



The Equal Rights Amendment

What You Need To Know

By Robin Bleiweis | January 29, 2020

Author's note: *The author uses the term “sex discrimination” throughout this issue brief to match the language in the ERA’s text. This term is intended to be synonymous with other terms, such as “sex-based discrimination,” “gender discrimination,” or “gender-based discrimination,” all of which are intended herein to be comprehensive and inclusive beyond discrimination based solely upon sex assigned at birth to include discrimination based on gender identity, gender expression, and/or sexual orientation. The ERA would protect individuals against discrimination on the basis of sex, gender identity, and sexual orientation, the same way that federal statutes such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 do.¹*

One hundred years after women gained suffrage²—and with a growing number of women in the workforce, holding elected office, and running for president—the time for a constitutional amendment explicitly guaranteeing equal rights regardless of sex is long overdue.³ Authored by legendary activists Alice Paul, Crystal Eastman, and others in 1923 and later revised, the proposed Equal Rights Amendment (ERA) mandates that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”⁴ Nascent efforts to pass the ERA grew out of a recognition that the commitment to equality rooted in the U.S. Constitution could not be fully realized without an explicit, meaningful commitment to equality regardless of sex. Now, as women and people across the gender spectrum increasingly face mounting attacks on their rights and autonomy, the current push for the ERA is a continued reminder that empty rhetoric and half-measures claiming to support and empower them are entirely inadequate.

When the ERA was written, women’s status in American society was often considered secondary to men’s. Legal restrictions—such as prohibitions against voting and property ownership—combined with long-standing stereotypes about women’s roles meant that women were relegated to certain defined spaces and not treated as full citizens. In particular, many women of color were further constrained by the compounding effects of entrenched racial, ethnic, and gender biases, reinforcing a societal hierarchy where they had diminished status when compared with white women. Although the ERA remains absent from the Constitution, many of the

attitudes and practices that spurred its initial proposal have long since been rejected. The broader push for gender equality gained momentum over decades, and, even without the ERA, women and people across the gender spectrum have made enormous strides to elevate their status, secure important legal protections, and gain opportunities across society. But there is still work to do in order to ensure that women and people across the gender spectrum are treated equally and fairly and have the ability to live their lives as they want. The absence of an explicit prohibition against sex discrimination in the Constitution remains one key impediment undermining the fight for gender equality and women's progress overall—and the ERA is an important tool to accomplish this progress.

Historical precedent in the fight for gender equality rooted in the Constitution

Neither “women” nor “sex” are words that appear in the Constitution, revealing the limits of the Founding Fathers’ narrow understanding of women as equal citizens. The Constitution was written by and for white men with means, which reserved its principle of equal justice under law for the sole benefit of the authors and their privileged peers. This meant that women and people of color, among others, were openly regarded as less than full citizens and thus excluded from many legal protections because of their sex, race, and/or ethnicity.

Even without an explicit mention of sex in the Constitution, many of the legal protections that seek to promote women's equality—and equality across the gender spectrum—are rooted in the Constitution's equality principles and a modern understanding of equality that has surpassed outdated prejudices and stereotypes. Strong majorities of the U.S. Supreme Court over more than four decades have made clear that the 14th Amendment, which guarantees “equal protection of the laws,” encompasses protections against sex discrimination; this is evident first in the 1971 landmark ruling, *Reed v. Reed*, followed by other cases such as *Frontiero v. Richardson*, which was argued by now-Supreme Court Justice Ruth Bader Ginsburg.⁵ Despite this broad consensus, some conservative thinkers and theorists—such as Justice Antonin Scalia⁶—have rejected a reading of the 14th Amendment to include sex, arguing that such arguments are specious because they do not reflect the original intent of the nation's founders. In the face of an increasingly conservative federal judiciary, arguments against sex discrimination rooted in the 14th Amendment are under threat, and existing protections are vulnerable to being rolled back.⁷

Ratifying the ERA would affirm that sex discrimination is inconsistent with the nation's core value of equal protection under the law, and it would send a clear message about a national commitment to the inherent equality of all people. The amendment also bolsters the argument that judicial review of cases alleging sex discrimination should utilize the highest level of legal scrutiny, requiring a compel-

ling state interest to deem a particular sex-based action or practice constitutional.⁸ Heightened scrutiny would make it harder to dismiss or reject sex discrimination claims and protections outright. Thus, the ERA has the potential to achieve vital progress, with its impact extending to a number of areas.

The modern-day push for the ERA

Boosted by activism of women's rights and civil rights advocates, Congress passed the ERA in 1973 and initially gave states until 1979 to ratify it by a three-fourths majority. The deadline was extended to 1982, but the ERA fell three states short of the 38-state threshold. More recently, a groundswell of support for women's rights led Nevada to ratify the ERA in 2017, followed by Illinois in 2018. In January 2020, Virginia became the historic and crucial 38th state to ratify the ERA. Pending legal challenges, however, mean the amendment's future remains uncertain.⁹

Understanding the potential implications

The ERA's explicit prohibition of sex discrimination could help to sustain or expand critical protections that have been used to challenge a wide range of discriminatory conduct and practices. Ratifying the amendment would likely provide additional support for new and existing protections against sex discrimination in areas including gender-based violence (GBV), the workplace, and access to reproductive health care.

Violence Against Women Act

First passed in 1994, the Violence Against Women Act (VAWA)¹⁰ is landmark legislation that seeks to combat GBV¹¹ through a basic infrastructure for governmental and community supports for survivors. VAWA has been reauthorized three times—in 2000, 2005, and 2013—but in 2018, the House of Representatives passed with bipartisan support a reauthorization bill that has since stalled in the Senate. While VAWA has led to a significant drop in GBV and has vastly expanded resources and supports, there remains room for improvement and a need for expanded protections. It is crucial that Congress swiftly reauthorizes and expands VAWA.

In addition, ratifying the ERA could ensure that these and future protections are as strong as possible for survivors seeking justice in court. When VAWA was first passed, it included a provision that would have allowed survivors to sue their attackers in federal court for damages or other relief. A divided Supreme Court later struck down the provision, ruling that it exceeded Congress' authority to regulate conduct that did not constitute interstate commerce.¹² Ratifying the ERA could pave the way to reexamine and restore this important provision, by bolstering arguments in support of Congress' constitutional authority and thus giving more than 50 million survivors an additional pathway to justice.¹³

Title IX

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs or activities and, thus, requires schools receiving federal funding to respond to incidents of sexual harassment and assault on their facilities or campuses.¹⁴ Survivors of sexual assault or harassment—whether at the collegiate, secondary, or elementary level—are at particular risk since the Trump administration weakened existing protections against sex discrimination under Title IX. Secretary of Education Betsy DeVos has rescinded more than 20 Obama-era anti-discrimination policy guidelines—signaling the current administration’s intent to weaken enforcement—and has proposed harmful rules that would make it harder for survivors to challenge and remedy sexual misconduct.¹⁵ The ERA could provide additional legal support in cases challenging the government and its efforts to disadvantage survivors and to dilute much-needed protections that acknowledge, respect, and protect them.

Pay discrimination

The ERA could enhance existing statutory protections against pay discrimination and bolster individual legal challenges to discriminatory conduct. For example, although the Equal Pay Act of 1963 prohibits sex-based pay differences, it includes an affirmative defense framework that allows employers to put forward specific defenses to justify a pay disparity. Courts have interpreted one of these defenses—called the “factor other than sex” defense—so broadly that it has effectively become a loophole that allows some employers to successfully defend discriminatory pay practices that sound impartial or gender neutral on the surface. The ERA’s clear prohibition against sex discrimination could strengthen arguments to close this loophole. This additional support could be enormously helpful, particularly in the absence of comprehensive equal pay legislation such as the Paycheck Fairness Act.¹⁶

Pregnancy discrimination

The Pregnancy Discrimination Act (PDA) was enacted more than 40 years ago, and while it has enabled more people to continue working—and for longer—while pregnant, it has not ended pregnancy discrimination all together.¹⁷ This is in part due to courts interpreting protections under the PDA too narrowly, often ignoring the discriminatory effects of employer practices—such as limits on the availability of light-duty work options—that result in leaving many pregnant people without access to necessary accommodations.¹⁸ The ERA could provide additional reasoning, grounded in constitutional protections, to challenge policies that effectively exclude individuals seeking pregnancy accommodations from the protection of the law, as well as to ensure equitable treatment and better conditions for pregnant workers.

Reproductive health

Equality means elevating the oppressed to enjoy the same rights and protections as the most privileged. This includes the freedom to make choices about one’s own body. Foundational rulings protecting reproductive autonomy—including in cases such as *Roe v. Wade*, which affirmed the constitutional right to access abortion

care, as well as *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Planned Parenthood v. Casey*—have made clear that reproductive autonomy is central to people’s abilities to participate equally in society.¹⁹ The ERA could further buttress these existing constitutional protections and help guard against the growing onslaught of attempts to restrict access to reproductive health care including abortion and contraception. For example, state courts in Connecticut and New Mexico have found that laws prohibiting Medicaid coverage of medically necessary abortions violate the ERA-type language in their state constitutions.²⁰

Opportunities for progress alongside the ERA

The ERA represents critical progress, but it is important to recognize that its passage alone will not end discrimination overnight or result in instant equality. The ERA, like other constitutional amendments, would expressly cover governmental and state actions but does not directly address the private sector. The amendment should be understood as just one fundamental element of the fight for gender equality, one that provides an extra layer of protection that could make a difference in undoing long-standing discriminatory practices. Thus, it does not supplant the critical role of policymakers to take robust action to combat all forms of discrimination in order to ensure equality and adequate protections for women and people across the gender spectrum. This work must be done with a deep understanding of the intersectional experiences of women of color and gender minorities, in order to recognize how a combination of factors such as racial and gender biases can erect unique discriminatory barriers.²¹ At minimum, this includes:

- **Securing access to comprehensive, noncoercive reproductive health care:** Lawmakers must ensure access to high-quality, culturally competent, affordable health care—including abortion care, contraceptives, family planning, and maternal health care.
- **Protecting and expanding access to abortion care:** Lawmakers must eliminate harmful restrictions, such as targeted regulation of abortion providers (TRAP) laws and the Hyde Amendment, as well as expand insurance coverage of abortion care.
- **Eliminating racial disparities in maternal health outcomes:** Lawmakers must improve access to critical services; improve the quality of care provided to pregnant women; address maternal mental health; enhance supports for families before and after birth; and improve data collection and oversight, particularly with a focus on persistent racial disparities.²²
- **Reauthorizing and expanding VAWA:** Lawmakers must reauthorize and expand VAWA to ensure protections and vital services for survivors.
- **Ensuring strong protections against GBV in educational settings:** Lawmakers must protect and strengthen Title IX’s protections against sexual assault and harassment.
- **Combating workplace discrimination:** Lawmakers must enact policies that improve protections against pay discrimination, enhance protections against workplace sexual harassment, and expand pregnancy accommodations and anti-retaliation protections for pregnant workers.
- **Increasing wages:** Lawmakers must raise the federal minimum wage, eliminate the subminimum wage for workers with disabilities, and eliminate the tipped minimum wage.
- **Supporting workers who are caregivers:** Lawmakers must implement comprehensive paid family and medical leave for all workers, secure paid sick days, and increase investment in universal child care.
- **Implementing a structural redesign for workforce equity:** Lawmakers should consider redesigning a workforce system that utilizes high-quality skills training and employment services to combat occupational segregation and workforce inequality.²³

These additional legislative and executive actions—and many more²⁴—are needed to hold private entities fully accountable for their conduct. Strong enforcement mechanisms are also essential to ensuring that the ERA is more than just an ideal.

The path forward

Opponents of the ERA have sought to undermine its passage using a variety of tactics, including by deploying alarmist language to argue that many areas where gender-specific programming exists—such as single-sex educational institutions or high school athletics—would be prohibited. But even without the ERA, specific parameters guided by Supreme Court and other legal precedent have been developed to determine when single-sex programs are permissible, such as when they are used to compensate for the historic, societal, and economic disadvantage of a particular class. Nothing in the ERA would alter this guidance. If anything, the ERA would provide additional support for this existing legal precedent. Furthermore, opponents point to the military draft as something women would have to contend with if the ERA is ratified. In reality, women are already commonplace in the military and have been allowed to serve in all combat roles since 2015.²⁵ Moreover, there is no clear indication that the United States plans on reinstating the draft in the future. The potential role of the ERA in this setting would simply be to ensure that all people serving in the military are treated equally regardless of sex.

Additionally, government and state officials who oppose the ERA, including a Trump appointee in the U.S. Department of Justice and three Republican state attorneys general, have argued that continued state efforts to ratify the ERA are moot given the initial deadline.²⁶ Thus, they claim, the entire process would need to restart for the ERA to be ratified.²⁷ ERA advocates argue that the ratification deadline—if even constitutional²⁸—is nonbinding given that it was written into the preamble of the amendment and thus is not present in the language ratified by the states. Advocates also dismiss the attempts of five states to rescind their ratifications, given that such attempts with the 14th and 15th Amendments were considered to lack constitutional authority and were thus ignored.²⁹ Moreover, advocates argue that if Congress can impose and extend ratification deadlines, then it can also remove them.³⁰ Based on this argument, the House Judiciary Committee passed a resolution to strike the time limit from the preamble of the ERA in November 2019.³¹ The resolution awaits a vote by the full House, and there is also a bipartisan companion bill awaiting uncertain action in the Senate.

Ultimately, the decision on the ERA's timeliness is up to Congress. According to legal precedent, Congress may set a time limit for ratification in a "reasonable" and "sufficiently contemporaneous" time frame to "reflect the will of the people."³² The interpretation of timeliness is a "political question ... with the ultimate authority in the Congress."³³ These rulings make clear that a time limit should not be the sole determining factor for ratification. Notably, the 27th Amendment to the U.S. Constitution was ratified nearly 203 years after it was introduced in the first Congress. In a moment of unprecedented attacks by the Trump administration and others against women and the programs and policies upon which they depend—and the majority of American adults supporting the ERA—the amendment seems as ripe as ever for ratification.³⁴

Conclusion

Moving forward, the Constitution should reflect the nation's future, one in which the United States is a leader—not a follower—on the world stage and where it upholds its central tenet of equality for all, regardless of sex or gender. While often portrayed as a world leader, the United States lags behind the 76 percent of countries around the world with constitutions that guarantee equal rights for women.³⁵ The federal government even falls short of the progress that has been made in many of its states, with 25 state constitutions in some way explicitly guaranteeing equal rights on the basis of sex.³⁶ When written, the U.S. Constitution reflected a moment in time when predominant views of women and women's roles were vastly different than they are today.

The ERA has certain symbolic importance, communicating unequivocally that people across the gender spectrum are innately equal and deserving of constitutional protection. It would demonstrate fundamental respect for the value and support of women and people across the gender spectrum in the way that the country has done for the privileged and powerful since its founding. And yet, it is not a perfect, cure-all solution. The ERA will not immediately garner rights for women and people across the gender spectrum that they do not already have under law—rights that were secured by over 100 years of litigation and activism. What the ERA could do, however, is provide essential support in litigating sex discrimination by bolstering existing statutory protections that are currently vulnerable to attack by the Trump administration and conservative lawmakers.

Moreover, the effect of the ERA depends in large part on how it is interpreted and enforced. Constitutional protections against discrimination, and existing statutory protections for that matter, are hollow without vigorous enforcement. Therefore, in addition to ratifying the ERA, it is essential for the public to hold politicians accountable for the ERA's promise of gender equality and to push for additional anti-discrimination policies that can reach spheres outside the ERA's direct influence. Women and people across the gender spectrum still face myriad challenges—but recognition of their equal rights in the nation's founding document should not be one of them.

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Endnotes

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