

ERACOALITION



FUND FOR WOMEN'S EQUALITY

WHY WE NEED AN EQUAL RIGHTS AMENDMENT

Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.

- Justice Antonin Scalia

Women and men are equals, yet they are not treated equally under the law or in American society. Recognizing sex equality explicitly in our highest statement of principle, the U.S. Constitution, will give women the equal status they never had under law. The ERA will give women new avenues of legal recourse when they face sex discrimination. Here are a few areas in which the ERA can make a significant difference:

Pay Equity: An ERA will set a norm for equal pay and provide a basis for litigation and legislation to extend the same pay entitlements to women and men.

Women and their children are the vast majority of persons in poverty in the US. Despite laws guaranteeing equal pay for equal work, women on average still are paid only 78 cents on the dollar that men are paid – even less for African American women and Latinas. This is due largely to women being segregated into lower-paying job categories in which their contributions are undervalued compared with those of men. No mechanism for achieving pay equity exists under current law, and the gender poverty gap has been growing. Neither Title VII nor the Equal Pay Act provides for fair pay for work of comparable worth, providing no remedy for this institutionalized form of sex discrimination. Without a foundation of economic equality, women will never be equal.

Tracy Rexroat worked for the Arizona Department of Education as an Education Program Specialist. Her starting salary was more than \$17,000 lower than her male peers' when she was hired in 2007 and remained well below theirs in 2010. Tracy sued for relief for pay discrimination, in part on the basis of the discrepancy in starting salaries. The federal court relied on a prior decision that said unequal starting salaries "do not violate the Equal Pay Act . . . as long as there was 'an acceptable business reason' for basing wages on prior salary and the practices."¹

¹ Rexroat v Ariz. Dep't of Educ., 2013 U.S. Dist. LEXIS 3515 at * (D. Ariz. Jan. 7, 2013), (quoting Kouba v. Allstate Insurance Co., 691 F. 2d 873, 876-77 (9th Cir. 1982)).

Paying a woman less than her male peer because she earned less in a previous job—without accounting for the inherent discrepancies in male versus female pay and barriers to access—is considered an employer’s prerogative to “accomplish business objectives.” An ERA would hold such decisions to more rigorous sex equality standard, giving women a fighting chance to oppose basing present unequal decisions on past unequal decisions.

Violence Against Women: An ERA could require that states meet Constitutional sex equality standards in the enforcement of their laws against gender violence and expand the federal power to legislate against these crimes.

The Violence Against Women Act (VAWA) provided a civil cause of action for gender-based violence that victims themselves could use against perpetrators. When Christy Brzonkala, a freshman at Virginia Tech, was assaulted and repeatedly raped by two fellow male students, she brought a claim against them through college disciplinary proceedings. When that failed, despite the fact that one of the perpetrators admitted to having sexual contact with Christy although she had said “No” twice, Christy tried to bring action in state court but the state grand jury did not find sufficient evidence to charge either man with rape, even the man who admitted to the nonconsensual sex. When Christy brought suit under VAWA, the Supreme Court struck down the civil cause of action in VAWA as an unconstitutional use of legislative power, leaving her without remedy.²

Although by 2005 all states and the US military finally eliminated the exemption from penalty for rape in marriage, 26 states still have lesser protection for victims, including lesser penalties and shorter reporting periods for sexual and violent crimes that occur in marriage.

Pregnancy Discrimination: An ERA could protect women from being disadvantaged because they are women, of which discrimination against pregnant women is an instance. When it is only women who are harmed by a policy, the fundamental principle of equal rights on the basis of sex is violated.

Constitutional jurisprudence guaranteeing equal protection of the laws has expressly rejected protection of pregnant women from sex discrimination. The Supreme Court has held that discrimination against pregnancy is not discrimination on the basis of sex under the Fourteenth Amendment. Title VII was subsequently amended to cover pregnancy in employment settings, but it does not require employers to provide minor workplace accommodations needed by pregnant employees, such as being allowed to take more frequent bathroom breaks. Moreover, it is legislation that can be revoked at any time.

Peggy Young had been working for United Parcel Service (UPS) for seven years when she got pregnant. UPS policy allowed light-duty assignments to employees who suffered from disabilities

² U.S. v. Morrison, 529 U.S. 598 (2000).

and were temporarily unable to fulfill their job's physical requirements. Peggy's position required her to lift items weighing up to 70 pounds. However, her pregnancy did not qualify her for light-duty assignment. Based on medical advice that she not lift more than 20 pounds during her pregnancy, Peggy asked for a modified work assignment to enable her to continue working. However, she was dismissed without pay and benefits for the last six and one-half months of her pregnancy on the grounds that she could not do her job. Peggy sued UPS in federal court, where both the district and appellate courts rule in favor of UPS finding no violation of the Pregnancy Discrimination Act, or the Americans with Disabilities Act. Her petition to the Supreme Court is currently pending.³

Heather Wiseman was a sales floor associate at Wal-Mart when she began suffering from intermittent urinary and bladder infections as a result of her pregnancy. Her doctor recommended she begin carrying a water bottle at work, but the store prohibited non-cashier employees from doing so. When she stopped carrying the water bottle, Heather's urinary and bladder problems recurred due to dehydration. With a doctor's note she resumed carrying a water bottle, but was terminated for insubordination. Heather sued Wal-Mart in federal court, claiming that she was fired on account of her pregnancy and subsequent medical conditions. She lost her case.⁴

Citizenship: Although the opportunity to pass on values and knowledge and identification relevant to citizenship does vary, it does not vary reliably by sex. Where the sexes are located in the same position relative to legislation, an ERA would likely require that they be treated the same.

The Constitution does not require that U.S. citizenship be granted on a basis that treats mothers and fathers equally.

In the Nguyen case, the Supreme Court upheld a law that gives different rights to children of unmarried parents based on their sex. An American citizen mother automatically confers her citizenship on a child, on the rationale that she is necessarily present at birth. The apparent assumption that fatherhood is optional, even when established by DNA, is permitted to require unwed fathers to take additional legal steps to establish their relationship with their children before they reach 18 in order to transmit their right to U.S. citizenship. As the dissent noted, this decision is based on and reaffirms traditional gender stereotyping of parental roles. While the Fourteenth Amendment has been interpreted to protect women from some sex discrimination, the U.S. Supreme Court has determined that sex discrimination is subject to a lesser standard of review than, for example, official racial or religious classifications. If the Nguyen case had been judged by the stricter standard of scrutiny, it is likely to have required the same treatment of fathers and mothers.

Systemic Bias: An ERA could provide the possibility of recourse when women are clearly

³ See *Young v. United Parcel Serv., Inc.*, 2011 WL 665321 (D. Md. Feb. 14, 2011), reconsideration denied, 2011 WL 3510997 (D. Md. Aug. 9, 2011), *aff'd*, 707 F.3d 437(4th Cir.)

⁴ *Wiseman v Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, at *2 (D. Kan. June 9, 2009)

disadvantaged by unequal treatment, without having to prove the intent to discriminate.

The Supreme Court's jurisprudence on the Fourteenth Amendment's provision requiring equal protection of the laws, interpreted to cover sex, requires that unequal treatment be intentional to be illegal. In fact, much sex discrimination is not intentional and for that reason can be even more persistent and damaging. When a clear pattern of disadvantage to their sex exists, with or without demonstrable intent, women should be able to find recourse under the Constitution that they currently do not have.

Public Policy: An ERA would be meaningful and significant on the level of policy guidance as much for what it says as for what it does. As a statement and symbol of principle, it would provide a guiding star and beacon of hope for efforts toward social equality at all social levels.

The U.S. Constitution does not include a specific provision to ensure sex equality. Constitutions provide fundamental principles that bind states and govern societies. In the ongoing effort to promote equality between women and men, an Equal Rights Amendment to the Constitution would send a clear message that sex equality is a fundamental human right in the United States, recognized and enforceable as such at the highest level of its law.

International Leadership: An Equal Rights Amendment in the United States Constitution would show this country not only talking sex equality talk to other countries but walking the sex equality walk here at home.

The United States has played an active role in promoting sex equality around the world. Most countries now have explicit sex equality provisions in their constitutions, leaving the United States behind in this respect. The United States, presenting itself as an example, should at least keep up with global progress in constitutional advancement for women.