

Equal Rights Amendment – Background to the Two Strategies

By Jone Johnson Lewis, Ethical Culture Leader in Brooklyn and in Riverdale-Yonkers,
and Women's History Expert for About.com

It was we, the people, not we, the white male citizens, nor yet we, the male citizens, but we, the whole people, who formed this Union. And we formed it, not to give the blessings of liberty, but to secure them; not to the half of ourselves and the half of our posterity, but to the whole people—women as well as men.
-Susan B. Anthony 1828 words

It's 2015, and there is still no explicit prohibition of sex discrimination in our Constitution. What progress has been made against sex discrimination on a federal basis has come either through the passage of federal laws or through court rulings. Thus, whatever gender equality there is now can be overturned by Congressional vote or a different court ruling.

In 1972 to 1978, 35 states ratified the Equal Rights Amendment, and it passed the House and the Senate. That is, by just about any measure, overwhelming support for making women's equality part of the U.S. Constitution.

Where Are We Now?

With the dismantling of voting rights protections, it has become especially clear to those advocating for human rights, including racial and gender equality, that statutes can easily be overturned by another Congress, with a simple majority and the signature of a President, or by a supermajority even if the President opposes the change.

Interpretations of intermediate vs. strict scrutiny – and whether gender discrimination will continue to be included under the Equal Protection Clause of the 14th Amendment – depends entirely on a majority vote in the Supreme Court, which also depends on who is appointing justices.

Proponents of the Equal Rights Amendment point to the Hobby Lobby case – which essentially decided that women's rights in the workplace could be set aside if the corporation owners claim a religious objection – and to [Justice Scalia's public statements](#) that the Equal Protection Clause was not meant to apply to women and to sex discrimination.

Strategy One: Start Fresh

On May 7, 2015, [Senate Joint Resolution 16](#) was introduced, and on May 14, 2015, [House Joint Resolution 52](#) was introduced, both proposing again the same Equal Rights Amendment as was ratified by 35 states in the 1970s, but without a time limit for ratification.

This would require a 2/3 vote of each House of Congress, and ratification by 3/4 of the states.

Strategy Two: Remove the Ratification Time Limits

Senate Joint Resolution 15 (also introduced May 7, 2015), and House Joint Resolution 51 (introduced May 13, 2015) remove the time limits in House Joint Resolution 208, passed in the House and Senate in 1972.

Also called the three-state strategy, this looks at the 203 years that it took to ratify the Madison Amendment (27th amendment) on Congressional pay raises. In 1996, the [Congressional Research Service of the Library of Congress concluded](#) that the Madison Amendment's ratification has implications for the Equal Rights Amendment ratification. The legal analysis for this can be found in "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States," written by Allison Held, Sheryl Herndon, and Danielle Stager, *William & Mary Journal of Women and the Law*, Spring 1997 ([summary here](#)).

Time Limits: A History

The Eighteenth Amendment (Prohibition) had a time limit on it, as did the 20th, 21st and 22nd Amendments. So did the proposed Equal Rights Amendment.

The time limit on the 18th Amendment was hotly debated at the time and questioned as to the validity of such limits. In 1921, the Supreme Court affirmed the time limit in that case, saying that Article V of the Constitution implies amendments must be ratified in a reasonable time.

The 27th Amendment was proposed in 1791, did not have time limits for ratification, and finally gained the last required ratifications in 1992. Before that, the longest it took to ratify an amendment was four years. A challenge to the 27th Amendment in 1994 was not sustained by the Supreme Court.

Strategy on Time Limits – Is It Practical?

So will it be legal to lift time limits on ratification of the ERA? It's very likely that such a strategy will be met with legal challenges. Will the challenges win the day? It's not certain – but what is certain is that if neither of the two strategies of today's ERA effort are successful, the ERA will not become a Constitutional Amendment.

The strategy to remove time limits on ratification requires, for passage of the ERA, only that the Congress lift the limits, that additional states pass the Amendment (three to eight, see next sections), and that the lifting of the time limits survives the likely challenge in the courts.

In the case of *Coleman v. Miller*, the Supreme Court left the decision on ratification time periods to Congress. Would that also apply to lifting time periods? Only another Supreme Court ruling will make that clear.

If Time Limits Are Lifted, What States Need to Pass the ERA?

The fifteen states which have not passed the ERA are: Alabama, Arkansas, Arizona, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. The other 35 states ratified the Amendment.

In addition to those three states, there may be litigation about the five states that rescinded ratifications. As [Linda Napikoski wrote](#), “There is some question as to what will happen if Congress passes the ERA again. A new amendment would require the two-thirds vote of Congress and ratification by three-fourths of the state legislatures. However, there is a legal argument that the original thirty-five ratifications are still valid, which would mean only three more states are needed. This ‘three-state strategy’ is based on the fact that the original deadline was not part of the amendment’s text, but only the Congressional instructions.” Those five states are Idaho, Kentucky, Nebraska, South Dakota and Tennessee.

A Short History of Women’s Rights and the Constitution

How is it that women’s equality is not already in the Constitution?

In creating the American legal system, lawmakers assumed that both women and people of color were not able to carry out civil and political functions in society, and thus were to be treated differently than white males were. Many have seen parallels to this treatment, and movements for women’s equality and racial equality have often had deep ties as well as tensions about priorities.

Equal Protection – Is Gender Fully Included as a Suspect Class?

The Fourteenth Amendment was originally passed after the American Civil War to justify laws protecting “citizens of every race and color” from the new Black Codes being created in states of the former Confederacy. The Fourteenth Amendment was explicitly passed to overturn the Dred Scott decision by the Supreme Court in 1857 which declared that not even free black people were citizens of the United States.

Ironically for gender equality, the ratification of the Fourteenth Amendment was also the first time that the word “male” was explicitly added to the Constitution (in Section 2). Some women’s rights advocates of the time even opposed the ratification of the Fourteenth Amendment, as Section Two explicitly included only “males” as having voting rights, destroying the coalition that had been built between advocates of racial and sex equality. It took until 1920, and another Constitutional amendment, to include women as having equal voting rights.

In early cases applying the Fourteenth Amendment, not only did the Supreme Court find that it did not apply to voting and many other rights for women, the Court also found that “separate but equal” protection was acceptable. The latter wasn’t overturned until 1954’s *Brown v. Board of Education*.

The Court developed an approach to looking at applications of equal protection, applying a “strict scrutiny” standard when a suspect class (such as a whole racial group) or a fundamental right was involved – where any law that discriminates must have a compelling government interest and no less restrictive alternative -- and a “rational basis” standard where laws are reasonably related to a legitimate government interest.

In the 1970s, when gender or sex discrimination first began to be included by the Court under the Fourteenth Amendment, the Court developed a new “intermediate scrutiny” level for such discrimination. The Court has been reluctant to include gender (or religious) discrimination under “strict scrutiny” treatment. Gender (as well as religion and sexual orientation) has not been given the same heightened scrutiny standard. Race is considered a “suspect classification” and gender only a “quasi-suspect classification” when looking at the Equal Protection Clause.

Thus, there remains a call for incorporating explicit equal protection for women’s rights in the United States Constitution.

Equal Rights Amendment History

The Equal Rights Amendment was first proposed right after the ratification of the 19th Amendment guaranteeing women’s right to vote.

It’s perhaps important to remember that in the early and mid 20th century, many within the Ethical Culture movement were allied with those who opposed the Equal Rights Amendment. Why? Because much protective labor legislation had been passed which protected working women. These laws limited overtime, ensured adequate bathroom facilities, and required breaks, for instance. (Protective legislation for anyone, including women, and including minimum wage and overtime laws, were first ruled as legal by the Muller v. Oregon Supreme Court case, with Felix Adler’s brother-in-law, Louis Brandeis, as the lawyer, and with Josephine Goldmark, Adler’s wife’s sister, being the chief researcher.) These women’s rights advocates into the early 1970s feared that an ERA would remove such women’s rights rather than extending the protections to men.

The increasing calls for women’s equality in the 1950s and 1960s led President John F. Kennedy to appoint a national commission on the status of women, chaired by Eleanor Roosevelt. By that point, Eleanor Roosevelt, who had early opposed the Equal Rights Amendment, no longer was speaking against it. But the commission recommended against an ERA. Esther Peterson, for example, a member of the Kennedy administration, advocated for “specific bills for specific ills” as a way to get equal rights for women. The Civil Rights Act of 1964 banned workplace discrimination on the basis of sex.

Such protective legislation has since been either overturned as failing intermediate scrutiny under the Equal Protection Clause, or has been supplanted with legislation that also applies to male workers, such as the Occupational Safety and Health Act (OSHA).

By the time that Congress passed the Equal Rights Amendment in 1972, many proponents of protective legislation had come around to supporting constitutional equality for women.

Congress sent the amendment to the states for ratification. Unlike with most Constitutional Amendments, Congress added a deadline for ratification. They extended that when the original date was near, but by that time the Stop ERA campaign of Phyllis Schlafly and others had reversed the tide of support, and no more states ratified.

Some Background Reading

[Some background on the Fourteenth Amendment and race and gender equality](#)

[Stop ERA – a history of the campaign against the ERA in the 1970s and 1980s](#)

[Scalia on women's rights and the Fourteenth Amendment](#)