



# Equal Rights Amendment Frequently Asked Questions

*This factsheet provides responses to frequently asked questions (FAQ) or misconceptions about the Equal Rights Amendment (ERA). The top three questions are listed first: unnecessary, unintended consequences, and deadline. Additional FAQs are provided in alphabetical order afterwards.*

## Unnecessary

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### “We don’t need it anymore.”

- Legislation advancing equal rights may be repealed or amended. Court decisions may be retreated from or abandoned. By contrast, a constitutional amendment is far more enduring.
- Legislation and court decisions without a constitutional backstop do not protect equality. Government agencies and courts must apply and interpret these statutes. Currently they do so without the guiderails of the Equal Rights Amendment.
- The Fourteenth and Fifth Amendments require equal protection of the laws, but courts do not hold state and federal governments discriminating on the basis of sex to the same high standard courts apply to government discrimination on the basis of race, national origin, or religion. Sex discrimination currently receives “intermediate scrutiny” in the courts, whereas other forms of discrimination receive “strict scrutiny.” Under intermediate scrutiny it is much easier for the government to discriminate.
- The late Justice Scalia once remarked that gender discrimination is not prohibited in the Constitution.
- Justice Bader Ginsburg has said that the Equal Rights Amendment is the one Amendment she would like to see added to our Constitution.
- The American Bar Association formally reaffirmed support for the Equal Rights Amendment in 2016. In a [June, 2018 letter](#) submitted for inclusion in the Congressional Record the ABA identified three immediate effects of the addition of the Equal Rights Amendment to the Constitution:
  - gender equality would be established under the law as a fundamental and irrevocable tenet of society;
  - judges would be required to apply the highest standard of scrutiny when deciding cases involving sex discrimination; and
  - existing gender equity laws would be protected, and enforcement of these laws would be reinvigorated.

## Unintended Consequences

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**“I don’t think we should add this amendment because we don’t know what will happen and there could be unintended consequences.”**

- When the Founding Fathers approved the Bill of Rights, they did not know the potential consequences of constitutionally guaranteeing individual rights. Our nation was a grand Enlightenment experiment, and no one could see how it would turn out. Moreover, Federalists opposed ratifying the Bill of Rights because they feared procedural uncertainties. Nonetheless, Virginia ratified the Bill of Rights and it became part of our Constitution.
- As we see from hundreds of years of judicial decisions, Constitutional rights—even ones as sacred as freedom of speech—are not absolute. No one has the right to yell “FIRE” in a crowded theater. Likewise, rights protected by the Equal Rights Amendment will not be absolute.
- Even with the Equal Rights Amendment, the government may make distinctions on the basis of sex if it has a compelling interest for doing so and the discriminatory action is narrowly tailored to serve that interest.
- The Equal Rights Amendment does not confer special rights. It simply prohibits the United States or any state from denying or abridging equality of rights under the law on account of sex.
- Failure to ratify continues the country’s current path of unintended consequences for not ratifying the Equal Rights Amendment. Without this amendment, women continue to be treated as second-class citizens in a nation that purports to value equality, opportunity for all, and advancement based on merit.

## Deadline

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**“Didn’t the ratification deadline pass?”**

- On May 11, 2018 Attorney General Mark Herring weighed in on this issue with a [formal opinion addressed to Virginia Senator Black \(R - Loudon\)](#):  

*“...the lapse of the ERA’s original and extended ratification periods has not disempowered the General Assembly from passing a ratifying resolution.”*

- Attorney General Mark Herring, May 11, 2018
- If Congress has the power to impose a ratification deadline, it should have the power to extend or eliminate the deadline. In *Coleman v. Miller*, the Supreme Court left it to Congress to decide ratification periods. Beginning with the prohibition amendment, Congress included ratification deadlines in amendments it submitted to the states. With the Equal Rights Amendment, Congress imposed a ratification deadline but, significantly, it did so in the preamble of the resolution proposing the amendment, not in the amendment itself. By not submitting the deadline with the amendment to the states for approval, Congress reserved for itself the ability to extend or eliminate the deadline. In fact, in 1978 it did extend the ratification deadline to 1982.
- Both Nevada (March 22, 2017) and Illinois (May 30, 2018) have ratified the Equal Rights Amendment, exercising their state’s right to ratify under Article V of the Constitution.
- After Nevada ratified [a white paper was produced for Congress](#) exploring whether or not the deadline precluded the Equal Rights Amendment from being added to the Constitution (spoiler alert: it can be added).
- Some legal scholars argue that Congress lacks the authority to impose a deadline on the ratification process.

Additional FAQs listed in alphabetical order:

## Abortion

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### **“Doesn’t this open the door for abortion rights.”**

- Women already have a right to choose to have an abortion. The right, as the Supreme Court explained in *Roe v. Wade*, is grounded in privacy rights, not equality, and certainly not on the basis of a non-existent federal Equal Rights Amendment.
- Twenty-four states, including Virginia, have adopted Equal Rights Amendments in state constitutions without voiding, limiting, or expanding statutes that govern the right to have abortion procedures.
- Some state courts have ruled that a state’s refusal to fund medically necessary abortions if it funds all other medically necessary procedures violates the Equal Rights Amendment of that state’s constitution. These court decisions, however, specifically state that they do not address the legality or morality of abortion rights.

## Bathrooms

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### **“We will all be using the same bathrooms!”**

- Existing privacy rights will continue to protect appropriate separation of facilities for performing intimate bodily functions.
- Anyone considering this argument should be mindful of the severe economic harm North Carolina suffered over its bathroom legislation, which caused at least one relocating company to choose Richmond instead of Charlotte.

## Constitutional Convention

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### **“Don’t worry about the Equal Rights Amendment since we are working on a constitutional convention!”**

- A constitutional convention is called when two-thirds of the states (34 states) agree to gather and discuss a specific topic or topics. Any amendment(s) approved by constitutional convention must nonetheless be approved by the legislatures of three-fourths of the states. In other words, it doesn’t matter whether Congress or a constitutional convention proposes an amendment. The proposed amendment, regardless of its source, must be submitted to the legislatures of the states for approval. A constitutional convention would have no impact on the ratification process except to slow it down and waste resources.
- The Equal Rights Amendment has already been submitted to the states for ratification, and 37 of the required 38 states needed for ratification have approved it. Why start over again, especially when none of the states appear to have called for a constitutional convention to address equal rights?
- Some have argued that ratification of the Equal Rights Amendment will cause a constitutional crisis because states would have to call a constitutional convention to remove the amendment from the Constitution. This argument overlooks the fact that an overwhelming percentage of Americans (94%) favor the Equal Rights Amendment.

## Contracts

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### **“Women contractors will lose enhanced status for contract bids.”**

- The enhanced status program for female contractors will continue unabated with a ratified federal Equal Rights Amendment, just like those same programs are allowed to give enhanced status to minority-owned businesses even though racial equality is protected under the Fourteenth Amendment.
- Virginia’s equal rights amendment has had no effect on this issue.

## Draft

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### **“Would the wording ‘equality of rights under the law’ force women to be drafted?”**

- Women are already eligible to be drafted and were nearly drafted in the last couple of days of WWII, as nurses. *Source: <http://www.historynet.com/drafting-women.htm>*
- Requiring both men and women to register for the draft is not dependent on passage of the Equal Rights Amendment. Already, in October 2017, the Pentagon recommended that women should register with the selective service. *Source: <http://thehill.com/policy/defense/357055-pentagon-recommends-requiring-women-to-register-for-the-draft>*
- Regardless of ratification of the Equal Rights Amendment, a reinstated draft likely will include everyone, not just men. Conscripting only men into our military force, currently comprised of both male and female volunteers, would be unreasonable and antithetical to defense needs and morale. Women have proven their worth in our modern military and in a time of war, if a draft were necessary, our military would want the very best our country has to offer, which would include women.

## Insurance

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### **“If the Equal Rights Amendment is ratified women’s insurance rates will go up!”**

- Insurance rates are regulated by the states. Since Virginia has regulated insurance with a gender equality statement in our Virginia state constitution, it can be assumed no change would occur.

## Ratification Rescission

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### **“We’re not really at 37 states because some states revoked their ratifications.”**

- Article V of the Constitution authorizes states to ratify amendments but does not give states the power to rescind their ratification.
- Allowing ratification while prohibiting a change of heart makes practical sense too. If states were allowed to rescind as well as ratify, there would be no point in time when we could safely say that three-fourths of the states ratified the amendment, making it part of the Constitution. The uncertainty would make it impossible to know what is or is not in the Constitution.
- Three amendments to the Constitution were added while ignoring rescissions. All states that ratified, including those who had attempted to rescind a ratification, were included in the count that determined the amendment was, indeed, valid as part of the Constitution:
  - Fourteenth Amendment: Ohio and New Jersey attempted to rescind their ratification, their rescission was ignored, the Fourteenth Amendment was added to the Constitution
  - Fifteenth Amendment: New York attempted to rescind; Georgia ratified; both were considered among the ratifying states (NY’s rescission was ignored)
  - Nineteenth Amendment: Tennessee attempted to rescind but its rescission was ignored and the Nineteenth Amendment was added to the Constitution

## Social Security

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### **“Widows will lose social security benefits.”**

- Social security has been gender inclusive for surviving spouses since a legal challenge in 1975. This is an anachronistic concern from the early 1970s.

## Tax Exempt Status

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### **“Would churches and religious organizations with gender-specific practices lose their tax exemptions?”**

- The First Amendment’s Free Exercise Clause protects the rights of religious groups to freely practice their religion. This fundamental right, which dates back to the founding of the United States, would be weighed against the protections afforded by any new constitutional amendment.
- The ERA would not require anyone to change their religious beliefs. The ERA would not limit the freedom of religions to organize their clergy and other religious practices according to their beliefs.
- When same-sex marriage was legalized, religions were not required to change their definitions of marriage for their institutions. When divorce and birth control were legalized, religious organizations were not required to change their beliefs regarding these practices. Churches that refuse to marry same-sex couples or to permit their members to divorce still receive tax exemptions. Passing the ERA is the same - it will not require churches to change their beliefs and gender-specific practices.

## Topless

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### **“Will passing the Equal Rights Amendment permit women to walk around topless?”**

- Constitutional amendments have limits, and rights do not exist in a vacuum. Public decency laws have been upheld by the Supreme Court even when challenged as violating the Constitution’s First Amendment guarantee of freedom of speech. As an example, it’s not legal to yell “FIRE” in a crowded theater (if there is no fire) despite free speech rights.
- Additionally, when the Equal Rights Amendment is added to the Constitution, the government can still pass sex specific legislation if it has a compelling government purpose and the government action is narrowly tailored to achieve that purpose.
- Public nudity prohibitions do not even have to meet this exacting standard. The Supreme Court has recognized nude dancing as expression protected under the First Amendment, YET nonetheless, upheld enforcement of public decency statutes as necessary to serve a substantial government interest.
- In other words, the Court allows state governments to infringe fundamental First Amendment rights in certain circumstances. These cases provide a basis for applying a more lenient standard to test and uphold public nudity statutes challenged on equal rights grounds.

## Transgender Discrimination

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### **“Does the Equal Rights Amendment prohibit discrimination on the basis of transitioning or transgender status?”**

- The Equal Rights Amendment states: “Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.” Whether the amendment protects transgender rights turns on the meaning of “sex.”
- In the context of civil rights cases, a majority of the circuit courts that have interpreted “sex” concluded that the proscription against sex discrimination prohibits discrimination on the basis of transitioning or transgender status. To date, only the Tenth Circuit has held that discrimination against transgender employees does not necessarily violate Title VII, but even that court recognizes that discrimination on the basis of transitioning or transgender status may violate Title VII under some circumstances. Of recent decisions, only those from a district court in the Northern District of Texas and one in the Western District of Pennsylvania have held that Title IX does not apply to discrimination on the basis of gender identity or transgender status.
- Although Titles VII and IX cases may illuminate the meaning of “sex,” they are not binding on any court’s interpretation of the word in the context of the Equal Rights Amendment, which, of course, has yet to be examined by courts.
- With a new amendment in the Constitution, judges will be free to apply any of numerous theories for interpreting constitutional provisions, from originalism to structuralism and more. In doing so they may look to what the word “sex” meant to Congress when it proposed the amendment in the early 1970s, to Congress’s intent with the amendment, or to contemporary usage in addition to how courts have interpreted the word in other contexts.