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The ERA: A Century-Long Fight to Achieve Equal Rights for Women

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Although the 19th Amendment provided women with the right to vote over 100 years ago, and women have made significant progress since that time, the U.S. Constitution still does not provide women with full legal gender equality. In the early 20th century, Suffragists, including Alice Paul, Ida Wells, and many others, were instrumental in pursuing progress for women's rights.

New Jersey Suffragist and lawyer Alice Paul drafted the Equal Rights Amendment (ERA and/or the Amendment) nearly 100 years ago, but it still has not been adopted. Now that the requisite 38 states have ratified the ERA, its ratification would seem within reach, but considerable resistance and obstacles remain. To fully understand the ERA and challenges to its passage and ratification, it is critical to consider our nation's history and the long-standing battle for gender equality.

The United States is now the only developed nation that does not guarantee equality for women. Seventy-six percent of countries around the world that have constitutions guarantee equal rights for women. The United States has also not kept pace with its individual states. Twenty-five state constitutions, including New Jersey's, explicitly guarantee equal rights on the basis of sex.

(See: https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/)

History of the ERA and Suffrage

The U.S. Constitution was framed and adopted under the influence of the English Common Law, which did not regard women as legal persons, but rather as the property of their fathers or husbands. Very often, women were relegated to home life and not treated as full citizens; they were not permitted to own property, hold jobs of their choosing, or engage in business or legal activities. Therefore, when drafting the U.S. Constitution, women's rights and liberties were not considered.

Following the 19th Amendment's ratification in 1920, many women were afforded the right to vote. (However, women of color continued to have their voting rights suppressed due to Jim Crow laws in the southern states.) In 1923, the Congressional Women's Party founder, Alice Paul, introduced the first draft of the ERA known as the "Lucretia Mott Amendment" on the 75th anniversary of the 1848 Woman's Rights Convention at Seneca Falls. However, the Amendment failed to gain broad support and was divided along class lines.

From 1923 until the 1960s and 1970s, the ERA was introduced in almost every Congressional session, but did not pass. Arguments in opposition ranged from fears that women would be drafted into military service (irrelevant now that women have served in combat roles since 2015), it would interfere with women's roles as "primary caregivers," protections would be extended based on sexual orientation and gender identity, and that it would eliminate single-sex educational institutions or high school athletics.

With the 1960s came significant progress and changes. Congresswoman Martha Wright Griffiths, who was instrumental in the passage of the Civil Rights Act of 1964 and the

creation of the Equal Employment Opportunity Commission, was a strong advocate for the ERA. In 1970, Congresswoman Griffiths filed a discharge petition demanding that the bill be moved out of the Judiciary Committee and heard by the House of Representatives. The ERA was then passed by the House but was unsuccessful in the Senate due to attempts to add in language exempting women from the military draft.

In 1971, Congresswoman Griffiths redrafted the ERA. Following months of debate, hearings, and changes, the House approved the revised ERA in October 1971, and the Senate approved an identical version in March 1972. Specifically, the Amendment states: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." (H.J. Res. 208).

To become part of the U.S. Constitution, ratification was required by three-fourths of the states (38 states) within seven years of passage (or by 1979). In 1978, with simple majorities in the House and Senate, Congress passed, and President Carter signed, a Joint Resolution extending the Congressionally-imposed ratification deadline from March 22, 1979, to June 30, 1982. A total of 35 states ratified the ERA by 1982, but the proposed Amendment expired, needing ratification by 3 more states. Three more states ultimately ratified the Amendment after the 1982 deadline. However, in 2020, a federal court ruled that ratification by Nevada (2017), Illinois (2018), and Virginia (2019) occurred too late.

(See: https://history.house.gov/People/Detail/14160; https://www.archives.gov/legislative/features/griffiths; https://www.equalrightsamendment.org/;

https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/).

In celebration of Women's History Month, on March 17, 2021, the House passed Joint Resolution 222-204 (H.J. Res. 17) removing the deadline for states to ratify the ERA. The Senate is now considering whether it will act upon the Joint Resolution.

According to New Jersey Congresswoman Mikie Sherrill, “We’ve been debating a version of this amendment for almost 100 years, since it was authored by a New Jersey woman named Alice Paul. The fact that the effort to enshrine women’s rights in the Constitution has been so long and hard is not surprising, but I’m proud to have voted in March to extend the deadline for the ratification of the ERA. The members of the House have reaffirmed our support for the Amendment and I hope the Senate will join us in paving the way to finally ratify the Equal Rights Amendment after all this time.”

Why the ERA Is Necessary

Congresswoman Sherrill emphasized that “the Equal Rights Amendment has had bipartisan support for decades, both in Congress and states across the country. The amendment is backed by an overwhelming majority of American voters, including near universal support among younger voters. It is a critical legislative step toward ensuring all Americans equal protection under law.”

Even though women have yet to gain full constitutional rights, they have gained significant protections through key legislative and case law developments. However, it is important to note that these legal advancements and protections for women are merely statutory and subject to being overturned by a simple majority of judges. The current protections are also comprised of a patchwork of federal, state, and local legal actions that can be changed due to shifts in government, legislatures, and the courts.

Further, despite increased legal protections over the past century, women continue to suffer workplace discrimination and harassment and are still not paid equal wages, averaging only 81 cents for every dollar earned by a man. According to the U.S. Bureau of Labor Statistics, the median usual weekly earnings of White female full-time wage and salary workers in 2020 were 82.3% of the earnings of White male full-time wage and salary workers. The percentages are even lower for women of color. While the

#MeToo movement has shined a spotlight on the issue of sexual harassment in the workplace, many challenges and vulnerabilities under the law remain.

Moreover, the ERA would make "sex" a suspect category subject to strict judicial scrutiny, thus clarifying the legal status of sex discrimination for the courts. In cases such as *Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190 (1976); and *United States v. Commonwealth of Virginia*, (1996), the United States Supreme Court declined to elevate sex discrimination claims to the strict scrutiny standard of review under the 14th Amendment, even though strict scrutiny is required for the suspect classifications of race, religion, and national origin.

To be upheld as constitutional, any disparate treatment based on race, religion, or national origin must bear a necessary relation to a *compelling* state interest. However, in cases of sex discrimination, the court only applies an intermediate level of heightened scrutiny, thereby permitting disparate treatment based on sex if it substantially advances an *important* governmental objective. If enacted, the ERA would make "sex" a suspect classification subject to the highest level of judicial scrutiny, making it harder to deprive rights on the basis of gender. This heightened standard would impact various state laws that discriminate based on sex, including those restricting access to reproductive health-care services and contraceptives.

The ERA would undoubtedly further the goals of the #MeToo movement related to combatting workplace discrimination by providing a fundamental legal remedy for sex discrimination and sexual violence, and could increase support for protections against sexual violence. First enacted in 1994, the Violence Against Women Act (VAWA) provides critical government and community support for survivors of violence. However, in *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court struck down a provision of the VAWA that provided a federal civil remedy for the victims of gender-motivated violence by permitting survivors to sue their attackers in federal court for damages or other relief. The Court held that this provision of VAWA exceeded

Congressional authority to regulate conduct that did not constitute interstate commerce. Ratifying the ERA would provide a strong basis for the restoration of this important provision and increase governmental funding for survivors of violence.

The ERA would significantly impact the fight for equal pay. Although equal pay laws have been in effect for many years, there are still many challenges to true equality and loopholes under existing laws. While states such as New Jersey are progressive and aim to ensure pay equity, this is not the same for all states. (In 2018, New Jersey passed a very expansive equal pay law with strong remedies (Diane B. Allen Equal Pay Act) and, in 2019, instituted a salary history ban prohibiting employers from inquiring about a prospective worker's wage and salary history. Both laws are aimed at closing gender wage gap.) State equal pay and salary history protections vary greatly. Ratification of the ERA would likely mean attaining gender pay equity.

The ERA would bolster the fight for LGBTQ rights. Although the Supreme Court ruled last year in *Bostock v. Clayton* County, 590 U.S. __, 140 S.Ct. 1731 (2020), that Title VII's prohibition against discrimination based on sex affords protections as to sexual orientation or gender identity, this prohibition has not yet been codified. The Equality Act (H.R. 5) has been passed by the House but hangs in the balance in the Senate. Additionally, some states explicitly extend protections based on sexual orientation and gender identity (such as under New Jersey's Law Against Discrimination), but laws in numerous other states still discriminate against individuals identifying as part of the LGBTQ community when it comes to employment, education, health care, and housing.

The ERA would also support enhanced pregnancy protections. Current pregnancy protections have expanded greatly but are not uniform and often create confusion for both employers and employees. The Pregnant Workers Fairness Act, clarifying employer responsibilities with respect to pregnancy accommodations and eliminating the requirement that workers prove the need for accommodations, has been introduced during several Congressional sessions but has not been enacted. Ratification of the

ERA may finally provide the necessary political support for this legislation. For now, pregnancy protections and employer requirements to provide accommodations remain a patchwork of federal, state, and local laws.

Notably, the New Jersey Pregnant Workers Fairness Act (PWFA), enacted in 2014, specifically prohibits pregnancy discrimination and provides pregnant women with reasonable accommodations. In *Delanoy v. Township of Ocean*, 245 N.J. 384 (N.J. 2021), the New Jersey Supreme Court reaffirmed that the PWFA recognizes three causes of action for pregnant and breastfeeding women: (1) “unequal” or “unfavorable” treatment; (2) failure to provide a reasonable accommodation; and (3) penalization for requesting an accommodation.

Conclusion

Although women have made significant progress and gained substantial rights through legislative and judicial protections, amending the Constitution to guarantee equal rights on the basis of sex would cement gender equality with the strongest possible protection under the highest law of our land. The ERA would ensure that women and men are equal under the law. In the words of the late Justice Ginsberg (quoting Abolitionist/Suffragist Sarah Grimké), “I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.”

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