Americans, Asian Americans, and Hispanic Americans. However, 80% of those polled thought the Constitution already guarantees equal rights to males and females.

In April 2012, a poll for Daily Kos/Service Employees International Union (SEIU) asked, “Do you think the Constitution should guarantee equal rights for men and women, or not?” The responses were 91% yes, 4% no, and 5% not sure.

An Opinion Research Corporation poll commissioned in 2001 by the ERA Campaign Network of Princeton, NJ showed that nearly all U.S. adults – 96% – believed that male and female citizens should have equal rights. The vast majority – 88% – also believed 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 believed that the Constitution already includes such a guarantee.

By asking these questions without mentioning the words “Equal Rights Amendment,” the surveys filtered out the negative effect of widespread misrepresentations and misperceptions of the ERA. These responses show that citizens of the United States overwhelmingly, almost unanimously, support a constitutional guarantee of equal rights on the basis of sex.