



Family Policy Brief

THE EQUAL RIGHTS AMENDMENT

In 1972, Congress proposed a change to the United States Constitution called the Equal Rights Amendment. The ERA would add to the Constitution a provision reading: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” At the time, confident the states would ratify the proposal, Congress set a deadline of 1979 for ratification. When the proposal met with fierce opposition from citizens concerned with the unintended consequences of its broad language and ratification stalled, they moved the goalposts and changed the deadline to 1982. The requisite number of states (38) failed to ratify it during that time period.

Now, 37 years after the deadline has passed, proponents of the ERA are arguing that the deadline set by Congress can be ignored and the ratification process picked up where it left off. Two states, Illinois and Nevada, have ratified the in the past few years so they argue only one state is needed. To make this argument, they must ignore the fact that 5 states that originally ratified rescinded their ratifications.

The U.S. Congress has considered starting the process again or changing deadlines but has not done so. All of this is a recipe for litigation and makes any state efforts to ratify at this stage, legally suspect.

Even aside from these significant procedural hurdles, the proposed ERA would be bad policy, potentially disastrous in some ways.

First, it would constitute a massive power grab for the federal government by giving to Congress and the U.S. Supreme Court power to determine which state laws impacting men and women are “equal.”

Second, it would threaten common-sense policies that recognize real differences between men and women and do not mistreat either sex. For instance, state and federal laws protecting women from pregnancy discrimination, or policies allowing accommodations for pregnant women in the workplace, maternity leave policies, sports teams, or insurance rules that provide beneficial treatment to women based on their demonstrated longer lifespans and safer driving.

Third, it is unnecessary. The U.S. Supreme Court has interpreted the Fourteenth Amendment to the U.S. Constitution to prevent unfair discrimination based on sex. Thus, under current constitutional law, the states and federal government cannot enact laws that classify men or women unless the policy advances an important government interest. Federal and state laws also prohibit discrimination in employment, housing, education, etc. It is not clear what additional laws are needed that cannot be enacted through normal legislative means.

Fourth, state Equal Rights Amendments have been interpreted to grant radical “rights” related to abortion. A Connecticut court interpreted the state’s ERA to require public funding of abortions. *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986). The New Mexico Supreme Court ruled taxpayer-funded Medicaid must be used for abortions under that state’s ERA. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P. 2d 841 (NM 1998). In fact, the National Organization for Women openly recognizes that the ERA could undermine protections for unborn children: “Although opinion is divided on the question, an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care and contraception.” Bonnie Grabenhofer & Jan Erickson, “Is the Equal Rights Amendment Relevant in the 21st Century?” *National Organization for Women*, <https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

Fifth, court decisions and federal government policies have interpreted the term “sex” in federal antidiscrimination laws to include “sexual orientation” and “gender identity” (the idea that a person of one sex can identify as the other sex). If this interpretation were to be applied to a national Equal Rights Amendment, the consequences for state laws would be far-reaching, affecting restroom policies, parentage laws, religious liberty, public schools, and much more. *See Hively v. Ivy Tech Community College of Indiana*, 853 F. 3d 339 (7th Cir. 2017); *Zarda v. Altitude Express, Inc.*, 883 F. 3d 100 (2nd Cir. 2018); *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 884 F. 3d 560 (6th Cir. 2018).

These latter two points may help explain the push for the ERA despite current laws already accomplishing its stated purposes. Radical changes in abortion laws or in matters of sexuality may very well be more likely to achieve through court interpretations of a broadly-worded amendment than they would be by convincing voters that these changes are necessary.

Pro-family advocates in states where ratification of the proposed ERA is being considered should communicate with their legislators the very real concerns raised in this policy brief.