

COMMON LEGAL QUESTIONS

What is the ERA and what is its status today?

The Equal Rights Amendment would add a provision to our Constitution saying that “[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”

Congress passed the ERA in 1972 with broad, bipartisan support, including from the Republican Party and President Nixon. The Amendment then went to the states for ratification. By the late 1970s, the legislatures of 35 states had ratified it—three short of the 38 required for a constitutional Amendment.

Now, decades later, the ERA is surging forward again. In 2017, Nevada became the 36th State to ratify. In 2018, Illinois became the 37th. In 2020 Virginia became the 38th, reaching the threshold set by Article V of the Constitution, which provides that an Amendment is effective when ratified by three-quarters of the states.

Why is the ERA before Congress again?

The joint resolution that introduced the ERA included a time limit for ratification. It said the ERA would become part of the Constitution when ratified by three-quarters of the states within seven years. Congress later passed another resolution, extending the time limit to 1982. When 1982 came and went, the movement stalled, though broad support for the ERA has continued. Every session since 1982, a bill has been introduced in Congress that would start the process over again.

Today, there are also bills pending that would do something different: they would eliminate the time limit, allowing the original ratification process to continue. See S.J. Res 1; H.J. Res 17. This is possible because the original time limit appeared in a joint resolution, rather than in the text of the Amendment itself. A joint resolution can be changed, under the basic principle that one Congress cannot bind subsequent Congresses.

If the time limit remains in place, courts will be asked to decide whether a time limit in a joint resolution can really be effective to stop an Amendment from becoming part of the Constitution once it has been ratified by three-quarters of the states. But to avoid that issue altogether—and to express Congress’s intent that the Amendment be effective with the ratification of the 38th state, as the framers of the Constitution intended—Congress can vote now to eliminate the time limit.

Why is the ERA necessary, in light of the Constitution's Equal Protection Clause?

The 14th Amendment says that the government may not “deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court has held that this provision gives some protection against sex discrimination, but it doesn’t apply to sex in the same way it applies to race or national origin. And some justices believe that the decisions that extended the 14th Amendment to sex discrimination are wrong, because the framers of the 14th Amendment did not have sex equality in mind. According to the late Justice Scalia, “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.” As a result, if the Court moves to the right, the decisions that say the 14th Amendment provides some protection against sex discrimination could be rolled back.

Ratification of the ERA would enshrine equal rights as a core value in our Constitution, finally providing an explicit guarantee of protection against discrimination on the basis of sex.

How would the ERA differ from the protections already provided under the law?

Many federal, state, and local laws prohibit discrimination. For example, Title VII is a federal law that prohibits corporate and government employers from discriminating based on sex, race, color, national origin, or religion. Title IX is a federal law that (with certain exceptions) requires schools that receive federal funds to give students equal opportunities regardless of sex. The ERA addresses discrimination from a different perspective: it prohibits discrimination under the law, including in statutes, regulations, government employment, and law enforcement. And it would enshrine those protections in the Constitution, which can’t be changed as easily as other laws can.

What could Congress do under the ERA that it currently cannot do?

The second clause of the ERA says that “Congress shall have the power to enforce, by appropriate legislation,” the equal rights guarantee reflected in the first clause. This would give Congress power to enact laws protecting against sex discrimination at the state level—for example, in law enforcement and criminal law.

In 2018 a federal court in Michigan struck down a federal criminal law relating to female genital mutilation, on the ground that Congress lacked the power under the Constitution’s Commerce Clause to pass that kind of law. (That decision is currently on appeal.) The second clause of the ERA would give Congress an independent source of power to enact laws like that one, to ensure that girls are adequately protected against this harmful procedure. Passage of the ERA would also give Congress the power to enact laws that ensure adequate prosecution of and protection against sexual assault and domestic violence.

Didn't some states try to "undo" their ratifications?

In the 1970s, five of the states that ratified the ERA later passed resolutions attempting to limit or rescind their prior ratifications. But historically, resolutions like these have not prevented the original ratifications from counting toward the threshold. When the 14th Amendment was ratified in 1868, for example, it became part of the Constitution even though two states had passed resolutions attempting to rescind their prior ratifications—and those two states were included on the list of states that ratified. Although one court held in 1981 that a state does have the power to rescind its ratification of the ERA, the Supreme Court vacated that decision after the ERA time limit had passed, so it is no longer on the books.

Opponents of the ERA have said that it would prohibit any distinctions based on sex, so it would harm women rather than helping them. Is that true?

No. The government would still be able to draw distinctions based on sex if they pass "strict scrutiny." So, if a state has a compelling interest in maintaining a specific sex-based distinction—for example, limiting a battered women's shelter to women, to protect them from continued trauma—the ERA would not affect it. Indeed, many states have had ERAs in their own constitutions for many years, and those ERAs have not led to the elimination of all sex distinctions—for example, in single-sex prisons, locker rooms, and bathrooms. In any event, most of the laws that people think of as benefitting women—like social security regulations, WIC benefits, laws requiring child or spousal support, and so on—are actually already sex-neutral.

Wouldn't the ERA require a major change in military service and the draft?

No. There is currently nothing that prevents the draft from being extended to women. In fact, the Senate passed a bill in 2016 that would have required women to register. The bill had the support of the late Senator John McCain, who noted that women already serve with great distinction in our armed forces. And a federal court in Texas recently held that a male-only draft would be unconstitutional even under the 14th Amendment.

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For more information, please visit <http://www.eracoalition.org/> or <https://www.winston.com/en/resource/equal-rights-amendment.html>