

ERA: Now is the time...

by MARCIA J. WEISS

The Equal Rights Amendment (ERA) states simply: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." It was introduced into every Congress between 1923 and 1972, when it was passed and sent to the states for ratification by both houses of their legislatures. The ERA has also been introduced in every Congress since 1982, since the proposed amendment was not approved by the necessary three-fourths (38) of the 50 states to make it part of the Constitution.

In the five years following 1972, 35 states approved the ERA. By the Congressionally imposed deadline of 1982, no additional states had voted yes and the ERA fell three states short of ratification. The states that have not ratified the amendment are: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia. Since then, 8 of the 15 unratified states have equal rights bills on the state level, but have not ratified federal legislation. Speculation by legislators on why ratification failed resulted in a determination that national economic injustice exists and that women must continue to fight for their rights.

Many Americans mistakenly believe that the Constitution already includes an equal rights guarantee. It does not. Only the 19th Amendment right to vote specifically affirms equality for men and women. The 14th Amendment equal protection clause has never

been interpreted to protect women against sexual discrimination in the way that the ERA would. We need a constitutional guarantee to protect against threats to the significant advances made in women's rights. In a 2012 poll, 91 percent of Americans believed that men and women should have equal rights affirmed by the Constitution.

U.S. Supreme Court Justice Ruth Bader Ginsburg (who will receive NA'AMAT USA's 2016 Golda Meir Humanitarian Award this May) stated in 2014: "If I could choose an amendment to add to the Constitution, it would be the Equal Rights Amendment. I think we have achieved that through legislation, but legislation can be repealed, it can be altered. I would like my granddaughters, when they pick up the Constitution, to see that notion — that women and men are persons of equal stature ...is a basic principle of our society." In contrast, the late Justice Antonin Scalia said: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."

What would an Equal Rights Amendment achieve? It would guarantee that the rights affirmed by the Constitution are held equally by all citizens without regard to their sex. It would provide a fundamental legal remedy against sex discrimination for both men and women. The ERA would clarify the legal status of sex discrimination for the courts, where decisions still deal inconsistently with such claims. Legal standards would be changed. For the first time,

sex would be considered a suspect classification, as race currently is. Governmental actions that treat males or females differently as a class would be subject to strict judicial scrutiny and would thus have to meet the highest level of justification — a necessary relation to a compelling state interest — to be upheld as constitutional. Currently, sex discrimination is subject to a lower or intermediate level of scrutiny. The governmental interest is not required to be "compelling" or "necessary" but rather simply "important."

Unless the bias against women has been shown to be intentional, women have no recourse under the 14th Amendment. Even decisions in current cases having a *disparate impact* on women have been upheld as not constituting sex discrimination against women. Examples include exclusion of pregnant women from employer health insurance benefits available to others unable to work temporarily, unequal pay for equal work, discrimination by law enforcement in responding to instances of domestic violence and sex discrimination in the workplace. Legislation currently in effect does not cover everyone equally and can be rolled back by a congressional vote. In many of its decisions, the Supreme Court has focused on equal *treatment* of women under the 14th Amendment rather than actual equality between men and women.

As stated by the National Council of Women's Organizations/ERA Task Force on July 2015: "To actual or potential offenders who would

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Take Action!

Equal Rights Amendment

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.

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try to write, enforce or adjudicate laws inequitably, the ERA would send a strong preemptive message: the Constitution has zero tolerance for sex discrimination under the law.”

New Approaches. In 2013, Rep. Carolyn Maloney (D-NY) and Sen. Robert Menendez (D-NJ) introduced the so-called “new” or “start-over” ERA, which adds an opening sentence to the 1972 text: “Women shall have equal rights in the United States and all territories subject to its jurisdiction.” The new language affirms equal rights and puts “women” into the Constitution for the first time. It helps to clarify that the purpose of the amendment is to address historical discrimination against women. The new language also says that the states as well as the Congress have the power to enforce the amendment by appropriate legislation. The approach suggested by Maloney and Menendez would require a new resolution and no ratification deadline. The new ERA has bi-partisan support with 176 co-sponsors in 2015.

A “three-state strategy” sponsored by Sen. Ben Cardin (D-MD) and Rep. Jackie Speier (D-CA) would repeal the ratification deadline and make the ERA part of the Constitution when three more states ratify it. Advocates point to the 27th Amendment, which was sent to the states in 1789 and finally ratified by three-fourths of the states in 1992.

Including sexual equality language in the amendment and a new strategy are important and critical first steps in providing momentum for ultimately rectifying a critical omission in our Constitution.

TAKE ACTION! As activity on the above approaches has been growing in the states, a new national ERA coalition has formed to work for Congressional action. Contact your members of Congress, urging them to cosponsor the ERA by signing onto both the three-state resolution and the start-over resolution. Thank them if they have already done this.

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