

Women in Emergency Medicine Committee

## Equal Rights Amendment

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A couple centuries ago, the Founding Fathers left women out of the United States Constitution. This problem could likely be fixed this year — it is the perfect time to review the Equal Right Amendment, its history, and why we need it.

The Equal Rights Amendment (ERA) is a proposed amendment to the United States constitution. It consists of three sections, with the essence of

the amendment in the first section. “Equality of rights of the law shall not be abridged or denied by the United States or by any state on account of sex.” It simply prohibits sex discrimination in our country by our Constitution. The following two sections state that Congress can enforce the amendment and that the amendment will take effect two years after ratification.

The concept of the ERA came long before 1923, but 1923 was the first year that it was introduced to the United States Congress. The ERA did not gain much traction at that time; however, it was introduced to every session of the US Congress from 1923 until 1972. In 1972, US Congress passed the ERA by two-thirds vote. As a reminder, proposed amendments become part of the US Constitution by US Congress passing the proposed amendment by two-thirds vote, followed by three-fourths of the states ratifying the amendment. In the case of the ERA, Congress sent the proposed amendment to the states with an arbitrary seven-year deadline written in the preamble of the bill. Immediately, states began to ratify the ERA. However, at the same time, an anti-equality force was developing. This force grew from a skillfully organized, well funded campaign with the message that the ERA would destroy families and morality. States stopped ratifying the ERA. Only 35 states ratified the ERA by 1977. In 1979, US Congress extended the arbitrary deadline by three more years (until 1982). Still, no more states ratified, and many thought that the ERA was dead.

In 1992, the Madison Amendment became the 27<sup>th</sup> amendment to our Constitution. Although this amendment does not pertain to equality (it involves rules for congressional pay), it is noteworthy because three-fourths of the states ratified it 202 years, 7 months, and 10 days after the US Congress passed it. Knowing this, 7 years, 10 years, or even 46 years seem like a short time frame to allow for ratification.

In 2017, Nevada became the 36<sup>th</sup> state to ratify the ERA, and in May 2018 Illinois became the 37<sup>th</sup> state to ratify the ERA. Virginia legislatures pre-filed a bill for Virginia to ratify the ERA to be introduced on the first day of Virginia’s legislative session on January 9, 2019. Most of the remaining 12 un-ratified states will also introduce bills for ratification this year.

At the federal level, Senate Joint Resolution 5 and House Joint Resolution 53, both to remove the arbitrary deadline to the ERA, were stalled in committees for the 2017-2018 session. It is likely that similar bills will be introduced this year.

“We need the ERA because of our work as emergency physicians. Victims of gender-based crimes, such as domestic violence, rape, and human trafficking, end up in front of us as patients. They often do not receive adequate justice.”

People often ask if we need the ERA anymore. Of course, we do. We need the ERA because we do not have it. When the United States Constitution was written, women were treated according to English common law and social tradition; women were denied most legal rights. Updates to include women in our Constitution never happened ... except for one right. The only right where it is prohibited to discriminate based on one’s sex is the right to vote, and that did not happen until the ratification of the 19<sup>th</sup> Amendment in 1920. The omission of women from our constitution allows a culture of discrimination to continue largely unchecked.

We need the ERA to protect the progress made for equality and secure the ability to advance further. In the past 40-60 years we have made improvements with laws like the Equal Pay Act, Title VII of Civil Rights Act, Title IX of the Education Amendment, Pregnancy Discrimination Act, Violence Against Women Act, and Lily Ledbetter Fair Pay Restoration Act. We need these laws, but they often put a band aid on a specific problem instead of tackling the issue at its core, which the ERA would do. Moreover, elected officials can easily modify or eliminate these laws much easier than an amendment.

We need the ERA because of the way in which courts view discrimination cases. Courts use the concept of judicial scrutiny when there is an allegation of a violation of one’s constitutional right. It is used to determine which has more weight: a citizen’s constitutional right or a government law or regulation that might discriminate between groups of people. The higher the level of scrutiny, the more favorable weight is placed on the citizen’s constitutional right. With discrimination cases that involve national origin, ethnicity, religion, or alienation, strict judicial scrutiny is used. With this, the government law or regulation must be: 1) justified by a *compelling* governmental interest, 2) *narrowly tailored* to achieve that interest, and 3) the *least restrictive means* for achieve that interest.

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With cases involving sex discrimination, intermediate judicial scrutiny, a lower level of scrutiny, is used. With intermediate judicial scrutiny, the government law or regulation must: 1) serve an *important* governmental interest and 2) be *substantially related* to serving that interest. Intermediate scrutiny has led courts to rule with varied and often unpredictable outcomes. In addition, the outcomes are less favorable for (mostly) women than if strict scrutiny were applied. The ERA would raise the level of scrutiny and in validate more discriminatory legislation.

We need the ERA because of our work as emergency physicians. Victims of gender-based crimes, such as domestic violence, rape, and human

trafficking, end up in front of us as patients. They often do not receive adequate justice. Courts treat crimes against women with greater lenience than other violent crimes. When seeking justice under our current legal system, with the Equal Protection Clause, the Commerce Clause, and the 14<sup>th</sup> Amendment has fallen short to provide justice against violence against women. The ERA could change that.

After almost 100 years of this amendment holding on in our legislative system, this could finally be the year where it becomes part of our Constitution. Stay tuned. ●



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