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# Issue Brief

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## EQUAL RIGHTS FOR WOMEN

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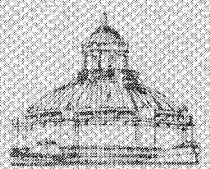

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# EQUAL RIGHTS FOR WOMEN

**SUMMARY**

Amendments to the Constitution to provide equality of rights for women have been reintroduced in every Congress from the 67th in 1923 to the 100th in 1987. Also proposed in recent years, although not to date in the 100th Congress, has been legislation to improve women's rights without amending the Constitution: a statute to forbid enforcement of a classification based on sex -- except where necessary to achieve a "compelling state interest," and a measure providing for selective revision of existing Federal laws that discriminate on the basis of sex.

## ISSUE DEFINITION

Women's rights proposals before the Congress have raised questions as to how to best provide legal equity for women and what effect each of these approaches might have on existing and future laws concerning women.

## BACKGROUND AND ANALYSIS

Proposals to clarify the status and legal rights of women extend historically from 1776 and Abigail Adams' famous letter to her husband at the Second Continental Congress admonishing lawmakers to "Remember the Ladies" to present-day efforts to add an Equal Rights Amendment to the Constitution. In the 19th Century, an attempt was made to include equality for women in the 14th Amendment, which had been designed to guarantee rights and privileges to newly liberated black males. In wording the 14th Amendment, however, Congress departed from previous constitutional usage referring to "persons" or "citizens" and in Section 2 referred three times to "male inhabitants" or "male citizens." In 1878, an amendment was proposed specifically affirming the right of women to vote, which became the "Suffrage," or 19th Amendment, upon ratification in 1920.

An Equal Rights Amendment (ERA) was first proposed in Congress in 1923. It was introduced in various forms in subsequent Congresses, finally winning passage in the 92d Congress in 1972. Under the resolving clause, a 7-year deadline was set for ratification. In 1978, when it had been approved by 35 States, three less than the necessary three-quarters (38), Congress voted to extend the deadline. No additional States voted for ratification before the new deadline, however, and the measure died on June 30, 1982.

(For a detailed discussion of the 1972 proposed Equal Rights Amendment, its legislative history, major arguments offered for and against, and questions raised by the extension of the ratification period, see CRS Report 85-154 GOV, The Proposed Equal Rights Amendment, by Leslie Gladstone.)

In the 100th Congress, an Equal Rights Amendment (H.J.Res. 1 and S.J.Res. 1) has been reintroduced in the same form as the 1972 proposal. It would provide "equality of rights under the law" for men and women.

The Reagan Administration is opposed to the Amendment and has not taken a position on the statutory proposal, the Equal Rights Act. In the 97th and 98th Congresses, the Administration endorsed legislation to revise specific discriminatory laws. To assist in this process, the President created a Task Force on Legal Equity [Executive Order 12336] to review sex discriminatory Federal laws, regulations, and practices and to implement changes ordered by the President.

Debate in the 100th Congress is expected to focus on the need for comprehensive coverage of women's rights by means of a constitutional

amendment versus a case-by-case legislative response, which can take into consideration legitimate differences between men and women.

## An Equal Rights Amendment

The proposed Equal Rights Amendment, as reintroduced in H.J.Res. 1 and S.J.Res. 1, provides that --

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

This wording of the amendment is identical to that passed by the 92d Congress in 1972. In 1971, in response to objections from Senator Ervin and several constitutional lawyers, the wording of the enforcement language contained in the second section (which had read since 1943: "Congress and the several States shall have power within their respective jurisdictions, to enforce this article by appropriate legislation") was changed to conform to the enforcement language of most the other 26 constitutional amendments now in effect.

Earlier Congresses found little disagreement with the general intent of the proposed amendment. A Senate Judiciary Committee report in 1972 (see Reports and Congressional Documents) interpreted the statement "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" to mean that sex should not be a factor in determining the legal rights of men and women; that the Amendment would affect only governmental action, with the private actions and private relationships of men and women left unaffected; and that the only requirement of the Amendment was equal treatment of individuals. The proposed amendment also gave Congress power to enforce these provisions (the States already possess such authority under their general police power) and provided that the Amendment should take effect 2 years after the date of ratification.

The effect of the Equal Rights Amendment, according to the 1972 Senate Report, would be to require that Government at all levels treat women and men equally as citizens and individuals under the law. It would eliminate from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, Federal or State laws or official practices that now make a discriminatory distinction between women and men would be invalid under the Equal Rights Amendment, and certain responsibilities and protections which once were, or are now, extended only to members of one sex would be either extended to both sexes or eliminated entirely.

Although there has been general agreement on the intent of the Amendment, there has been disagreement as to whether an amendment is the best vehicle for assuring equality for women. One point of view is that only an amendment can provide protection against sex discrimination comparable to that now provided against discrimination on the basis of race under the 14th Amendment. Proponents of this position note that the Supreme Court's application of the 14th Amendment to claims of sex discrimination has been inconsistent, and that its standard for judging sex discrimination has been less strict than the standard used in judging other kinds of discrimination. Since the 14th Amendment was written to provide "equal protection of the laws" to black males -- it was extended to women only by recent interpretation -- it is argued that the legislative history of the 14th Amendment's equal protection clause provides no guide for applying it to sex discrimination, nor has the Court itself devised a consistent standard of analysis for use in judging such cases.

Proponents also believe that a constitutional declaration that no individual may be discriminated against on the basis of sex is necessary to establish this principle permanently as a fundamental policy of Government.

In response to the argument that the amendment approach would be too sweeping, proponents observe that the Amendment would of necessity be modified by other rights guaranteed under the Constitution (the right of privacy, for example, with respect to sex segregation of rest rooms and institutional accommodations) and applied within the rules of constitutional practice.

Opponents of an Amendment argue that the present method of applying the 14th Amendment, on a case-by-case basis and using the current standard of review, offers more flexibility of interpretation than the proposed ERA, which would bar all distinctions based on sex. This idea is closely allied with the view that women and men should not always receive equal treatment, due to differences in physical characteristics and traditional social roles. They note that by using current 14th Amendment review standards, the Supreme Court has been able to uphold the registration of males for the draft, but not females and to preserve a State tax exemption that benefits some widows, but not comparably situated widowers.

Another view of the Amendment holds that the Amendment in its present form would not necessarily provide additional protection against sex discrimination. According to this view, the Amendment as proposed may be redundant because in 1971 the Court began to apply the 14th Amendment to classifications based on sex. By this argument, the Amendment as proposed could have been interpreted by the Court either as a reinforcement of current standards of review or as a mandate for more stringent ones. To insure the strictest scrutiny of discrimination on the basis of sex, they believe new wording would have to be added to specify an "effects" test, i.e., that any law having a discriminatory effect would be in be in violation of the Equal Protection Clause of the 14th Amendment.

The possible influence of the Amendment on specific areas of law, especially those concerning military service, abortion and abortion

funding, homosexual rights, and States' rights is also questioned. Arguments concerning these issues may be summarized as follows:

**Military Service**

According to the 1972 Senate Judiciary Committee Report on the effects of the ERA, if the ERA were in effect and a draft were reinstated, Congress would be required to treat equally women and men who met physical and other requirements and who were not exempt or deferred by law. Concern has been voiced that the Amendment also would require that women be assigned combat roles in the same manner and in the same numbers as men. Those who disagree with this premise argue that assignment to particular kinds of duty, including combat or combat-related duty, would be determined by the needs of the services themselves and by Congress, which is empowered under Article I of the Constitution "to provide for the common defense." Proponents of the amendment note that in Rostker v. Goldberg (453 U.S. 57), a 1981 Supreme Court case testing the constitutionality of requiring the registration of males but not females for the draft, the Court dismissed the argument that the law was discriminatory, ruling that "Congress was entitled, in the exercise of its Constitutional powers, to focus on the question of military need rather than 'equity.'" Proponents cite this as an example of the way in which rights under the ERA would be modified by other provisions of the Constitution.

**Abortion**

The impact of the ERA on abortion and abortion funding depends to some extent upon the legislative history established by Congress. It would also depends on whether the Supreme Court, in deciding cases of sex discrimination under an ERA, chose to apply an "intent" test, i.e., forcing the party to show that there was a discriminatory intent or motive on the part of the Government, or whether the Court would have found that an "effects" test, i.e., disproportionate impact, was sufficient to establish a case of sex discrimination under the ERA. The question to be answered in cases challenging restrictions on abortion or abortion funding is whether discrimination based upon pregnancy constitutes legally prohibited sex discrimination. Clearly, pregnancy discrimination is sexual-related, but the crucial issue is whether it is a prohibited practice in the legal sense.

To date, there have been no State court decisions (in States with State ERA's) ruling definitively on the question of whether a State ERA impacts on abortion and/or abortion funding. The matter of whether there might be an impact has been raised, and arguments made on both sides. Some proponents of the ERA contend that the ERA would have no impact on abortion and/or its funding. They theorize that the ability to become pregnant stems from a unique physical characteristic and would thus be exempt from the ERA. Only women can become pregnant, i.e., the reproductive function is unique to females. Thus, they argue, since men are not similarly situated in this context, there would be no sex discrimination under the ERA. This would be consistent with the only Supreme Court precedent under the equal protection clause with respect to a regulation having an adverse impact on pregnant women. There are other

ERA proponents who argue to the contrary. They pointed out that the effects of discriminating on the basis of pregnancy were such that there is gender discrimination. There were also proponents of the amendment who argue that the physical uniqueness exemption has no application because the discrimination based on pregnancy is not necessarily confined exclusively to the reproductive function itself, i.e., only the reproductive aspect would qualify for the exemption.

Regarding the question of abortion funding, ERA proponents in certain State ERA cases have argued in complaints and briefs filed before State courts that to deny public funds for abortion constitutes sex discrimination (since only women can become pregnant) and they believe that to single out women and to deny them funds for this purpose violates the State ERA's in question. On the other hand, opponents of the ERA and of abortion, citing these very same arguments, also contend that there is a possibility that the ERA could broaden a women's right to an abortion as well as mandate the expenditure of public money for abortion.

**Homosexual Rights**

The question of whether homosexual rights, such as homosexual marriage, would be affected by passage of ERA also has been raised. Those who believe that homosexual rights would not be affected argue that the ERA pertains to sex discrimination, not to sexual preference. In addition, the record of the Senate debate, prior to passage of the ERA in 1972, shows that the Amendment's sponsors did not interpret it to require the legalization of homosexual marriages. It is believed quite probable that this question will be raised again during debate on the currently proposed ERA with similar results. In interpreting legislation, Courts traditionally refer to the legislative history to determine the intent of Congress.

**States' Rights**

Some opponents of the ERA argue that Section 2 of the proposed Amendment, stating that "Congress shall have power to enforce this article by appropriate legislation," would augment Federal power at the expense of the States. Proponents of the Amendment point out, however, that the 10th Amendment already reserves to the States or to the people "the powers not delegated to the United States by the Constitution," thus necessitating that the ERA delegate enforcement authority only to the Congress, the States already having this authority.

**An Equal Rights Statute**

This proposal, introduced in previous Congresses, has been considered an alternative to the proposed Amendment and would extend by statute the Equal Protection Clause of the 14th Amendment so as to forbid enforcement of "a classification based on gender," except where such a classification is necessary to achieve a "compelling State interest." It would establish a uniform nationwide standard governing classifications based on sex. In other words, the standard now applied by the Court to classifications based on race and national origin would be applied to sex also. This proposal, should it become law and should it be accepted by the Supreme

Court, would have the effect of extending equal legal rights to women by statute rather than by amendment of the Constitution.

The provisions would affect actions of Federal, State, and local governments by prohibiting the making or enforcement by law of any classification based on gender unless such a classification is necessary to achieve a compelling interest of that government, and is the least burdensome alternative possible.

In addition, the Equal Rights Statute included provisions to specifically except restrictions presently established under Titles 10, 50, and 50 appendix of the United States Code which pertain to war, national defense, and the selective service system.

Those who support this approach believe that such a method of insuring equal rights for women could provide the benefits claimed by the Amendment and in a shorter time, since it would not need to be ratified by the States. They argue that the statutory approach is simpler and faster, requiring only a majority vote of both Houses of Congress and the signature of the President to become effective. Although a statute lacks the relative permanence of an amendment, they note that once rights are granted they are difficult to revoke.

Opposition to the statutory approach has been divided. Some point out that while Congress has authority to declare that sex is a suspect classification in matters governed by Federal law, the Constitutional validity of applying the statute to States may be questioned. They note that the Supreme Court is not required to uphold the constitutionality of such a finding, and there is no guarantee that the Court would defer to Congress' judgment in this instance. This group also notes that a statute could be changed more easily than an amendment, a step that could substantially undermine the purpose of the statute. Others oppose the statutory approach on grounds that legislation is unnecessary since the Supreme Court already has power to declare sex a "suspect" classification under the 14th Amendment.

The effect of an Equal Rights Statute on specific areas of the law, such as those previously discussed in relation to the Amendment, would be the same as under the Amendment, provided the Court accepts Congress' judgment that sex should be considered a "suspect" classification under the 14th Amendment.

### Selective Revision of Existing Discriminatory Laws

Also introduced in earlier Congresses and in the 99th Congress, this proposal would have revised approximately 100 existing Federal laws that discriminate because of sex by removing from the Code certain statutes ruled unconstitutional or by amending the law to conform with current legal practice. Typically, the bill would have replaced such single-sex words as "males" with "persons," or "widows" with "widows and widowers," or "boys" with "youths" or "wife" with "spouse." Left unchanged would have been certain sex-based sections of the Federal Code pertaining to

combat limitations, the Selective Service, and parts of the Social Security Act and the Criminal Code.

Some sponsors have viewed legislative revision such as this bill proposed as an alternative to an amendment, while others -- who also supported an amendment -- have seen it as an interim step which would neutralize specified statutes by extending to both sexes provisions of the Federal Code now limited to only one sex.

Those who have supported such legislation as an alternative to an amendment tend to believe that reforms should come gradually and that more time is needed to prepare for such basic changes as would result from eliminating all sex-based provisions of the Federal Code.

Opponents of selective revision of existing laws as a method of providing legal equity suggest that revision or repeal of existing statutes could take many years and was likely to benefit too few women now alive. Moreover, they believe that to be successful, such revisions would require a single, coherent theory of women's equality and consistent application of this theory, which only an amendment could provide. They say that piecemeal legislative reform already has been practiced for almost a century and that fundamental change in the legal position of women is now overdue.

## LEGISLATION

**H.J.Res. 1 (Edwards)/S.J.Res. 1 (Kennedy)**

Constitutional amendment. Provides that equality of rights shall not be denied or abridged by the United States or by any State on account of sex. Introduced in the House and Senate Jan. 6, 1987; referred to Committees on the Judiciary.

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