THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS

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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 1923, the ERA has generated both rabid support and fervid opposition. Interpretations of its intent and potential impact have been widely varying, even contradictory.

These frequently asked questions about the ERA encourage an understanding of the amendment based on facts rather than misinformation. A 17-minute educational film, "The Equal Rights Amendment: Unfinished Business for the Constitution," can be purchased as a DVD or downloaded via www.equalrightsamendment.org.

1. Why is an Equal Rights Amendment to the U.S. Constitution necessary?

The Equal Rights Amendment is necessary because when the Constitution was originally written, all women had far fewer civil and legal rights than privileged categories of men did. That founding document has never been amended or interpreted to guarantee that the rights of women as a class and the rights of men as a class are equal.

When the U.S. Constitution was adopted in 1787, the rights it affirmed were guaranteed equally only for certain white males. After a bloody civil war and ongoing political struggles, those rights have been extended far more broadly through constitutional amendments, laws, and court decisions. However, those rights are not yet guaranteed to apply equally without regard to sex.

The Equal Rights Amendment would provide a fundamental constitutional remedy against sex discrimination by guaranteeing that legal rights may not be denied or abridged on account of sex. For the first time, sex would be considered a suspect classification, as race, religion, and national origin currently are. 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.

The ERA would guarantee "Equal Justice Under Law" (the promise inscribed over the entrance to the Supreme Court) and send a strong preemptive warning against writing, administering, or adjudicating laws unequally on the basis of sex.

2. What is the political history of the Equal Rights Amendment?

The Equal Rights Amendment was first proposed and introduced in Congress 100 years ago and has still not been affirmed as part of the U.S. Constitution.

The original Equal Rights Amendment was proposed in 1923 by Alice Paul, woman suffrage leader and head of the National Woman's Party, and was introduced in Congress in the same year. 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.

For several decades, supporters of women's rights were divided over the desirability of the Equal Rights Amendment. The protectionists feared it would eliminate hard-won labor laws regulating working conditions for women, while the emancipationists believed that "gendered citizenship" traditionally disadvantaged women and should no longer be constitutional.

In 1943, Paul reworded the text into the key Section 1 of the ERA (now called the "Alice Paul Amendment") that was eventually sent to the states for ratification in 1972:

> *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.

This wording was modeled on the 19th 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." Ratified in 1920, the 19th Amendment is still the Constitution's only explicitly affirmed guarantee of an equal right for women, the right to vote.

On March 22, 1972, in accordance with the constitutional amendment process described in Article V of the Constitution, the ERA passed the Senate and the House of Representatives by well over the required two-thirds majority and was sent to the states for ratification. Although no ratification time limit is mentioned in Article V, a seven-year deadline was placed in the proposing clause, not in the text of the amendment itself. [*See Question 5 for more details.*] In 1978, when the ERA had received only 35 of the necessary 38 approvals (three-fourths of the states, as required by Article V), Congress passed a bill by a simple majority extending the deadline to June 30, 1982. Although Article V does not give the President any role in the amendment process, President Jimmy Carter signed the extension bill as a symbolic show of support for the ERA.

By the June 30, 1982 deadline, no more states had ratified the ERA. Two weeks later, the amendment was reintroduced in Congress, and the ERA has continued to be reintroduced in

every session of Congress since that time. A November 1983 floor vote in the House of Representatives under a suspension of the rules failed to achieve the required two-thirds majority by only six votes.

Beginning with the 113th Congress (2013-2014), wording that varies from the 1972 version was included in the text of the reintroduced ERA bill in the House of Representatives:

> *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.

In the 117th Congress (2021-2022), the reworded ERA bill was introduced in the House of Representatives by lead sponsors Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY. The ERA bill in the Senate, with language unchanged from the 1972 version, was introduced by lead sponsor Senator Robert Menendez, D-NJ.

In the 118th Congress (2023-2024), no "start-over" ERA bill has been introduced in the House or the Senate. Constitutional scholars and ERA advocates have presented a substantive legal argument to support the claim that the ERA is now ratified as of January 27, 2020. [*See Questions 3, 4, and 5 below*.]

3. What is the three-state strategy for ERA ratification?

Since 1994, an alternative "three-state strategy" for achieving ERA ratification has been pursued in Congress, state legislatures, and the courts. Through this strategy, the ERA achieved the last of its necessary 38 state ratifications on January 27, 2020.

In 1994, a novel "three-state strategy" for ERA ratification was first proposed by the ERA Summit, a small national volunteer organization of ERA advocates who met in Washington, DC during the 1990s.

This strategy was developed after the 1992 ratification of the 27th (Madison) Amendment, which was added to the Constitution more than 203 years after its 1789 passage by Congress with no time limit attached. After the 38th state approved the amendment, House Speaker Tom Foley (D-WA) considered challenging the validity of the unusual ratification process, but he changed his mind when members of Congress realized how popular the amendment was. The Archivist published it with certification of its ratification, and a day later Congress passed a bill declaring the ratification valid, thereby affirming its political acceptance of the process. Congress has made such a legislative affirmation of a ratification only one other time, when it passed a joint resolution declaring that the 14th Amendment was duly ratified in 1868. [*See Question 4 for the relevance of this history to the current status of the ERA*.]

Acceptance of the Madison Amendment's ratification period as sufficiently contemporaneous

led some advocates to posit that the ERA's existing 35 ratifications were still valid and that states could ratify the amendment even though the deadline had passed. They argued that Article V, specifying the process for constitutional amendments, does not mention a time limit, and any time limit on ERA ratification would be open to change, as Congress demonstrated in extending the original deadline. Precedent with the 14th and 15th Amendments shows that state votes to retract their ratifications have never been accepted as valid. [*See Question 6.*]

The legal explanation for this strategy is found 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). Analysts at the Library of Congress's Congressional Research Service (CRS) considered this law article in their periodic reports on the status of ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the three-state strategy. Resolution of the procedural issues, they said, is more a political question for Congress than a constitutional one for the courts.

The first three-state strategy bill, introduced in 1994 by Representative Robert Andrews (D-NJ), stated 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 override any previous deadline and affirm the validity of the ERA's ratification when the constitutionally required 38 states have approved the amendment. This bill has been introduced in every session of Congress since that time, with the effort led by Senator Benjamin Cardin (D-MD) in the Senate and Representative Jackie Speier (D-CA) in the House.

In the 118th Congress (2023-2024), the three-state strategy bills are *S.J. Res. 4* (lead sponsors Senators Benjamin Cardin, D-MD and Lisa Murkowski, R-AK) and *H.J. Res. 25* (lead sponsor Representative Ayanna Pressley, D-MA). These companion bills state:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* 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 proposed to the States in that joint resolution is valid to all intents and purposes as part of the United States Constitution having been ratified by the legislatures of three-fourths of the several States.

The language of this resolution, when passed by Congress, will affirm that the Equal Rights Amendment is now the 28th Amendment to the Constitution.

In the last two sessions of Congress, the House of Representatives took the next step toward putting the ERA into the Constitution when it passed the three-state strategy bill invalidating any deadline on the ERA's ratification. However, the companion bill in the Senate was prevented by Republican leadership from being brought up for a vote in committee or on the floor before the end of both sessions.

As of March 8 in the current Congressional session, *S.J. Res. 4* in the Senate has 52 co-sponsors (including two Republicans), and *H.J. Res. 25* in the House has 153 (including one

Republican). Democratic leadership in the Senate, with a 51-49 majority, does not have the 60 votes required to defeat a filibuster that would keep the bill from being put up for a vote. The outcome of a vote in the House, with its thin 222-213 Republican majority, is not a foregone conclusion.

4. Having achieved ratification by the required 38 states, is the Equal Rights Amendment now in the Constitution?

Leading constitutional scholars, including Laurence Tribe of Harvard, Kathleen Sullivan of Stanford, and Erwin Chemerinsky of the University of California Berkeley, have stated that the Equal Rights Amendment has met the necessary requirements for ratification and is now included in the Constitution. However, the Archivist of the United States has not yet taken the final ministerial step of publishing the ERA in the* Federal Register *with certification of its ratification as the 28th Amendment, pending resolution of political, legal, and judicial challenges to its unique ratification process.

The Equal Rights Amendment has now met the standard in Article V that an amendment is "valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states."

When a state approves a proposed amendment, it submits its ratifying documents to the National Archives and Records Administration (NARA), an independent agency. In accordance with law (1 U.S.C. 106b), when NARA receives notice of at least 38 state approvals, the U.S. Archivist publishes the amendment, with a certification of the ratification documents and a list of the ratifying states. The Archivist's certification is final and conclusive, and the amendment is part of the Constitution as of the date of the 38th state approval, with no further action by Congress required.

Some circumstances of the ERA's ratification history have never arisen with other amendments. The ERA is the only proposed constitutional amendment to achieve approval by 38 states after the expiration of a ratification deadline set and extended by Congress. [*See Question 5*.] Also, six of the states that ratified the ERA subsequently voted to withdraw their ratification. [*See Question 6*.] It is important to note that a 1981 *Idaho* v. *Freeman* district court ruling, often still cited by ERA opponents to support their contention that deadline extensions are invalid and rescissions are permissible, was vacated as moot by the Supreme Court in 1982 and has no legal standing as a precedent.

On January 6, 2020, in a written opinion responding to a request from the U.S. Archivist for clarification regarding his duty to publish the ERA after a 38th state ratified, the Department of Justice's Office of Legal Counsel under Attorney General William Barr in the administration of President Donald Trump contended that the ERA was dead because its time limit had expired. ERA supporters in Congress and elsewhere countered that Article V gives no role in the constitutional amendment process to the Executive Branch, and that the Department of Justice's opinion is not binding on the Legislative Branch. The Department of Justice under Attorney General Merrick Garland in the administration of President Joe Biden has characterized the

Trump administration's memo as inaccurate and has called for Congressional action to resolve the status of ERA's ratification.

After Virginia's ratification of the ERA on January 27, 2020, several lawsuits were filed against then U.S. Archivist David Ferriero, arguing that he had a ministerial duty (defined as the action of a public officer with no room for the exercise of discretion because the action is required by law) to publish and certify the ERA as part of the Constitution.

The most important of these lawsuits (*Virginia* v. *Ferriero*) was filed by the Attorneys General of Virginia, Illinois, and Nevada, the three states that ratified the ERA after the June 30, 1982 deadline. On March 5, 2021, Judge Rudolph Contreras in the U.S. District Court for the District of Columbia said that the plaintiffs' "laudable" motives were insufficient, because the deadline set by Congress for the ratification period is valid, and the states have no standing to sue. Virginia withdrew from the suit after electing a Republican governor in November 2021, and the remaining plaintiffs appealed that ruling, seeking a decision that the ERA is now part of the Constitution. On February 28, 2023, the DC District Court of Appeals rejected the request of the plaintiffs for a writ of mandamus declaring that the ERA is ratified, since the legal issue is not "clear and indisputable." No appeal of that decision has been announced.

Another lawsuit (*Equal Means Equal* v. *Ferriero*) was filed by the pro-ERA organization Equal Means Equal and several other plaintiffs, but the suit was dismissed for lack of standing, and an appeal of that ruling was rejected in January 2022. In May 2022, the Elizabeth Cady Stanton Trust filed separate lawsuits in Michigan, Rhode Island, and New York, asking each state court to declare the ERA a fully ratified and enforceable part of the Constitution and to require their state's attorney general to "identify and repair all sex discriminatory laws, policies, and programs." On February 27, 2023, the case was argued in a Michigan court.

January 27, 2022, marked two years since Virginia became the 38th state to ratify the ERA. Section 3 of the Equal Rights Amendment states: "This amendment shall take effect two years after the date of ratification." Based on the constitutional amendment process of Article V that declares an amendment ratified when the final necessary state ratifies, it is possible to argue that the ERA's requirement for the enforcement of equality of rights under the law without regard to sex became operative on January 27, 2022, two years after its date of ratification.

5. Is a state's ratification of a proposed constitutional amendment valid even if a ratification deadline has passed?

Arguments both for and against the validity of the ERA's ratification process because of the time limit issue have been made in Congress, the courts, and the Executive Branch.

Article V's description of the ratification process does not mention time limits, and no amendments proposed during the Constitution's first 130 years had time limits attached. The first amendment with a Congressionally imposed ratification deadline was the 18th Amendment (Prohibition), which was sent to the states in 1917 with an arbitrarily chosen time limit of seven

years. The 19th (Woman Suffrage) Amendment was passed by Congress with no deadline attached. All subsequent proposed amendments that were eventually ratified contained a seven-year time limit either in the text of the amendment ratified by the states or (beginning with the 23rd Amendment in 1960 and including the ERA) in the proposing clause, which is not voted on by the states.

The Supreme Court in *Dillon* v. *Gloss* (1921), a case involving a time limit in the words of the amendment itself, discussed Congress's right to set a ratification deadline in a passage that is commonly considered by legal scholars to be "dictum" (a non-binding statement in a decision that does not establish precedent). The Court later said in *Coleman* v. *Miller* (1939) that "Congress in proposing an amendment may fix a reasonable time for ratification" (likewise widely considered to be dictum) and that the timeliness of an amendment's ratification period is a political question for Congress to resolve if and when the amendment is approved by three-fourths of the states.

Two issues related to time limits that have arisen for the first time with the ERA's ratification process are (1) the validity of extending or removing an existing deadline by a vote in Congress, either before or after the deadline has passed, and (2) the validity of a state ratification of an amendment after the deadline has passed. Some legal scholars also raise the question of whether, if the Supreme Court's language about time limits in *Dillon* and *Coleman* is in fact dictum rather than precedent, Congress's application of any time limit on a constitutional amendment's ratification period might in fact violate Article V.

In a 2019 memorandum ("The Equal Rights Amendment: Advocacy, Litigation, and the 38th State"), the Legal Task Force of the national ERA Coalition stated:

> Congress has already changed the ERA's deadline once, extending it by more than three years. In doing so, Congress relied in part on the deadline's location in the preamble, rather than in the body of the amendment. No legal barrier prevents Congress from eliminating the deadline altogether – and doing so retroactively. No Supreme Court case has ever cast doubt on Congress's power with respect to the timing of ratification or suggested that Congress lacks the power to extend or remove a ratification deadline after the fact.

While these issues are being resolved, legislatures in the remaining 12 unratified states continue to have the authority to approve the amendment, and ERA ratification bills have been introduced in a number of them. Advocates in some states are also promoting analysis of their state statutes to identify those that would be in violation of the Equal Rights Amendment when it is affirmed to be in effect.

6. Can a state rescind or otherwise withdraw its ratification of a constitutional amendment that is still in the process of being ratified?

Article V grants no power of rescission to the states, and based on both precedent and statutory language, a state withdrawal of its ratification of a constitutional amendment has never been accepted as valid.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – attempted to rescind or withdraw their approval of the Equal Rights Amendment before the 1982 deadline. In 2021 the North Dakota legislature adopted a resolution saying that its ratification of the ERA lapsed in 1979. No state vote to withdraw approval of a constitutional amendment has ever been recognized as valid.

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. … 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."

During the 14th Amendment's ratification process, New Jersey and Ohio legislators voted yes and then rescinded their ratification, but both states were included in the published list of ratifying states in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state voted yes in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19th Amendment, approved it by one vote on August 18, 1920, but the House then "non-concurred" on August 31. However, the amendment had already been certified as part of the Constitution as of August 26 (now celebrated as Women's Equality Day).

U. S. Archivist David Ferriero wrote in an October 25, 2012, letter to Representative Carolyn Maloney, lead sponsor of the ERA in the House of Representatives, in response to her query about the official list of ratified states and the validity of rescissions:

> NARA'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.

The Archivist's accompanying list of 35 states that had ratified the ERA by 2012 included the five states that had attempted to withdraw their approval, marked by asterisks and also listed separately in a column marked "Purported Rescission."

As Archivist, David Ferriero recorded the ratifications of Nevada (2017) and Illinois (2018), but pursuant to a memo from the Office of Legal Counsel in the Trump administration's Department of Justice, he did not act to publish and certify the ERA after receiving Virginia's ratification documents in January 2020. He retired in the spring of 2022, and Colleen Shogan, the person nominated to be his successor, is still awaiting confirmation by the Senate.

7. Do some states have state ERAs or other guarantees of equal rights on the basis of sex?

State constitutions in 27 of the 50 states contain a guarantee of equal rights on the basis of sex, providing extensive evidence based on decades of state-level equal rights jurisprudence about the prospective impact of a federal ERA.

Only a federal Equal Rights Amendment can provide the highest and broadest level of legal protection against sex discrimination. However, the constitutions of 27 states – Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Nevada, 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. Ironically, three states with state-level equal rights amendments or guarantees – Florida, Louisiana, and Utah – have not yet ratified the federal ERA.

The ways in which state equal rights guarantees are worded, cited in lawsuits, or interpreted by state courts to achieve equal rights on the basis of sex are varied. Utah and Wyoming entered the Union in the 1890s with constitutions that affirm equal rights for male and female citizens. Some states (e.g., Colorado, Hawaii) amended their constitutions in the 1970s with language virtually identical to the federal ERA. Others (e.g., New Jersey, Florida) have language in their state constitution that implicitly or explicitly includes both males and females in their state affirmations of rights. Some state equal rights guarantees are restricted: e.g., California specifies equal employment and education rights, Louisiana prohibits "arbitrary and unreasonable" sex discrimination, and Rhode Island excludes application to abortion rights. On the other hand, Nevada in 2022 adopted the most comprehensive state ERA in the country, ensuring equal rights for all "regardless of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin."

States continue to update their constitutions with equal rights guarantees. The New York legislature has passed a state ERA that will be on the November 2024 ballot for public approval. Advocates in Maine and Minnesota are advancing state ERAs through their legislatures. As a point of historical comparison, by the time the 19th Amendment guaranteeing women's right to vote was added to the Constitution in 1920, only one-quarter of the states had enacted state-level guarantees of that right.

8. Since the 14th Amendment guarantees all citizens equal protection of the laws, and prohibitions against sex discrimination exist in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, and other laws and court decisions, why do we also need the ERA?

The 14th Amendment has never been interpreted to make sex a suspect classification like race, religion, and national origin. Laws can be repealed, inadequately applied, or unfairly adjudicated based on social or political bias.

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 in the Constitution, women had to continue their political battle for the right to vote, finally guaranteed by the 19th Amendment in 1920 but even then not fully enforced on the basis of race/ethnicity.

Over a century after it was ratified, the 14th Amendment was first interpreted by the Supreme Court to prohibit sex discrimination. In *Reed* v. *Reed* (1971) 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 14th Amendment jurisprudence requires for the suspect classifications of race, religion, and national origin. Disparate treatment of such protected classes must bear a necessary relation to a compelling state interest to be upheld as constitutional.

In cases of sex discrimination, courts currently apply a heightened (so-called "skeptical") level of intermediate scrutiny and require extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. However, the intermediate standard of review requires only that such classifications must substantially advance an important governmental objective. The ERA would make sex a suspect classification protected by the highest level of judicial scrutiny.

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 Executive Branch can negligently enforce such laws, and courts, including the Supreme Court, can interpret the intermediate standard of review to permit certain forms of sex discrimination.

The most recent evidence of the inadequacy of the 14th Amendment to provide protection for women's equal rights is the June 2022 Supreme Court decision in *Dobbs* v. *Jackson Women's Health Organization*, which contended that the 14th Amendment was not written to apply to sex discrimination and a state's regulation of abortion is not a sex-based classification deserving heightened scrutiny. [*See Question 9 for further discussion of the* Dobbs *decision*.]

In an interview reported in the January 2011 *California Lawyer*, the late Supreme Court Justice Antonin Scalia disregarded 40 years of 14th Amendment precedent when he stated that the Constitution does not protect against sex discrimination. This remark has been widely cited as clear evidence of the need to put the words of the Equal Rights Amendment in the Constitution, so that all judges, regardless of their judicial or political philosophy, will have to interpret the Constitution to prohibit sex discrimination.

In addition, ratification of the ERA would improve the United States' credibility globally with respect to sex discrimination. The majority of the world's countries affirm legal equality of the sexes in their governing documents, however imperfectly implemented. Some of those constitutions – in Japan and Afghanistan, for example – were written under the direction of the United States government.

9. How has the ERA been related to reproductive rights?

The Supreme Court's 2022 decision in* Dobbs *v.* Jackson Women's Health Organization *overturned nearly 50 years of reproductive rights precedent and returned control of abortion law to the states. Advocates contend that having the Equal Rights Amendment in the Constitution would provide federal protection for women's equal civil rights and bodily autonomy, including access to legal abortion and comprehensive reproductive health care.

Many restrictive laws dealing with contraception and abortion were invalidated in the past 60 years based on the legal principles of the right to privacy and due process. *Roe v. Wade* (1973), which affirmed the constitutional right of a pregnant person to decide whether or not to continue the pregnancy under specified conditions, was consistent with a line of court decisions expanding the constitutional "right to privacy" to protect individuals against excessive governmental reach into certain personal decisions in their lives. Supreme Court decisions in the following years narrowed that reproductive right with various restrictions.

On June 24, 2022, by a 5-4 decision in *Dobbs* v. *Jackson Women's Health Organization*, the Supreme Court overturned *Roe* v. *Wade* (1973) and *Planned Parenthood* v. *Casey* (1992), which had upheld the right to choose an abortion under certain restrictions defined by trimesters of pregnancy. The majority opinion by Justice Samuel Alito eliminates federal protection of that right and makes women subject to the abortion laws of the state they reside in. Punitive abortion bans are in place or imminent in over a dozen Republican-dominated states, and pregnant people in at least half the country may soon be unable to obtain a legal abortion without traveling to another state. A lawsuit in Texas is currently challenging the availability by mail of medication to produce an abortion, even in states where abortion care is legal.

In the *Dobbs* decision, Justice Alito stated that abortion restrictions are not sex discrimination. Additionally, Justice Clarence Thomas wrote in a concurring opinion that *Dobbs* provides grounds for reconsidering other right-to-privacy and due process precedents, thus threatening to do away with constitutional guarantees to contraception, same-sex relationships, and same-sex marriage.

With the Equal Rights Amendment in the Constitution, the legal tradition of "gendered citizenship" – the articulation of rights for women as a class and rights for men as a class incorporating certain assumptions about differing roles for the two classes – will be eliminated. Courts will then have to consider abortion litigation in the context of guaranteed rights that are equal for women and men, including rights to bodily autonomy, health care, religious liberty, equal protection and due process, unenumerated rights reserved to the people, and more.

State equal rights amendments have been cited in Connecticut and New Mexico cases dealing with 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 program. Those state Supreme Courts ruled that the state must fund both of those

pregnancy-related procedures if it funds either one, so the government cannot use fiscal pressure to influence a woman's exercise of her 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, not on the state constitution's equal rights guarantee.

Although some state courts have required Medicaid funding of medically necessary abortions, the U.S. Supreme Court has upheld the constitutionality of the "Hyde Amendment," which was added to the federal budget in 1976. This prohibition of federal funding for most or all abortions, including many that are medically necessary, survived an effort by the Biden administration to remove it in 2022.

10. How has the ERA been related to discrimination based on sexuality?

The application of laws prohibiting sex discrimination to situations of discrimination based on sexuality is currently evolving even without the Equal Rights Amendment in the Constitution.

Although discrimination on the basis of sexuality has not traditionally been treated by courts as a form of sex-based discrimination protected by an equal rights guarantee, federal and state laws and court decisions have rapidly evolved over the past several decades to legalize same-sex marriage and advance LGBTQ+ (lesbian, gay, bisexual, transgender, queer, plus) rights based primarily on equal protection, right-to-privacy, and individual liberty principles.

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 principles.

In June 2020, the Supreme Court ruled in *Bostock* v. *Clayton County* that Title VII of the Civil Rights Act of 1964, which bars employment discrimination based on race, religion, national origin, and sex, also applies to sexual orientation and gender identity. The cases under consideration dealt with the firing of an employee based on that person's sexual orientation, gender identity, or transgender status. The ruling was 6 to 3, with Chief Justice John Roberts and Justice Neil Gorsuch joining the liberal minority (Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan). The U.S. Equal Employment Opportunity Commission (EEOC) now defines sex discrimination as "treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy."

Justice Clarence Thomas's concurring opinion in the Supreme Court's *Dobbs* decision overturning *Roe* v. *Wade* highlights the vulnerability of same-sex relationships and same-sex marriage to adjudication by the current reactionary court majority. Legislators in a number of states are proposing and passing laws discriminating against transgender individuals, a major target in the current culture wars.

With the ERA in the Constitution, laws would have to be interpreted to advance equality of rights on the basis of sex, now including sexuality.

11. How has the ERA been related to single-sex institutions?

Even without the 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, in that case prohibiting discrimination against men as a class.

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 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.

12. How has the ERA been related to women in the military?

Women's status in the U.S. military has advanced rapidly in recent decades even without the Equal Rights Amendment in the Constitution, but the ERA would guarantee them the "equal justice under law" that they are risking and even sacrificing their lives to defend.

In 2021, women in the U.S. military made up 17.3 percent of the active-duty force and 21.4 percent of the National Guard and reserves. Women have participated in every war our country has fought, and they have held top-level positions in all branches of the military, as well as in government administration of defense and national security activities. They are fighting and dying in combat, and the armed services could not operate effectively without their participation.

However, without the ERA in the Constitution, women's equal access to military career ladders and their protection against sex discrimination in their chosen profession are not guaranteed. Sexual harassment and sexual assault by fellow service members continue to be a threat for women on military duty and at the service academies.

The issue of women and 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. Because the registration requirement classifies people based on the sex assigned at birth, transgender women are required to register, while transgender men are not. The status of transgender members of the military, which is vulnerable to shifts in policy depending on the political view of a given Administration, would be guaranteed as equal by the Equal Rights Amendment.

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 *Rostker* v. *Goldberg* (1981), the Supreme Court upheld the constitutionality of a male-only draft registration. The Department of Defense's 2015 decision to open all combat positions to women has revived the public debate about whether a future draft would include women. In a March 2020 report to Congress, the National Commission on Military, National, and Public Service recommended that registration for the draft be retained and expanded to include women as well as men.

It is virtually certain that a reactivated male-only draft system would be legally challenged as a form of sex discrimination and 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 inducted into military service.

Since there is no way to know what future draft requirements would be, a discussion about the ERA's relation to it is primarily theoretical.

13. Would the ERA adversely affect existing benefits and protections that women now receive (e.g., alimony, child custody, Social Security payments, etc.)?

Laws that include language based on sex stereotypes can be brought into conformity with the Equal Rights Amendment by substituting sex-neutral categories (e.g., "primary family caregiver" instead of "mother") to achieve their objectives.

Most family law is written, administered, and adjudicated at the state level. Court decisions in states with ERAs show that the benefits opponents claim women would lose remain constitutional if they are legislated in a sex-neutral manner based on function rather than on

stereotyped sex roles. That same principle would apply to laws and benefits related to Social Security and other programs at the federal level. Courts have for many years been moving toward sex-neutral standards in family court decisions, and legislatures have been writing laws with increased attention to sex-neutral language and intent.

14. Does the ERA shift power from the states to the federal government?

The ERA would not transfer jurisdiction of any laws 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, which sometimes lists enforcement by the states as well, appears in eight other amendments, beginning with the 13th Amendment in 1865. The ERA would simply be one legal principle among others in the Constitution by which courts evaluate the constitutionality of governmental actions.

15. What level of public support exists for a constitutional guarantee of equal rights for on the basis of sex?

People in the United States overwhelmingly support a constitutional guarantee of equal rights on the basis of sex.

Despite heightened partisanship and increased visibility of anti-equality policies and messaging in recent years, a June 2022 poll by Data for Progress showed that 85 percent of the people polled support the Equal Rights Amendment, with only 10 percent opposing it and 5 percent not sure. The breakdown by party showed very high support across the partisan divide, with 93 percent of Democrats, 79 percent of independents, and 79 percent of Republicans saying they strongly or somewhat strongly supported the ERA.

That support has grown since a 2020 poll by the Associated Press-NORC Center for Public Affairs Research found significant majority support nationally for the ERA. When asked “Do you favor or oppose the Equal Rights Amendment?” 73% of respondents (89% of Democrats, 61% of Republicans) said they favored it. Only 4% of respondents (1% of Democrats, 9% of Republicans) indicated that they opposed it. In line with previous polls, the gender gap was not significant, with 76% of women and 70% of men supporting the ERA.

Questions in previous polls generally used a term like “constitutional guarantee of equal rights for women and men” rather than “Equal Rights Amendment” in order to filter out a lack of knowledge or misconceptions about what the ERA is. Those polls showed that equal rights without regard to sex has public support at an almost unprecedented level. In 2016 the research agency db5 found that 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 and African-Americans, Asian-Americans, and Hispanic-Americans.

Polls consistently show that a strong majority of those polled think that the Constitution already guarantees equal rights to males and females (80% of those polled in the 2016 survey and 70% of those polled in the 2022 one).