

The Equal Rights Amendment: Common Legal Questions

1. What does the ERA do, and why is it important?

The U.S. Constitution does not guarantee equal rights for women. According to the late Justice Scalia, “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.”

The ERA would change that. It would guarantee 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 apply, for example, if the government passes a discriminatory law, or takes female assault victims less seriously than male victims, or imposes a tax that disadvantages women in particular, or denies female soldiers an equal chance to defend their country and move up in the ranks. The ERA would stand in the way of these and other discriminatory “state actions.”

The Illinois Constitution already prevents state and local officials from treating people differently based on sex. **But the Illinois Constitution does not apply to the federal government, including the President and Congress.** The ERA would protect Illinois women from federal discrimination and would provide equal rights in other states.

2. Why is the ERA necessary, in light of the Constitution’s Equal Protection Clause?

The Fourteenth Amendment says that no state may “deny to any person within its jurisdiction the equal protection of the laws.” The Fifth Amendment applies the same principle to the federal government. But these protections do not apply to sex in the same way they apply to race or national origin.

Today, when a court considers a challenge to a law that discriminates based on sex, it will uphold the law as long as it bears a “substantial relationship” to an “important government purpose.” This is called **intermediate scrutiny**. The ERA would require **strict scrutiny**—the same test that applies to discrimination based on race and national origin. Under that test, the law must be “narrowly tailored” to achieve a “compelling government interest,” and it must be the “least restrictive means” of doing so. This means that the court would strike down the law if the goal behind it is not appropriate and compelling, or if there is a different way to accomplish it.

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

There are a variety of local, state, and federal laws that prohibit discrimination. For example, Title VII is a federal law that prohibits employers from discriminating based on sex, race, color, national origin, or religion. It protects employees who work for corporations over a certain size, as well as federal and state employees. Title IX is a federal law that (with certain exceptions) requires any school that receives federal funds to give students equal opportunities regardless of sex. The ERA addresses discrimination from a different perspective: it would prohibit discrimination by the government, including in statutes, regulations, employment, and law enforcement.

4. What about the deadline for ratification that expired in 1982?

The ERA was ratified by 35 states before the deadline imposed by Congress. Last spring, Nevada became the 36th. Two more ratifications would be needed to make the amendment part of the Constitution. At that point, Congress will need to take action to accept the ratifications that came after the deadline.

Congress created the deadline, so it must have the power to remove it—or to extend it (as it did in 1979). The Supreme Court has held that it is up to Congress—not the courts—to decide how to deal with ratifications. [*Coleman v. Miller* (S.Ct. 1939).] A decision to remove the deadline should be analyzed the same way.

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

Yes, five states passed resolutions in the 1970s attempting to limit or rescind their ratifications. The effect of this is unclear. In 1981, a court held that an ERA ratification **can** be rescinded. The Supreme Court agreed to decide the issue, but then the deadline passed, so the Court dismissed the case.

If the ERA reaches 38 ratifications—and if Congress accepts the ratifications that came after the deadline—this issue could arise again. But this issue too is most likely a “political question” that should be resolved by Congress, not by the courts. When the Fourteenth Amendment was ratified in 1868, Congress directed the Secretary of State to declare the Amendment to be ratified, even though two states had passed resolutions that purported to rescind their ratifications.

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

Congress will need to take action to remove, extend, or waive the earlier deadline. (There is already a proposed bill that would do this.) It should also express a view about the attempts to rescind the ratifications in five states.

7. Opponents of the ERA have said that it would prohibit *any* distinctions based on sex and would overturn laws that benefit women. Is that true?

No. The government would still be able to draw a distinction based on sex if it passes “strict scrutiny.” But most of the laws that people think of as benefitting women—like social security regulations, estate laws, laws requiring child and spousal support, and so on—are actually already sex-neutral. And for those that are not, legislators would have two years after the ERA is enacted to add broader language—like “spouse” rather than “wife.”

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. The ERA will not take any power away from states—except the power to make unnecessary distinctions based on sex.

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

No. The Supreme Court has held that the Constitution already protects the right to abortion. [*Roe v. Wade* (S.Ct. 1973).] And in Illinois, ratifying a federal ERA will not change state law at all, so it will not lead to any change in state laws relating to abortion. Illinois has had an equal rights guarantee in its own Constitution since 1970, and that provision did not play any significant role in the recent debates about HB40—the Illinois law that expanded funding for abortions and provides that abortion will remain legal in Illinois even if *Roe v. Wade* is overturned.

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 have these kinds of effects. The Illinois equal rights guarantee has been in place since 1970, and it has not eliminated separate women's and men's restrooms.

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

Yes. The ERA alone would not erase the wage gap, because it would apply to discrimination by “the United States and any State,” not by private employers. It might stop the government from rolling back anti-discrimination laws, but it will not make them stronger. So in the fight for equality, there will be plenty left to do.

Updated 4/28/2018
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