



**ALICE PAUL  
INSTITUTE**

*Education. Empowerment. Equality.*

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May 9, 2019

To the Honorable Members of the House Judiciary Committee,

The Alice Paul Institute (API) greatly appreciates the efforts of this committee and its members to advance the Equal Rights Amendment (ERA) one step closer to ratification and inclusion in the United States Constitution. API fully supports H.J. Resolution 38, which when passed will nullify the deadline originally given to this important proposed constitutional amendment.

The ERA, first written and introduced in Congress in 1923, is a long overdue correction to our country's founding document, which has even until now failed to explicitly recognize women as equal citizens. Once ratified, the ERA will ensure that the United States is guided by constitutional principles that represent all citizens equally, regardless of their sex, and will elevate our country beyond outdated legislative and judicial actions and patterns of sexism that devalue women's equal participation as citizens politically, socially, and culturally.

Alice Stokes Paul (1885-1977), author of the ERA, was the architect of some of the most outstanding political achievements on behalf of women in the 20th century. A leading American suffragist, she was a force in the passage and ratification of the 19th Amendment in 1920, which guaranteed women's equal right to vote (still the only constitutional right explicitly affirmed as equal for women and men). She wrote, "Most reforms, most problems, are complicated. But to me there is nothing complicated about ordinary equality."

The Alice Paul Institute, which educates the public about her life and work and offers heritage and girls' leadership programs at Paulsdale, her National Historic Landmark home in Mt. Laurel, NJ, is committed to continuing her fight to amend the United States Constitution to rectify its failure to offer equal legal protections to both women and men.

We urge the members of this committee to consider the information in the attached documents, which counters some of the central arguments of ERA opponents, and advance H.J. Resolution 38 to a vote on the House floor. To deny H.J. Resolution 38 is to deny a centuries-long fight of millions of U.S. citizens toward ordinary equality.

Respectfully submitted,

Lucienne Beard  
*Executive Director*

Linda Coppinger  
*Chair, Board of Directors*

Krista Niles  
*Outreach & Civic Engagement Director*

Roberta Francis  
*ERA Education Consultant*

Enclosures:

1. Letter from U.S. Archivist David S. Ferriero to Representative Carolyn Maloney (Oct. 25, 2012) regarding the role played by the National Archives and Records Administration in certifying amendments to the Constitution
2. *Congressional Quarterly Almanac* (1982) article, "ERA Dies Three States Short of Ratification," confirming that the 1981 Idaho v. Freeman court decision often cited by ERA opponents was vacated and has no legal standing or effect
3. "The Equal Rights Amendment: Frequently Asked Questions," fact sheet from the Alice Paul Institute website [www.equalrightsamendment.org](http://www.equalrightsamendment.org)
4. "Why the Equal Rights Amendment Remains Legally Viable and Rescissions Are Invalid," fact sheet from the Alice Paul Institute website [www.equalrightsamendment.org](http://www.equalrightsamendment.org)



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25 October 2012

The Honorable Carolyn Maloney  
U.S. House of Representatives  
Washington, DC 20515

Dear Ms. Maloney:

Thank you for your letter requesting information about the ratification status of the Equal Rights Amendment (ERA), and the role played by the National Archives and Records Administration (NARA) in certifying amendments to the Constitution.

You asked for a list of the states that ratified the ERA, and a list of states that either rejected the amendment, or rescinded an earlier ratification vote. I have attached a chart showing this information.

You also asked for legal verification of statements on NARA's website page "The Constitutional Amendment Process" ([www.archives.gov/federal-register/constitution](http://www.archives.gov/federal-register/constitution)). This webpage 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 my 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

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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 the 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.

I hope this information answers your question and is of use to you. If you would like more information or would like to discuss this issue further, please do not hesitate to contact me again.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Ferriero", with a long horizontal flourish extending to the right.

DAVID S. FERRIERO  
Archivist of the United States



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## **Disposition of *State of Idaho v. Freeman* Court Decision (1982)**

***NOTE:* The underlined sentence contradicts the claim that any existing court decision has declared the ERA deadline extension illegal and state rescissions valid.**

### **“ERA Dies Three States Short of Ratification”**

*[Congressional Quarterly] CQ Almanac, 1982, pp. 377-378*

After Idaho in 1978 voted to rescind its 1973 ratification of the ERA, a group of anti-ERA state legislators and other officials sued the General Services Administration (GSA), which maintained the official list of ratifying states, seeing to force removal of Idaho from the list.

Pro-ERA forces and the Justice Department sought unsuccessfully to remove Judge Marion Callister, of the federal district court in Idaho, from hearing the case because he was a Mormon, and his church opposed the ERA.

However, on Dec. 23, 1981, Callister ruled that Congress exceeded its power when it extended the ERA ratification period in 1978, and that states could rescind their approval of the amendment if they acted within the period available for ratification.

After Callister’s adverse ruling, both the National Organization for Women (NOW) and the Justice Department appealed directly to the Supreme Court. NOW asked for expedited consideration of the appeal, but the Justice Department – which was under fire from conservative political groups opposed to the ERA – said such speed would be “inadvisable.”

On Jan. 25, 1982, the Supreme Court agreed to hear the cases of *NOW v. Idaho* and *Carmen v. Idaho*, but denied NOW’s request for expedited action.

The court did not hear arguments in the case during its 1981-82 term, and on Oct. 4, 1982, the first day of its 1982-83 term, the court dismissed the ERA cases as moot.

Not only did the justices dismiss the cases as moot, they also vacated the lower court decision, wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it.

*For further information, see [www.equalrightsamendment.org](http://www.equalrightsamendment.org) and [www.eracoalition.org](http://www.eracoalition.org).*

*Roberta W. Francis, ERA Education Consultant, Alice Paul Institute*

*January 2019*



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## ***THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS***

**Roberta W. Francis**  
**ERA Education Consultant, Alice Paul Institute**  
**February 5, 2019**

*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](http://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 those who would try to write, enforce, or adjudicate laws inequitably, the ERA would send a strong preemptive warning: the Constitution has no 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 19<sup>th</sup> 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 19<sup>th</sup> Amendment is thus far 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. The only procedural action taken on it, a House floor vote in 1983, failed by six votes.

In the 116<sup>th</sup> Congress (2019-2020), the traditional ERA ratification bill is [H.J. Res. 35](#) (lead sponsors, Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY):

*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.

Beginning with the 113<sup>th</sup> Congress (2014-2015), the text of the traditional ERA bill in the House of Representatives has included wording not present in the 1972 bill passed by Congress. 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.

In the 116<sup>th</sup> Congress, bills to override any deadline and affirm ratification when 38 states have ratified are [S.J. Res. 6](#) (Senators Benjamin Cardin, D-MD, and Lisa Murkowski, R-AK) and [H.J. Res. 38](#) (Representative Jackie Speier, D-CA). These bills are related to a non-traditional route to ERA ratification, a novel and unprecedented “three-state strategy,” which has been advanced since 1994. (See Question 5 for more details.) In that year, 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 pursuit of this strategy, ERA supporters have since 1995 advocated for passage of ERA ratification bills in the 15 "unratified" states. (See the list in Question 5.) As of 2019, such bills have been introduced in one or more legislative sessions in 14 of these states, with only Alabama never having filed such a bill.

On March 22, 2017, after more than two decades of advocacy based on the three-state strategy, Nevada became the 36<sup>th</sup> 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 37<sup>th</sup> state to ratify the ERA.

**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 27<sup>th</sup> (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 to the legal argument 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 14<sup>th</sup> and 15<sup>th</sup> Amendments shows that legislative votes retracting ratifications have never been recognized as valid. (See Question 6.) Thus the 35 ratifications achieved before 1982 may be viable, and state ratifications that occur after 1982 may be accepted as valid.

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 (CRS) discussed this law article in its 1996, 2014, and 2017 reports on the status of ERA ratification. CRS analysts concluded that acceptance of the Madison Amendment does have implications for the three-state strategy, and the issue is more a political question than a constitutional one.

Since 1995, ERA supporters have advocated for passage of ERA ratification bills in the 15 unratified states. On March 22, 2017, 45 years to the day after Congress passed the amendment and sent it to the states for ratification, Nevada became the 36<sup>th</sup> state to ratify the ERA, and in May 2018, Illinois became the 37<sup>th</sup> state to ratify it. With only one more state needed to reach the required 38, legislatures in a number of unratified states have ERA ratification bills already introduced in the current session. Even after the 38<sup>th</sup> state ratifies, the remaining states continue to have the opportunity to ratify the amendment.



**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 ratification of a constitutional amendment is not accepted as valid.

During the ratification process for the 14<sup>th</sup> Amendment, New Jersey and Ohio voted yes and then rescinded their ratifications, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15<sup>th</sup> Amendment before the last necessary state ratified in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19<sup>th</sup> 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” . . . 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 . . . : “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. . . . [O]nce 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 25 states – Alaska, California, Colorado, Connecticut, Delaware, 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 19<sup>th</sup> 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 unfounded 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 14<sup>th</sup> Amendment guarantees all citizens equal protection of the laws, why do we still need the ERA?***

The 14<sup>th</sup> 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 14<sup>th</sup> 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 19<sup>th</sup> Amendment in 1920.

It was not until 1971, in *Reed v. Reed*, that the Supreme Court applied the 14<sup>th</sup> 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 14<sup>th</sup> 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 14<sup>th</sup> 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 14<sup>th</sup>-Amendment precedent when he stated that the Constitution does not protect against sex discrimination. This remark has been cited as clear evidence of the need for an Equal Rights Amendment 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 14<sup>th</sup> 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 legal equality of the sexes in their governing documents, however imperfectly implemented. 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–20<sup>th</sup> century based on the constitutional principles of right of privacy and due process. 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 abortion 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. The existence of an Equal Rights Amendment in the Constitution would almost certainly influence 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 have 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 for the majority that a gender-based classification is 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 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 enforcement by the states as well, appears in eight other amendments, beginning with the 13<sup>th</sup> 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?***

The remarkably high level of public support for a constitutional guarantee of equal rights on the basis of sex continues to rise.

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.



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## **WHY THE EQUAL RIGHTS AMENDMENT REMAINS LEGALLY VIABLE AND RESCISSIONS ARE INVALID**

### ***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.

The Equal Rights Amendment to the U.S. Constitution, first proposed by Alice Paul in 1923, was passed by the Senate and the House of Representatives on March 22, 1972, by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline in the proposing clause was later extended by Congress to June 30, 1982. At that date, only 35 of the necessary 38 of the states had ratified the ERA. It has not yet become part of the Constitution.

### **The ERA is still legally viable and properly before the states.**

In the 1990s, supporters began to advocate for passage of ERA ratification bills in the 15 so-called “unratified” states (Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia). Between 1995 and 2019, ERA ratification bills were introduced in one or more legislative sessions in 14 of these states (all except Alabama).

Political activity in the unratified states is the result of a “three-state strategy” for ERA ratification, which was developed after the 27th (“Madison”) Amendment was added to the Constitution in 1992, more than 203 years after its 1789 passage by Congress. Acceptance of that uniquely long ratification period as sufficiently contemporaneous has led to legal analysis contending that the ERA’s existing 35 state ratifications remain legally viable and it is still properly before the states for consideration. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14<sup>th</sup>, 15<sup>th</sup>, and 19<sup>th</sup> Amendments shows that rescissions or other legislative retractions of ratifications have never been accepted as valid.

This untrodden constitutional ground is explored by Allison Held *et al.* in “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,” *William & Mary Journal of Women and the Law*, Spring 1997. The Library of Congress’s Congressional Research Service discussed this analysis in their 1996, 2014, and 2017 reports on the status of

ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the legal viability of the ERA's three-state strategy.

On March 22, 2017, 45 years to the day after Congress sent the amendment to the states for ratification, Nevada became the 36<sup>th</sup> state to ratify the ERA. On May 30, 2018, Illinois became the 37<sup>th</sup> state to ratify. In 2019, legislatures in several other unratified states may provide the 38<sup>th</sup> approval necessary to put the ERA into the Constitution.

**No previous efforts to withdraw a state ratification by rescission or other means have ever been accepted as valid.**

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment after first ratifying it. However, based on precedent, case law, and statutory language, a state's vote to rescind or otherwise withdraw its ratification of a constitutional amendment has never been accepted as valid.

During the ratification process for the 14<sup>th</sup> 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 15<sup>th</sup> Amendment before the last necessary state ratified in 1870, but it was listed as one of the ratifying states.

In *Leser v. Garnett* (1922), the Supreme Court upheld the constitutionality of the 19<sup>th</sup> Amendment with language supporting the claim that a state's ratification of a federal amendment ends its ability to further participate in that amendment's ratification process:

“The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the Legislatures of 36 states, and that it “has become valid to all intents and purposes as a part of the Constitution of the United States.” As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.”

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.”

A 1981 court decision (*Idaho v. Freeman*) in the U.S. District Court of the District of Idaho is sometimes inaccurately cited as support for the claim that the ERA time extension was invalid and rescission votes are permissible. This decision was appealed to the Supreme Court, which



did not hear arguments on the appeal before the June 30, 1982 ratification deadline passed. As the Congressional Quarterly's 1982 *CQ Almanac* explained:

“Not only did the justices dismiss the cases as moot, they also vacated the lower court decision [*Idaho v. Freeman*], wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it.”

In an October 25, 2012 letter to Congresswoman Carolyn Maloney (NY), longtime lead sponsor of the traditional ERA ratification bill in the House of Representatives, Archivist of the United States David Ferriero wrote:

“[The National Archives and Records Administration's] website page “The Constitutional Amendment Process” ([www.archives.gov/federal-register/constitution](http://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.”

### **Bills in Congress support implementation of the three-state strategy for ERA ratification.**

Since 1994, bills have been introduced in each session of Congress to support the premise that ERA ratification will be accomplished when an additional three states beyond the original 35 ratify it.

In the 116<sup>th</sup> Congress (2019-2020), companion bills *S.J. Res. 6*, co-sponsored by Senators Benjamin Cardin (D-MD) and Lisa Murkowski (R-AK), and *H.J. Res. 53*, sponsored by Representative Jackie Speier (CA), aim to maintain the legal viability of the 35 state ratifications achieved before the 1982 deadline. They resolve

That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment [the ERA] proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.

*For further information, see [www.equalrightsamendment.org](http://www.equalrightsamendment.org) and [www.eracoalition.org](http://www.eracoalition.org).*