

WHY WE NEED THE EQUAL RIGHTS AMENDMENT

*by Roberta W. Francis
Chair, ERA Task Force
National Council of Women's Organizations*

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.***

After more than a generation of significant advances for women, do we still need the Equal Rights Amendment? The answer is an unqualified yes! Legal sex discrimination is not yet a thing of the past, and the progress of the past 40 years is not irreversible. Some remaining inequities result more from individual behavior and social practices than from legal discrimination, but they can all be influenced by a strong message that the Constitution has zero tolerance for any form of sex discrimination. Thus, the reasons why we need the ERA are at one level philosophical and symbolic, and at another level very specific and practical.

1. The Equal Rights Amendment is needed to affirm constitutionally that the bedrock principles of our democracy – "all men are created equal," "liberty and justice for all," "equal justice under law," "government of the people, by the people, and for the people" – apply equally to women.

In principle:

It is necessary to have specific language in the Constitution affirming the principle of equal rights on the basis of sex because for more than two centuries, women have had to fight long and hard political battles to win rights that men possessed automatically because they were male. The first – and still the only – right that the Constitution specifically affirms equally for women and men is the right to vote. Alice Paul introduced the ERA in 1923 to expand that affirmation to all the rights guaranteed by the Constitution.

It was not until as recently as 1971 that the 14th Amendment's equal protection clause was first applied to sex discrimination. Even today, a major distinction between the sexes is present from the moment of birth – the different legal standing of males and females with respect to how their constitutional rights are obtained. As demonstrated in 1996 by

the last major Supreme Court decision on sex discrimination, regarding admission of women to Virginia Military Institute (VMI), we have not moved beyond the traditional assumption that males hold rights and females must prove that they hold them. The Equal Rights Amendment would remove that differential assumption by affirming that "equality of rights under the law shall not be denied or abridged . . . on account of sex."

In practice:

The practical effect of this amendment would be seen most clearly in court deliberations on cases of sex discrimination. For the first time, "sex" would be a suspect classification requiring the same high level of "strict scrutiny" and having to meet the same high level of justification – a "necessary" relation to a "compelling" state interest – that the classification of race currently requires.

The VMI decision now tells courts to exercise "skeptical scrutiny" requiring "exceedingly persuasive" justification of differential treatment on the basis of sex, but prohibition of sex discrimination is still not as strongly enforceable as prohibition of race discrimination. Ironically, under current court decisions about sex and race discrimination, a white male claiming race discrimination by a program or action is protected by strict scrutiny, but a black female claiming sex discrimination by the same program or action is protected by only skeptical, not strict, scrutiny.

We need the ERA to clarify the law for the lower courts, whose decisions still reflect confusion and inconsistency about how to deal with sex discrimination claims. If the ERA were in the Constitution, it would in many cases influence the tone of legal reasoning and decisions regarding women's equal rights, producing over time a cumulative positive effect.

2. The Equal Rights Amendment is needed in order to prevent a rollback of women's rights by conservative/reactionary political votes, and to promote laws and court decisions that fairly take into account women's as well as men's experiences.

In principle:

Aren't there already enough legal prohibitions of sex discrimination – the Equal Pay Act, Title VII and Title IX of the 1964 Civil Rights Act, the Pregnancy Discrimination Act, Supreme Court decisions based on the 14th Amendment's equal protection clause, and more? Why are there still people saying, as Alice Paul did in 1923, "We shall not be safe until the principle of equal rights is written into the framework of our government"?

The need for the ERA can be expressed simply as a warning. Unless we put into the Constitution the bedrock principle that equality of rights cannot be denied or abridged on account of sex, the political and judicial victories women have achieved with their blood, sweat, and tears for the past two centuries are vulnerable to erosion or reversal at any time – now or in the future.

Congress has the power to make laws that replace existing laws – and to do so by a simple majority. Therefore, many of the current legal protections against sex discrimination can be removed by the margin of a single vote. While courts in the near term would still apply skeptical scrutiny to laws that differentiate on the basis of sex, that precedent could be undermined or eventually ignored by future conservative or reactionary courts. With a specific Constitutional guarantee of equal rights through the Equal Rights Amendment, it would be much harder for legislators and courts to reverse our progress in eliminating sex discrimination.

In practice:

Would anyone really want to turn back the clock on women's advancement? Ask the members of Congress who have tried to cripple Title IX, which requires equal opportunity in education – who have opposed the Violence Against Women Act, the Fair Pensions Act, and the Paycheck Fairness Act – who voted to pay for Viagra for servicemen but oppose funding for family planning and contraception – who for over a decade have blocked U.S. ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Most laws that discriminated explicitly against women have been removed from the books – in many cases, as a result of the political power and expertise developed by women in the course of the ERA ratification campaign. The current legal and judicial systems, however, still often have an impact on women that works to their disadvantage, because those systems have traditionally used the male experience as the norm.

Therefore, lawmakers and judges must be encouraged to include equitable consideration of female experiences as they deal with issues of Social Security, taxes, wages, pensions, domestic relations, insurance, violence, and more. Without an Equal Rights Amendment providing motivation, the status quo will change much more slowly.

IN SUMMARY:

We need the ERA because we do not have it yet! Even in the 21st century, the U.S. Constitution still does not explicitly guarantee that all of the rights it protects are held equally by all citizens without regard to sex. The first – and still the only – right that the Constitution specifically affirms as equal for women and men is the right to vote.

We need the ERA because the 14th Amendment's equal protection clause has never been interpreted to grant equal rights on the basis of sex in the same way that the Equal Rights Amendment would. The 14th Amendment has been applied to sex discrimination only since 1971, and the Supreme Court's latest decision on that issue, regarding admission of women to Virginia Military Institute, does not move us beyond the traditional assumption that males hold rights and females must prove that they hold them.

We need the ERA because until we have it, women will have to continue to fight long, expensive, and difficult political and judicial battles to ensure that their rights are

constitutionally equal to the rights automatically granted to males on the basis of sex. And in a few cases, men will have to do the same to ensure that they have equal rights with females (usually in areas of family law).

We need the ERA because we need its protection against a rollback of the significant advances in women's rights over the past 50 years. Congress has the power to replace existing laws by a majority vote, and even judicial precedents can be eroded or ignored by reactionary courts responding to a conservative political agenda. With an ERA in place, progress already made in eliminating sex discrimination would be much harder to reverse.

We need the ERA because we need a clearer and stricter federal judicial standard for deciding cases of sex discrimination. Lower-court decisions in the various circuits and states (some with state ERA's and some without) still reflect confusion and inconsistency about how to deal with sex discrimination claims. Sex discrimination should get the same judicial scrutiny as race discrimination.

We need the ERA because we need to improve the standing of the United States in the world community with respect to equal justice under law. The governing documents of many other countries specifically affirm legal equality of the sexes (however less than perfect that ideal may be implemented). The United States' image is also tarnished by the fact that the Senate has still not ratified CEDAW (UN Convention on the Elimination of All Forms of Discrimination Against Women).

We need the ERA because we need to move beyond the struggle for it. We need to affirm the spirit and free the energies of the women and men who have spent countless hours, years, and even lifetimes working for this basic human right of equal constitutional protection. When we can redirect that energy and those resources to work on the many other challenges we face in common, we will truly have fulfilled the vision of suffragist leader and ERA author Alice Paul.

Source: <http://www.equalrightsamendment.org/why.htm>

This website is a project of the **Alice Paul** Institute in collaboration with the ERA Task Force of the National Council of Women's Organizations, a non-partisan network of over 200 women's organizations, established in 1982 in response to the deadline for ERA ratification. The NCWO's ERA Task Force was established in 1999.