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THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS

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 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 lack of knowledge or misinformation.

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

The Equal Rights Amendment is necessary because the Constitution has never been interpreted to guarantee the rights of women as a class and the rights of men as a class to be equal.

When the U.S. Constitution was adopted in 1787, the rights it affirmed were guaranteed equally only for certain white males. After intense political battles and a bloody civil war, 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 legal remedy against sex discrimination by guaranteeing that constitutional 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” (as inscribed over the entrance to the Supreme Court) and send a strong preemptive warning against writing, enforcing, or adjudicating laws unfairly on the basis of sex.

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

The Equal Rights Amendment was first proposed nearly a century ago and has still not been added to the U.S. Constitution.

The original Equal Rights Amendment was proposed in 1923 by Alice Paul, a leader of the woman suffrage movement, 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.

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. [See *Introduction*.] The wording of the first two sections 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”), which for 100 years has been women’s only constitutionally guaranteed equal right, the right to vote.

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 the required two-thirds majority and was sent to the states for ratification on March 22, 1972. A seven-year deadline, not required by Article V, was placed in the proposing clause, not in the text of the amendment itself. [See *Question 5*.] 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 a November 1983 floor vote in the House of Representatives failed by only six votes. The ERA has continued to be reintroduced in every session of Congress since that time.

Beginning with the 113th Congress (2013-2014), wording that varies from the 1972 version has been added to 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.

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 116th Congress (2019-2020), the reworded ERA bill in the House of Representatives is *H.J. Res. 35* (lead sponsors, Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY). The ERA bill in the Senate, unchanged from the 1972 version, is *S.J. Res. 15* (lead sponsor Senator Robert Menendez, D-NJ).

Further information about the history of the ERA is available in a 17-minute educational film, "The Equal Rights Amendment: Unfinished Business for the Constitution," which can be purchased from the Alice Paul Institute as a DVD or downloaded via www.equalrightsamendment.org.

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

An unprecedented "three-state strategy" has produced the remaining three necessary state ratifications nearly four decades after the Congressionally imposed deadline passed.

Legislation was first introduced in Congress in 1994 to implement a novel method for ERA ratification, a "three-state strategy" proposed by the ERA Summit, a national volunteer organization of ERA advocates that met periodically in Washington, DC.

This strategy was developed after the 1992 ratification of the 27th (Madison) Amendment, which had no time limit attached and was added to the Constitution more than 203 years after its 1789 passage by Congress. After the 38th state approved that amendment, Speaker of the House Tom Foley (D-WA) considered challenging the validity of the unusually long ratification process, but he changed his mind when members of Congress recognized how popular the amendment was. The Archivist certified its ratification, and a day later Congress passed a bill declaring the ratification valid, thereby affirming political acceptance of the process. Congress has made such a legislative endorsement of a ratification only one other time, when it passed a joint resolution declaring that the 14th Amendment was duly ratified in 1868.

Acceptance of the Madison Amendment's ratification period as sufficiently contemporaneous led some ERA 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 the time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and that precedent with the 14th and 15th Amendments shows that state votes to retract ratifications have never been accepted as valid.

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 considered this law article 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 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 was introduced beginning in 1994 by Representative Robert Andrews (D-NJ). In 2011, Representative Tammy Baldwin (D-WI) introduced a revised 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 Senator Benjamin Cardin (D-MD) as the lead sponsor in the Senate.

The current three-state strategy bills – *S.J. Res. 6* (lead sponsors Senators Benjamin Cardin, D-MD, and Lisa Murkowski, R-AK) and *H.J. Res. 79* (lead sponsor Representative Jackie Speier, D-CA) – 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 shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States.

To advance the three-state strategy, ERA supporters have advocated since 1995 for passage of ERA ratification bills in the 15 states that did not approve the amendment by 1982 – Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. By 2020, only one of those “unratified” states, Alabama, has never had an ERA bill introduced in its legislature based on this strategy.

A renewed countdown of state ratifications began on March 22, 2017, when Nevada became the 36th state to ratify the ERA, 45 years to the day after Congress had passed it and sent it to the states for approval. On May 30, 2018, Illinois became the 37th state to ratify the amendment. Finally, on January 27, 2020, the Equal Rights Amendment reached the required goal of approval by 38 states when both houses of the Virginia legislature passed ERA ratification bills.

On February 13, 2020, the House of Representatives took the next step toward putting the ERA into the Constitution when it passed *H.J. Res. 79* to declare inoperative any deadline on the ERA’s ratification. If the companion bill in the Senate, *S.J. Res. 6*, passes before the end of this 116th session of Congress, the bills will become law. The President has no role in the Article V process of amending the Constitution and cannot veto this legislation.

Legislatures in the remaining unratified states continue to have the ability to approve the ERA, and ratification bills have been introduced in the current session in the majority of them.

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

Political and legal challenges to the ratification process must be resolved before the Equal Rights Amendment can be certified as part of the Constitution.

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.

Some circumstances of the ERA’s history vary from Article V’s ratification process, and several issues have not arisen with other amendments. The ERA is the only proposed constitutional amendment to achieve approval by the required number of states after the expiration of a ratification deadline set (and extended) by Congress. [See *Question 5*.] Also, five of the states that ratified the ERA subsequently voted to withdraw their ratification. [See *Question 6*.] As a result, several challenges to the validity of the ERA’s ratification process remain to be resolved.

Three lawsuits have been filed against the U.S. Archivist, two of them arguing that he has 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 certify and publish the ERA as part of the Constitution. The other lawsuit argues that he should not certify the ERA because the ratification process is invalid. In a January 6, 2020 written opinion responding to a request for clarification from the U.S. Archivist, the Department of Justice’s Office of Legal Counsel 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.

Many ERA opponents, including the litigants in the anti-ratification lawsuit, continue to refer to a 1981 *Idaho v. Freeman* district court ruling to support their contention that deadline extensions are invalid and rescissions are permissible. However, this decision was vacated as moot by the Supreme Court after expiration of the 1982 deadline, and it has no legal standing with regard to the resolution of those issues.

This dispute is being fought out on untraveled constitutional ground, and further developments in Congress and the courts will determine when the ERA will take its place as the 28th Amendment to the Constitution.

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 with respect to the time limit are being 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 Amendment was then passed by Congress with no deadline, but all subsequent proposed amendments that were eventually ratified contained a seven-year time limit either in the text of the amendment or (beginning with the 23rd Amendment in 1960 and including the ERA) in the proposing clause, not in the language ratified by the states.

The Supreme Court in *Dillon v. Gloss* (1921) 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:

One of the guiding principles of our legislative branch is that one Congress cannot bind or limit the power of later Congresses. ... 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.

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. No state vote to withdraw approval of a constitutional amendment has ever been recognized as valid.

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 (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. ... 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.”

U.S. Archivist David Ferriero wrote on October 25, 2012 to Congresswoman 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. ... 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.

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.” The Archivist has recorded the ratifications of Nevada (2017) and Illinois (2018), but he has not acted to certify and publish the ERA pursuant to receiving Virginia’s ratification documents in 2020.

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

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

Only a federal Equal Rights Amendment can provide 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 19th 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.

State constitutions may choose to provide greater equal rights protection than the U.S. Constitution does. Ironically, three states with state-level equal rights amendments or guarantees – Florida, Louisiana, and Utah – have not yet ratified the federal ERA.

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. Progressive laws can be repealed, ineffectively administered, or unfairly interpreted 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 fighting a long political battle for the right to vote, which was 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. However, 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.

Ratification of the ERA would also 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 – e.g., in Japan and Afghanistan – were written under the direction of the United States government.

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 for an Equal Rights Amendment, in order to guarantee that all judges, regardless of their judicial or political philosophy, will have to interpret the Constitution to prohibit sex discrimination.

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

The repeated claim of opponents that the ERA would have the direct effect of requiring government to allow “abortion on demand” misrepresents existing federal and state laws and court decisions, which have been based primarily on due process and the right of privacy.

In federal courts, including the Supreme Court, a number of restrictive laws dealing with contraception and abortion have been invalidated since the mid–20th century based on the constitutional principles of right of privacy and due process, not equal rights. *Roe v. Wade* (1973) falls squarely in the middle of a line of court decisions expanding the interpretation of the constitutional right of privacy of individuals to be protected against excessive governmental reach into certain personal areas in their lives.

State equal rights amendments have been cited in several state court decisions (e.g., in Connecticut and New Mexico) dealing with 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 program. The 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 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.

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. 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 certain restrictions on abortion in Pennsylvania under the federal due process clause.

State court decisions on abortion are not conclusive evidence of how federal courts would decide such cases. 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 prohibits federal government funding of nearly all Medicaid abortions, even medically necessary ones.

Recent Supreme Court decisions on reproductive rights (e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 2014) have raised concerns about the legal vulnerability of women’s right of privacy to have access to contraception as well as abortion. This spring the Supreme Court will hear two cases regarding whether employer health plans can receive expanded religious and moral exemptions from the Affordable Care Act’s requirement to cover birth control, which were granted by the Trump administration in November 2018 but prevented from taking effect by lower-court judges.

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 an Equal Rights Amendment.

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. Instead, federal and state laws and court decisions have rapidly evolved over the past several decades to legalize same-sex marriage and advance LGBTQAI (lesbian, gay, bisexual, transgender, queer, asexual, and intersexual) rights based primarily on equal protection 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.

Lower-court decisions in recent years have reached inconsistent conclusions about whether prohibition of sex discrimination includes discrimination on the basis of sexuality. Three cases argued before the Supreme Court in October 2019 deal with the firing of an employee based on that person's sexual orientation, gender identity, or transgender status. The court's decision, due by June 2020, will provide an interpretation at the highest judicial level of whether such actions on the basis of sexuality are held to be sex discrimination under the law.

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

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.

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.

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 an Equal Rights Amendment in the Constitution, but the ERA is needed to guarantee them the "equal justice under law" that they are risking and even sacrificing their lives to defend.

Women in 2019 made up 20% of the U.S. Air Force, 19% of the Navy, 15% of the Army, and almost 9% of the Marine Corps. They have participated in every war our country has fought and have held top-level positions in all branches of the military as well as in government defense and national security operations. 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. In addition, sexual

harassment and sexual assault by fellow service members continue to be a disproportionate 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. 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. 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.

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. 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 imminent prospect of reinstating the draft and no way to know what its requirements would be, a discussion about the ERA's relation to it is largely 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 use 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 provided in a sex-neutral manner based on function rather than on stereotyped sex roles. That principle would also apply to laws and benefits related to Social Security and other federal programs.

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. Legislators will have two years after the ERA is ratified to revise sex-based classifications in laws that might be vulnerable to challenge as unconstitutional after that time.

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. The power the states would lose is the power to discriminate on the basis of sex.

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 women and men?

Support for a constitutional guarantee of equal rights on the basis of sex is nearly unanimous.

In a 2016 poll for the national ERA Coalition, 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 99% among 18-to-24-year-olds and 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 Public Policy Polling survey 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.

By asking these questions without mentioning the words "Equal Rights Amendment," the surveys filtered out the direct effect of widespread misperceptions and misrepresentations of the ERA. The responses show that people in the United States increasingly, overwhelmingly, and almost unanimously support a constitutional guarantee of equal rights on the basis of sex.

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