The Equal Rights Amendment: FAQs

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1. Why is the ERA important?

Currently, the U.S. Constitution does not contain a guarantee against discrimination on the basis of sex. The ERA would change that. It would provide 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." It would also give Congress the power to enforce that constitutional guarantee by passing legislation.

This would be an important step for residents of Illinois. True, this State has already guaranteed equality in its own Constitution, which says that "equal protection of the law shall not be denied or abridged on account of sex by the state or its units of local government and school districts." *But the federal government is not subject to the same limitation.* Residents of Illinois may still be the subject of sex discrimination by the federal government, and the Illinois Constitution cannot protect them. The ERA would apply the same limitation to the federal government, and it would make the same rights enjoyed by Illinois residents available in every other state as well.

2. Why is the ERA necessary, in light of the rights provided under the 14th Amendment?

The Equal Protection Clause of the 14th Amendment says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has interpreted the 14th Amendment to provide *some* protection against classifications based on sex, but not as much as for classifications based on race, religion, and national origin.

Today, when a court considers a challenge to a law that classifies or discriminates based on sex, it will uphold the law as long as the classification bears a substantial relationship to an important government purpose. This is called "intermediate scrutiny." *Craig v. Boren* (S.Ct. 1976). The ERA would require a higher, "strict scrutiny" standard. Under that standard, the court would uphold the law only if it is narrowly tailored to achieve a compelling government interest and is the least restrictive means of doing so. *See, e.g., Regents of Univ. of California v. Bakke* (S.Ct. 1978); *Fisher v. University of Texas* (S.Ct. 2016).

This may sound like semantics, but it can make a big difference. For example, in *Ngyuen v. INS* (S.Ct. 2001), the child of an American father challenged an immigration law that gave automatic citizenship to children of American mothers but required American fathers to take affirmative legal steps to get the same benefit. Applying intermediate scrutiny, the Supreme Court upheld the statute. The case likely would have been decided differently under strict scrutiny, because there were non-discriminatory ways to accomplish the same goal.

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

Congress and some state legislatures and municipalities have enacted laws that prohibit certain kinds of sex discrimination. For example, Title VII is a federal law that prohibits discrimination against employees based on sex, race, color, national origin, or religion. It applies to private employers over a certain size, as well as to federal, state, and local governments. Other sex-related protections include Title IX, which prohibits sex discrimination in education, and the Pregnancy Discrimination Act, which prevents employers from engaging in sex discrimination based on pregnancy.

Outside the context of employment and education, however, the government can discriminate based on sex as long as its action meets the test for "intermediate scrutiny"—in other words, as long as the discrimination is substantially related to an

important government purpose. That kind of discrimination will be upheld even if the government could accomplish the same purpose *without* discrimination. The ERA would subject those laws to "strict scrutiny," just like laws that discriminate on the basis of race or religion.

4. What about the deadline for ratification?

When it enacted the ERA and sent it to the states for ratification, Congress included a preamble that set a 7-year deadline. Later, it extended that deadline by a couple of years. But that deadline was never part of the proposed amendment itself, so it was not part of the language that was ratified by the states. That means that Congress can arguably extend, remove, or waive that deadline if it chooses. Article V of the Constitution gives Congress very broad power over the amendment process. Further, the Supreme Court has held that it is entirely up to Congress to decide whether to impose a deadline on ratification—and, if no deadline is imposed, whether a ratification came too late. According to the Court, these are "political questions" that should be decided by elected legislators, not by the judiciary. *Coleman v. Miller* (S.Ct. 1939). In 1992, for example, Congress passed resolutions accepting the final states' ratification of the Madison Amendment 203 years after it was first proposed and sent by Congress to the states for ratification.

5. Didn't some states rescind their ratifications? What is the impact of that?

Yes, the legislatures of five states—Nebraska, Tennessee, Idaho, Kentucky, and South Dakota—passed resolutions in the 1970s purporting to repeal or rescind their prior ratifications. It is unclear whether those attempted rescissions are effective, as the Constitution is silent as to the effect, if any, of rescissions. One court held in 1981 that a rescission is effective if it happens before the amendment actually becomes part of the Constitution. The Supreme Court agreed to hear that case and decide the issue. Soon after that, however, the congressional deadline passed, so the Supreme Court dismissed the case as moot. The Supreme Court also vacated the lower court's decision, so there is no current case law on the effect of attempted rescissions.

If the ERA reaches 38 ratifications—and if Congress acts to accept those ratifications—this issue will likely arise again, along with the question whether Congress has the power to remove or waive a ratification deadline after the fact. Based on the case law discussed above, the Supreme Court arguably would find these to be "political questions" that should be resolved by Congress, not by the courts. When the Fourteenth Amendment was ratified in 1868, for example, Congress directed the Secretary of State to declare the Amendment to be ratified, even though two of the ratifying states had passed resolutions that purported to rescind their ratifications.

6. So, if 38 states ratify the ERA, what happens next?

The fight for the ERA will not end once the 38th state ratifies. At that point, Congress will likely need to pass another bill that either removes, extends, or waives the earlier deadline. It may also need to express a view about the effectiveness of the efforts of five states to rescind their prior ratifications. And once Congress acts, there will likely be litigation about whether its actions were within the power provided under the Constitution.

7. Opponents of the ERA have said that it would prohibit *any* distinctions based on sex, even when drawing such distinctions makes sense based on biology. As a result, they say that adopting the ERA would overturn laws that benefit women. Is that true?

No. Government entities would still be able to draw distinctions based on sex, as long as the distinctions are narrowly tailored and the least restrictive means to serve a compelling government interest. For example, the Pregnancy Discrimination Act has the effect of giving special protection to anyone who, based on sex characteristics, can become pregnant. But if that law were challenged under the ERA, the government would likely be able to demonstrate a "compelling interest" in making sure that

child-bearing cannot be used to deny a person the ability to participate fully in the economy. A classification based on pregnancy may well be narrowly tailored and the least restrictive means of achieving that goal.

8. Opponents of the ERA say that if it passes, states will lose their power to legislate about family law, sex crime laws, and other laws impacted by gender. Is that true?

No. Nothing in the ERA will take away the power of state legislatures. Yes, the ERA will give Congress "the power to enforce by appropriate legislation" the rights it creates. But it will not take any power away from the states—except the power to make unnecessary distinctions based on sex. As long as states make sure that their laws in these categories do not discriminate unnecessarily, their power will be unaffected.

9. Isn't this all about changing the law on abortion?

No. The right to abortion is already protected under the U.S. Constitution. Whether the ERA has an additional impact on state laws relating to abortion is something that courts will have to resolve, based on the goal that the state is attempting to achieve through the law and whether the law is narrowly tailored (and the least restrictive means) of achieving that goal. Within Illinois, ratifying the ERA will not lead to a significant change in the status of state laws that might touch on abortion, given that the Illinois Constitution already prohibits sex discrimination by the state government.

10. One anti-ERA organization has said that passing the ERA would require removing gender designations from bathrooms, locker rooms, jails, and hospital rooms. Is that true?

No. There is no reason to think that passing the ERA would eliminate these kinds of gender designations. The same equal rights guarantee has been part of the Illinois Constitution since 1970, and it has not eliminated the longstanding practice of having separate women's and men's restrooms in state government buildings and schools.

11. Isn't it true that adopting the ERA won't erase the gender wage gap?

Yes. The ERA alone won't solve the problem of the gender wage gap, because like other important constitutional amendments, it governs "state action"—that is, actions by federal, state, and local governments—and will not apply directly to private employers. So in the fight for gender equality, there will be plenty more left to do.

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