

POLICY PAGES

Equal Rights Amendment

September 4, 2019

OVERVIEW

The Equal Rights Amendment (ERA) is an amendment to the United States Constitution proposed in the 1970's. The amendment reads:

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.

Proponents of the ERA argue this constitutional amendment is necessary to ensure equal rights and equal pay for women. Although these goals are laudable, the ERA is unnecessary because the Fifth and Fourteenth Amendments *already* guarantee equal protection under the law, and countless federal, state, and local laws *already* prohibit sex discrimination and unequal pay.

In addition, the ERA advances abortion rights and could require taxpayer funding of abortion. Finally, the ERA is legally dead. The deadline to ratify the ERA was 1982, so any attempt to ratify the ERA is futile and it would likely embroil the state in lengthy and expensive court cases.

ANALYSIS

Congress passed the Equal Rights Amendment in 1972 and was ratified by 35 states, three states short of the 38 states required for ratification. The initial deadline for ratification was 1979, but Congress extended the deadline to 1982, though it remained unratified.¹

As the negative consequences of the ERA became evident, five states voted to rescind or withdraw their ratification: Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979).²



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Now, long after the deadlines have passed, a new movement is pushing for ratification, claiming that there is legal precedent to ratify the amendment beyond the deadline.³ With this new push, Nevada (2017) and Illinois (2018) became the 36th and 37th states to ratify the ERA.⁴

THE ERA IS UNNECESSARY

Contrary to what proponents argue, the ERA is unnecessary. First, the U.S. Supreme Court has consistently ruled that both the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment guarantee women equal protection under the law.⁵

The Court made this abundantly clear in *United States v. Virginia* (1996):

Since *Reed* [1971], the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.⁶

As the American Civil Liberties Union (ACLU) notes, in *Reed* “[t]he Supreme Court set a precedent upon which many significant later cases would rest when it ruled that sex-based classifications violated the Equal Protection Clause of the Fourteenth Amendment.”⁷ That is why the ACLU’s Women’s Rights Director, Lenora Lapidus, could write, since *Reed* “it has been clearly understood that the 14th Amendment prohibits discrimination based on sex. *In decision after decision*, many authored by conservative Supreme Court justices, this principle has been reaffirmed.”⁸ (emphasis added).

Second, countless federal, state, and local laws *already* prohibit sex discrimination, including pay discrimination. Nondiscrimination laws throughout the country, at all levels of government, prohibit sex discrimination. In addition, federal laws — like the Equal Pay Act, the Civil Rights Act, and the Lilly Ledbetter Fair Pay Act — and Arizona’s Equal Wages law⁹ prohibit pay discrimination based on sex. Therefore, the ERA would do nothing for equal pay— it would simply authorize Congress to pass laws requiring what the law *already* requires.

THE ERA IS ABOUT ABORTION

The ERA advances abortion rights and could require taxpayer funding of abortion. Pro-abortion organizations agree:

- According to the ACLU, the ERA “could provide an addition[sic] layer of protection against restrictions on abortion . . . [and be] an additional tool against further erosion of reproductive freedom and the stereotypes restrictions on reproductive freedom reflect and engender.”¹⁰

- According to NARAL Pro-Choice America, “the ERA would reinforce the constitutional right to abortion” and “would require judges to strike down anti-abortion laws.”¹¹
- According to National Organization for Women (now), “an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care and contraception. Denial of legal and appropriate medical care for women – and only women – is sex discrimination and a powerful ERA should recognize and prohibit that most harmful of discriminatory actions.”¹²

More significantly, courts have already ruled that restrictions on abortion violate the ERA language. For instance, state courts in Connecticut and New Mexico have struck down prohibitions on taxpayer-funded abortions as violations of their state ERAs.¹³

Planned Parenthood is using this same argumentation in a lawsuit it filed in early 2019 challenging Pennsylvania’s ban on abortion coverage in its Medicaid program.¹⁴ In its brief, Planned Parenthood argues Pennsylvania’s ERA requires taxpayer funding of abortion because men receive comprehensive coverage without restriction, but the coverage ban “improperly discriminates against women based on their sex without sufficient justification” in violation of the state’s ERA.¹⁵ Although proponents might contend the ERA is not about abortion, their own statements and legal arguments prove otherwise.

THE ERA IS LEGALLY DEAD

The self-imposed Congressional ERA ratification deadlines of 1979 and 1982 have long passed. Therefore, any attempt to ratify the ERA is a futile exercise. Congress put a deadline on the ratification for a reason and it cannot be simply set aside. The thirty-five states that initially ratified the amendment did so with the deadline in mind. In addition, when the deadline passed in 1982, the U.S. Supreme Court dismissed all cases related to the ERA because it held the cases to be moot, suggesting the controversy was over.¹⁶

Known as the “three-state strategy,” proponents contend the ERA can still go into effect because “(1) Congress has the constitutional authority to propose, alter, or terminate any limits on the ratification of amendments pending before the states; (2) all existing ratifications remain in effect and viable; (3) rescissions of ratification passed by some states are invalid.”¹⁷ However, as should be obvious, these three propositions are legally suspect and would be challenged in court.¹⁸

In any case, if Arizona ratifies the ERA and becomes the 38th and last state needed to ratify, it would likely embroil Arizona in lengthy and expensive court cases.

CONCLUSION

The Arizona Legislature should not ratify the Equal Rights Amendment. The Fifth and Fourteenth Amendments already guarantee equal protection under the law, and countless federal, state, and local laws already prohibit sex discrimination, including pay discrimination. Moreover, the ERA would advance a pro-abortion agenda, and would likely embroil Arizona in lengthy and expensive court cases.

TALKING POINTS

- **The ERA is unnecessary because the Fifth and Fourteenth Amendments already guarantee equal protection under the law for men and women.** There are no constitutional rights that men have that women do not also have.
- **The ERA is unnecessary because countless federal, state, and local laws already prohibit sex discrimination, including pay discrimination.**
- **The ERA is not about equal pay. Several federal and state laws already require equal pay for women.** The Arizona Board of Regents recently agreed to pay \$190,000 to three former college deans to settle their gender discrimination lawsuit filed under these types of laws.¹⁹ Clearly, current laws are working. Equal pay is a red herring.
- **The ERA is really about abortion; state courts have already required taxpayer funded abortions based on state ERAs.** Pro-abortion organizations like the ACLU, NARAL Pro-Choice America, and NOW have all made public statements lauding the ERA for advancing their pro-abortion agenda.
- **The ERA is legally dead; the deadline for ratification passed in 1982.** If Arizona became the 38th state to ratify, it would embroil Arizona in lengthy and expensive court cases.

¹THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 1 (2018). Available at <https://crsreports.congress.gov/product/pdf/R/R42979>.

²*Id.* at 14 n.76.

³Organizations advocating for the ratification of the ERA include, [Alice Paul Institute](#), [American Civil Liberties Union \(ACLU\)](#), [Equality Now](#), [NARAL Pro-Choice America](#), and [National Organization for Women \(NOW\)](#) to name a few.

⁴[Nevada ratifies Equal Rights Amendment decades past deadline](#), Las Vegas 8 News Now, March 22, 2017; Brendan O'Brien, [Illinois passes Equal Rights Amendment, more than three decades after deadline](#), Reuters, May 30, 2018.

⁵The U.S. Supreme Court approaches due process claims under the Fifth Amendment— which applies to the federal government— “precisely the same as to equal protection claims under the Fourteenth Amendment,” which applies to the states. [Weinberger v. Wiesenfeld](#), 420 U.S. 636, 638 n.2 (1975).

⁶[United States v. Virginia](#), 518 U.S. 515, 532 (1996).

⁷*The ACLU and Women's Rights: Proud History, Continuing Struggle*, ACLU. Available at <https://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle>.

⁸Lenora M. Lapidus, *The Constitution Protects Women Despite Justice Scalia's Views*, ACLU (Jan. 6, 2011, 11:46 AM). Available at <https://www.aclu.org/blog/smart-justice/mass-incarceration/constitution-protects-women-despite-justice-scalias-views>.

⁹A.R.S. §23-341(A) reads, “[N]o employer shall pay any person in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work.”

¹⁰Letter from the ACLU to Steven Cohen, Chair House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, and Mike Johnson, Ranking Member Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, regarding the Equal Rights Amendment (May 8, 2019). Available at https://www.aclu.org/sites/default/files/field_document/2019.5.8_aclu_statement_for_the_record_equal_rights_amendment-final.pdf.

¹¹NARAL Pro-Choice America, *Campaign: ERA Y-E-S*. Available at https://web.archive.org/web/20190903200533/https://www.prochoiceamerica.org/campaign/era_yes/.

¹²Bonnie Grabenhofer, *Is the Equal Rights Amendment Relevant in the 21st Century?*, National Organization for Women. Available at <https://web.archive.org/web/20190903224944/https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

¹³*Doe v. Maher*, 40 Conn. Sup. 394, 449 (1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

¹⁴*Allegheny Reproductive Health Center, et al. v. Pennsylvania Department of Human Services, et al.*, No. 26 M.D. 2019 (Pa. Commw. Ct. filed Jan. 6, 2019).

¹⁵*Id.* at p. 27-28.

¹⁶*Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

¹⁷NEALE, *supra* note 1, at 4.

¹⁸For an in-depth discussion of the legal issues involved with the ratification of the ERA, see *id.* at 18-31.

¹⁹AP News, Arizona board agrees to pay \$190k in gender pay settlement, August 1, 2019. Available at <https://apnews.com/4e9cf524f87944ba89f8f5761a433cdc>.