

# POLICY *focus*

RECIPES FOR RATIONAL GOVERNMENT

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## Equal Rights Amendment

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### Introduction

2019 has been a good year for American women. The female sex is currently enjoying the lowest unemployment since 1965, holds the majority of wealth in the country, and makes up the majority of voters in nearly every election.

It's hard to make the objective case for female victimhood these days, but the left is managing to turn empowered, successful women into damsels in need of special legal protection. Long thought dead, the left has resurrected the Equal Rights Amendment (ERA), which ostensibly grants women equality under the law, in recent years.

With the passage of ERA ratification bills in Nevada and Illinois, the Amendment stands just one state short of capturing the 38th state ratification that could—barring legal problems—meet the Constitutional requirement of three-fourths of states, making the ERA official.

While the basic legal equality of the sexes enjoys overwhelming support from all quarters of the electorate, the ERA is a wolf in sheep's clothing, and could actually have radical impacts on policy far beyond what most Americans think of as equality.

Either the ERA is a symbolic nullity, a mere celebration of the basic legal equality women have long since achieved, or it will accomplish the laundry list of progressive priorities—from vindicating #MeToo to fixing the alleged “pay gap”—its proponents tout, but it cannot be both.

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## Why You Should Care

While proponents characterize the ERA as merely enshrining the basic legal equality of men and women into the highest law of the land, the reality is that the Amendment could have sweeping consequences unintended by voters. Risking those consequences is foolish when legal equality is already guaranteed by the Constitution, and buttressed by federal and state law.

- **The Constitution already protects women:** Women’s rights to free speech, religious liberty, bearing arms, due process, jury trial, and more are protected just as they are for men.
- **The ERA threatens women’s legal protections:** Especially if interpreted broadly by judges, the ERA could affect a wide range of policies, such as the exclusion of women from the draft, whether programs like WIC (Women, Infants, and Children) can be aimed just at one sex, and whether restrooms and locker rooms in government facilities, like public schools, can remain single sex.
- **The ERA is a bait and switch:** It promises basic equality, but leaves the door open for a radical progressive agenda to be implemented through the judiciary, without input from American voters, the majority of whom today are women.

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## Background

### History of the Equal Rights Amendment

Article V of the Constitution outlines the amendment ratification process. Congress proposes an amendment in the form of a resolution, which must pass both chambers with a two-thirds vote. Then, three-fourths of states (38) must ratify the amendment to add it to the Constitution. Typically, this process only takes a few years.

But the ERA’s ratification timeline has been unusually long, which may put it in legal jeopardy.

Initially introduced as a concept in 1923 by suffragette Alice Paul, it took the ERA until 1972 to be passed by Congress (with minor changes to its language over the years). After Congressional passage, the ERA went to the states for ratification with a seven-year time limit. While the first several years saw dozens of ratifications, the movement stalled out by the mid-1970s, in no small part to the efforts of conservative activist Phyllis Schlafly.

In 1978, Congress extended the ratification deadline to 1982, but even with the extra time, American public opinion had turned against the Amendment, and at the deadline, just 35 states had ratified the Amendment, three short of the 38 required to make it the law of the land. A further five states have since rescinded their ratifications. It seemed that Phyllis Schlafly and her millions of conservative women had consigned the ERA to the ash heap of history.

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But in the polarized political era of the Trump administration, the ERA has been resurrected. In 2017, Nevada became the first state since the 1970s to ratify the ERA, and Illinois followed in 2018. Most recently, an attempt to ratify the ERA in Virginia (which would have been the 38th state) failed narrowly in the state’s House of Delegates.

## Legal Questions

The legal status of amendment ratification over a very long period of time, as well as that of rescission (five of the original states have since retracted their ratification of the Amendment), remain open legal questions. The Supreme Court has ruled that ratification must take place within a “reasonably contemporaneous” time frame, as part of a “single process,” so as not to subvert the spirit of Article V, which is clearly to demonstrate overwhelming popular agreement among the American people. However, the Court has also ruled that the precise determination of these concepts is left to Congress as a political question.

ERA supporters claim this leaves the ball in Congress’ court when it comes to counting the 35 ratifications from 40 years ago alongside contemporary ones in Nevada and Illinois. If they succeed in getting another state to ratify the Amendment and Congress to revise its previous deadline for ratification, these questions are likely to be decided by the Supreme Court.

## Nice-Sounding Words with Potentially Radical Impact

The Equal Rights Amendment reads: *“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”*

Ninety-four percent of Americans agree that women should have basic legal equality. But the broad language in the Amendment also throws the door wide open to judges, who could interpret it to require sweeping changes to current law without the buy-in of the American voter. Depending on how it’s interpreted, the ERA could affect a range of controversial issues, from drafting women into combat, to single-sex bathrooms in public schools, to equal pay, or even government programs that support girls.

While the Constitution protects fundamental rights like freedom of speech, bearing arms, religious liberty, and jury trial for women as well as men, ERA proponents insist that the document does not protect us from what they call “discrimination on the basis of sex.”

Under current 14th Amendment doctrine, laws that classify or offer different benefits based on sex are subject to “intermediate scrutiny,” meaning that the government must show that an important government interest is at stake, and that sex classification is substantially related to achieving that interest. While this is a high Constitutional burden, it recognizes that differences between men and women are real, and sometimes substantial, and that laws may

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reflect that reality. The ERA could change this legal standard, by effectively barring any type of “discrimination” on the basis of sex, depending on the political composition of the courts. This could lead to real, and potentially extreme, policy changes.

## Draft and Combat

One of the most obvious distinctions on the basis of sex in the federal code is that men, upon turning 18, must register for the Selective Service, while women need not. While there are many reasonable arguments against drafting women, and especially against drafting them for front-line combat in equal numbers to men, our draft laws currently discriminate on the basis of sex and would likely be struck down under the ERA.

## Abortion

Without the ERA, states still have some leeway to decide what their laws will be with regard to issues like tax support for abortion and late-term abortion in the third trimester. With the ERA, there’s strong evidence that laws like the Hyde Amendment, which forbids federal money to go towards abortion, and statutes like the one recently repealed in New York restricting extremely late-term abortion may be Constitutionally infirm.

Some states have a version of the ERA in their state constitutions, which can give some indication of how federal courts would interpret a federal amendment. In 1998, the state court ruled that New Mexico’s Medicaid program must cover abortion services because not doing so would violate the state’s ERA. A similar ruling under a state ERA was made in Connecticut.

## Laws that Benefit Women

The ERA could also affect dozens of laws meant to protect and benefit women. For example, the WIC program (Women, Infants, and Children) provides welfare benefits for mothers, in what could be considered sex-based discrimination. Similarly, state laws that set presumptions in favor of mothers retaining custody of very young children could be in jeopardy, as could various family court staples like alimony and child support.

Even gender-neutral language would not guarantee a law would be upheld under the ERA if the benefits traditionally accrued to female homemakers. Justice Ruth Bader Ginsberg has voiced her opinion that the Social Security laws granting dependent spouses benefits violate the equality principle because they (de facto) encourage women to stay out of the workforce.

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## Sex Segregation and Safety

There are many instances where the sexes are segregated for women’s safety, even in government facilities. Boys and girls, for example, still use separate bathrooms and locker rooms in most public schools, transgender accommodations notwithstanding. Male and female prisoners are kept separated in prisons, as are male and female patients even in hospitals receiving federal dollars through Medicare and Medicaid.

## #MeToo and Equal Pay

Proponents of the ERA often point to the mistreatment of women in society as proof of the ERA's necessity. While the conduct of #MeToo'd men in power like Harvey Weinstein is despicable, it's also already illegal under federal and state law to harass and assault women. The Constitution says nothing about murder, either, but properly leaves that criminal matter to the states. Federalism has not weakened criminal law or justice against criminal sexual perpetrators any more than it has weakened prosecution for murder.

ERA activists also bring up the myth that women frequently receive less pay for equal work than men, but the 80-cents-on-the-dollar statistic has been shown repeatedly to be the result of women's free choices, rather than discrimination. However, the ERA, if applied as liberal justices want to apply the 14th Amendment to statistical racial disparities, could shift the burden onto institutions like workplaces to prove average pay gaps were not the result of discrimination. This may lead to the de facto introduction enormously expensive and unfair sex quotas in organizations that interact with state or federal money in any way.

## Undermining the Power of the Vote

Regardless of one's views on these contentious policy issues (and others), the sweeping language of the ERA could take many debates outside of the purview of voters and instead grant judges broad latitude to decide what "equality" means for everyone.

Ironically, each time a ruling is made, the ERA will remove that contentious issue from the scope of voters, including women. The 19th Amendment granted all women the right to vote (although many women voted in state elections prior to the Amendment), but the ERA has the potential to remove the ability of voters to weigh in on a whole list of issues that may intimately affect their lives.

## Bait and Switch

Proponents of the ERA cannot have it both ways. If the ERA confers nothing more than the basic legal equality the overwhelming proportion of voters support, then it's unnecessary. Women's equal rights are already protected in the United States.

If, however, the ERA moves beyond that fundamental legal equality and tackles issues like the draft and the alleged "pay gap," as many proponents claim, then it goes beyond basic equality and short-circuits fair debate.

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Women don't need the ERA. The beauty of the American Constitutional system is that it protects liberty for us all, regardless of sex. The only thing the ERA can add to that protection is a fast track for the progressive agenda.

# What You Can Do

## Get Informed

Learn more about the Equal Rights Amendment. Visit:

- [The Federalist](#)
- [The Washington Post](#)
- [Eagle Forum](#)

## Talk to Your Friends

Help your friends and family understand these important issues. Tell them about what's going on and encourage them to join you in getting involved.

## Become a Leader in the Community

Get a group together each month to talk about a political/policy issue (it will be fun!). Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.

## Remain Engaged Politically

Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions. After all, they are supposed to work for you!

## CONNECT WITH IWF! FOLLOW US ON:

### ABOUT INDEPENDENT WOMEN'S FORUM

Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

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