



National Council
of Women's
Organizations

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ALICE PAUL
INSTITUTE

THE EQUAL RIGHTS AMENDMENT

Simple Justice ~ Long Overdue

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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.

ERA Timeline: Key Dates

- 1923** The Equal Rights Amendment was written by Alice Paul, woman suffrage leader and lawyer, and first introduced into Congress.
- 1923-1971** The ERA was introduced into every session of Congress but never passed.
- 1972** The ERA was passed by a two-thirds vote in the Senate and the House of Representatives, and was sent to the states on March 22 with a seven-year deadline for ratification.
- 1972-1977** The ERA was approved by 35 state legislatures, with only three more state ratifications needed to put it into the Constitution.
- 1978** Congress passed a bill extending the ratification deadline to June 30, 1982.
- 1978-1982** Organized political, economic, social, and religious anti-equality forces prevented any more state ratifications before the deadline.
- 1982-2012** The ERA has been introduced into every session of Congress for the past 30 years and has seen legislative activity in 8 of the 15 unratified states.

The ERA in the 112th Congress (2011-2012)

1. Bills for ERA ratification by traditional constitutional amendment process (per Article V of the Constitution):

S. J. Res. 21 (lead sponsor, Senator Robert Menendez, D-NJ)

H. J. Res. 69 (lead sponsors, Representative Carolyn Maloney, D-NY, and Representative Judy Biggert, R-IL)

2. Bills removing ERA ratification time limit *ex post facto*:

H. J. Res. 47 (lead sponsor, Representative Tammy Baldwin, D-WI)

S. J. Res. 39 (lead sponsor, Senator Benjamin Cardin, D-MD)

What the ERA Would Do

- Guarantee that the rights affirmed by the U.S. Constitution are held **equally** by all citizens without regard to sex;
- Provide a **fundamental legal remedy against sex discrimination** for both women and men;
- **Clarify the legal status of sex discrimination** for the courts, where decisions still deal inconsistently with such claims;
- Make “sex” a **suspect classification**, as race currently is, so that governmental actions that treat males or females differently as a class would have to bear a necessary relation to a compelling state interest in order to be upheld as constitutional.

We Need the ERA Because . . .

- The first – and still the only – right that the Constitution specifically affirms to be equal for women and men is the right to vote (19th Amendment, 1920).
- The 14th Amendment's equal protection clause has never been interpreted to protect against sex discrimination in the same way that the ERA would.
- We need a constitutional guarantee of equality to protect against current threats to the significant advances in women's rights achieved over the past half century.
- Without the ERA, women and occasionally men still have to fight long, expensive, and difficult political and legal battles for equal rights under the law.
- We need to improve the standing of the United States globally with respect to equal justice under law, since the governing documents of many other countries, however imperfectly implemented, specifically affirm legal equality of the sexes.
- We need to liberate the time, intelligence, and energy of the women and men who work for the simple justice of equal legal rights, so we all can be fully engaged with the many other challenges we face in common.

The ERA and the 14th Amendment

- 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's constitutional guarantee of "equal protection of the laws," women had to fight a long and hard political battle to have their right to vote affirmed through the 19th Amendment in 1920.
- Not until 1971 did the Supreme Court first apply the 14th Amendment to prohibit sex discrimination. While the 14th Amendment has been used effectively against sex discrimination since then, such claims are still evaluated under a heightened intermediate standard of review, rather than the highest level of strict judicial scrutiny.
- In September 2010, Supreme Court Justice Antonin Scalia said he does not believe that the Constitution, specifically the 14th Amendment, protects against sex discrimination. His remark has been cited as clear evidence of the need for an Equal Rights Amendment in the Constitution.

The Equal Pay Act, the Pregnancy Discrimination Act, Title VII and Title IX of the 1964 Civil Rights Act . . . So Why Do We Need the ERA?

- Women's rights have been won slowly and incrementally with great difficulty and are maintained only with constant vigilance and political struggle. They are currently under intense political and social attack from right-wing opponents of equality.
- Without the ERA in the Constitution as a bedrock guarantee of equal rights for women and men, the statutes and case law that have produced major advances in women's rights, especially since the middle of the last century, are vulnerable to being ignored, weakened, or even reversed.
- Congress and state legislatures can amend or repeal anti-discrimination laws by a simple majority, federal and state administrations can negligently enforce such laws, and the judiciary, including the Supreme Court, can use the intermediate standard of review to uphold certain forms of regressive sex discrimination.
- The ERA is necessary to make our Constitution conform with the promise inscribed over the entrance of the Supreme Court: "Equal Justice Under Law."

State ERAs

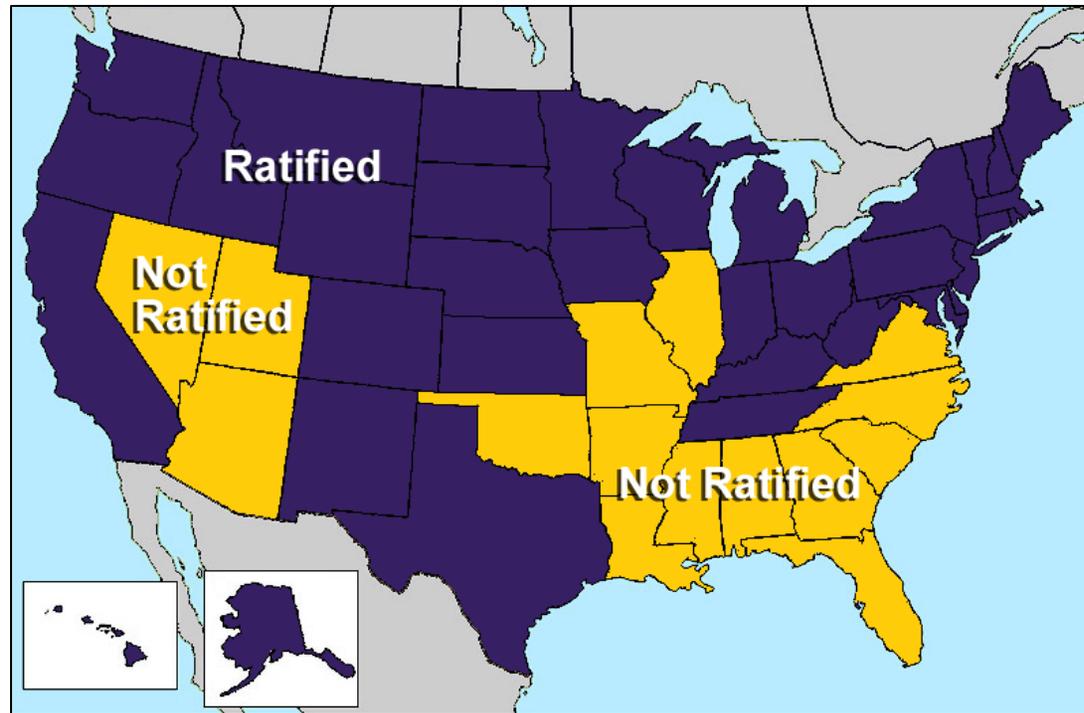
- The constitutions of 22 states contain either partial or inclusive equal rights amendments or guarantees of equal rights on the basis of sex.

Alaska	Iowa	Pennsylvania
California	Louisiana	Rhode Island
Colorado	Maryland	Texas
Connecticut	Massachusetts	Utah
Florida	Montana	Virginia
Hawaii	New Hampshire	Washington
Illinois	New Jersey	Wyoming
	New Mexico	

- Experience with these state ERAs over more than 40 years has in virtually all cases validated the interpretation of the amendment's effects described by ERA advocates.
- The vast majority of claims by ERA opponents about purported undesirable effects of the amendment have proved to be false, slanted, incomplete, or overstated.

States (15) That Have Not Ratified the ERA

- Alabama**
- Arizona**
- Arkansas**
- Florida***
- Georgia**
- Illinois***
- Louisiana***
- Mississippi**
- Missouri**
- Nevada**
- North Carolina**
- Oklahoma**
- South Carolina**
- Utah***
- Virginia***



** = states with state ERAs or equal rights guarantees*

Two Strategies for ERA Ratification

- **The traditional ratification process (per Article V of the Constitution):**
 - Passage in the U.S. Senate and House of Representatives by a two-thirds majority vote
 - Ratification by legislatures in three-fourths (38) of the states
- **The “three-state strategy” (based on questions about the constitutionality of time limits and other restrictions on the ratification process)**
 - This strategy proposes that the ERA will become part of the Constitution when ratified by three more states. It was developed following the 1992 ratification of the 27th Amendment more than 203 years after its 1789 passage by Congress.
 - Since 1995 ERA ratification bills have been introduced in eight (Arizona, Arkansas, Florida, Illinois, Mississippi, Missouri, Oklahoma, Virginia) of the 15 unratified states.
 - The 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.
- **ERA advocates generally believe that both strategies should be supported in the effort to put the ERA into the Constitution.**

The ERA and Reproductive Rights

- Experience with state ERAs over more than 40 years has disproved claims that the ERA would require government to allow “abortion on demand.”
- Federal and state court decisions on reproductive rights have been based almost exclusively on the constitutional principles of the right of privacy and the due process clause of the 14th Amendment, not equal protection or equal rights analysis.
- State equal rights amendments cited in Connecticut and New Mexico court decisions were applied to a very narrow aspect of reproductive rights – a requirement that if the state pays for childbirth expenses for low-income women on Medicaid, it must also fund medically necessary abortions for women in that government program.
- Some states with state ERAs (e.g., Pennsylvania) enforce significant restrictions (waiting period, medical certification of necessity, no public funding, etc.) on a woman’s exercise of her constitutional right to choose whether or not to terminate a pregnancy.

The ERA and LGBT Rights

- Courts have not yet adjudicated discrimination on the basis of sexual orientation as a form of sex-based discrimination susceptible to equal rights analysis.
- Experience with state ERAs over more than 40 years has disproved claims that the ERA would require government to allow same-sex marriage.
- Some states with ERAs (e.g., Washington, Hawaii, Alaska, Maryland) have maintained the legal definition of marriage as a union between a man and a woman, while other states with ERAs (e.g., Massachusetts, New Jersey, Connecticut, New Hampshire, Iowa) have legalized same-sex civil unions or marriages.
- Vermont is a state with same-sex marriage but without a state ERA, which was defeated in 1986 primarily by opponents' claims that it would legalize same-sex unions. In 2009, the legislature passed a same-sex marriage bill over the governor's veto, supported by a state Supreme Court decision based on the common benefits clause of the state constitution.
- With or without the ERA in the Constitution, laws, court decisions, and public opinion have increasingly supported the civil right of same-sex couples to marry.

The ERA and Single-Sex Institutions

- Even without the ERA in the Constitution, Supreme Court decisions in recent decades have increasingly limited the constitutionality of public single-sex institutions.
- In *Mississippi University for Women v. Hogan* (1972), the Court found that Mississippi's policy of refusing to admit males to its all-female School of Nursing was unconstitutional.
- In *United States v. Commonwealth of Virginia* (1996), which prohibited the use of public funds for all-male Virginia Military Institute unless it admitted women, Justice Ruth Bader Ginsburg wrote in the majority decision that sex-based classifications may be used to compensate the disadvantaged class for economic disabilities, to promote equal employment opportunity, and to advance full development of the talent and capacities of all citizens, but not to create or perpetuate the legal, social, and economic inferiority of the traditionally disadvantaged class.
- 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 could, if courts so choose, remain so under the ERA.

The ERA and the Military

- The ERA would guarantee equal treatment for the women who now constitute approximately 20% of the U.S. military and provide them with the “equal justice under law” that they are risking and sometimes sacrificing their lives to defend.
- The lack of an ERA in the Constitution does not protect women against involuntary military service (the draft). Congress already has the power to draft women as well as men and in fact considered doing so during World War II and the Vietnam War.
- The constitutionality of an all-male draft registration was upheld by the Supreme Court in *Rostker v. Goldberg* (1981). However, registrants have not been drafted into service since 1973, and recent 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 the ERA, 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. Exemptions would still be granted to those unqualified to serve for reasons of physical inability, parental status, or other relevant factors.

The ERA and Family Law

- Experience with state ERAs over more than 40 years has disproved claims that the ERA would require government to eliminate existing benefits and protections that women have traditionally received (e.g., alimony, child custody, certain Social Security payments).
- Court decisions in states with ERAs show that such benefits are not in fact unconstitutional if they are provided in a sex-neutral manner based on function rather than on stereotyped sex roles (e.g., by designating "primary caregiver" instead of "mother"). That same principle would apply to laws and benefits (e.g., Social Security) at the federal level.
- 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.

Who Supports the Goal of the ERA? Over 9 out of 10 Americans!

April 2012: Poll for Daily Kos and SEIU (Service Employees International Union)

“Do you think the Constitution should guarantee equal rights for men and women, or not?”

Yes: 91% No: 4% Not sure: 5%

July 2001: Opinion Research Corporation poll for the ERA Campaign Network

“In your opinion, should male and female citizens of the United States have equal rights?”

Yes: 96% No: 3% Not sure: 1%

“In your opinion, should the Constitution make it clear that male and female citizens are supposed to have equal rights?”

Yes: 88% No: 9% Not sure: 3%

“As far as you know, does the Constitution of the United States make it clear that male and female citizens are supposed to have equal rights?”

Yes: 72% No: 18% Not sure: 10%