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THE ERA PROJECT

The Equal Rights Amendment and the Equality Act: Two Equality Measures Explained

When the United States Constitution was written in 1787, its defining phrase “We the People” did not include women, LGBTQ+ people, people of color, or immigrants. In 2021, these groups, among others, still lack fundamental equality under the law. Two pieces of legislation are pending in Congress that would strengthen legal protections against discrimination based on sex, sexual orientation, and gender identity: the Equal Rights Amendment (ERA) and the Equality Act.

The United States is an outlier among modern democratic countries in not including these protections in our constitution and laws. Nevertheless, the Equal Rights Amendment and the Equality Act remain controversial. As the ERA gains renewed momentum and as sexual minority groups gain recognition and visibility in the sex equality movement, the same fear tactics that were used to stall the ERA in the 1970s and 1980s are being repurposed to once again pit women against each other, particularly when it comes to the Equality Act.

This policy brief explains what the Equality Act and the ERA would do, how they can work together, and why we need both.

What is the Equality Act?

LGBTQ+ people face pervasive discrimination and lack basic equality protections under federal laws and the laws of 29 states.¹ The Equality Act would update existing federal civil rights laws² by applying an inclusive definition of sex that encompasses sexual orientation as well as gender identity and expression.³ In 2020, in *Bostock v. Clayton County*, the Supreme Court held that Title VII of the 1964 Civil Rights Act, which (among other things) prohibits employment discrimination based on “sex,” extends to discrimination against employees based on their sexual orientation and gender identity and expression.⁴ The Equality Act would codify the Supreme Court’s decision in *Bostock* and explicitly bring LGBTQ+ people under the protections of other sections of federal law, reaching beyond the workplace to public schools, housing, credit opportunities, juries, federally funded programs, and public accommodations (defined generally as public and privately-owned facilities that are open to the public).⁵

¹ Sharita Gruberg, Lindsay Mahowald, & John Halpin, *The State of the LGBTQ Community in 2020*, Center for American Progress (October 2020) <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/#Ca=10>; Conron, K.J., Goldberg, S.K., *LGBT Protections from Discrimination: Employment and Public Accommodations*, The Williams Institute, UCLA (April 2020) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Supp-Apr-2020.pdf>; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

² Including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and additional laws covering employment with the federal government.

³ Equality Act, H.R.5, 117th Cong. §3(a)(2-5) (2021-2022).

⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

⁵ Places of public accommodation include hotels, restaurants, entertainment venues, retail stores, transportation services, healthcare facilities, and funeral homes.

The Equality Act would also fill important gaps in federal law by expanding existing sex discrimination protections to places of public accommodation and to federally funded programs.⁶ On a practical level, this would mean, for example, that sexual harassment would be outlawed in bars, restaurants, hotels and transportation; that gender-based differential pricing in commerce would no longer be allowed; and that sex discrimination would be prohibited in federal food assistance and disaster relief programs.⁷

Far from stopping at protections that cover LGBTQ+ individuals and sex discrimination, the Equality Act would also expand the kinds of public accommodations that are included in federal non-discrimination laws to include places that provide (1) exhibitions, recreation, exercise, amusement, gatherings, or displays; (2) goods, services, or programs; and (3) transportation services.⁸ These changes would not only expand federal anti-discrimination protections on the basis of sex, sexual orientation, and gender identity, but would further extend protections to people of color, immigrants, and people of minority faiths in spaces of public accommodations who experience widespread discrimination in our society.⁹

What is the Equal Rights Amendment?

The ERA grew from the early women’s movement and was first proposed to Congress in 1923—nearly 100 years ago—on the heels of the ratification of the 19th Amendment, which guaranteed women’s right to vote. Feminist leader Alice Paul and others believed that without explicit protections in the Constitution, women would never be fully protected under our laws.

The ERA is simple in language, but broad in its implications: “*Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*”¹⁰ It does not focus on women exclusively and instead, it guarantees equality for all, regardless of sex.

⁶ Equality Act, H.R.5, 117th Cong. §3(a)(2-5) (2021-2022); Arthur S. Leonard, *The Biden Administration's First Hundred Days: An Lgbtq Perspective*, 2021 U. Ill. L. Rev. 127, 130 (2021).

⁷ *New Report Outlines Why the Equality Act Is the Civil Rights Update Needed Now for Women, People of Color, and People of Faith, in Addition to LGBTQ People*, National Women’s Law Center (Jan. 27, 2021), <https://nwlc.org/press-releases/ew-report-outlines-why-the-equality-act-is-the-civil-rights-update-needed-now-for-women-people-of-color-and-people-of-faith-in-addition-to-lgbtq-people/>; *Why We All Need the Equality Act*, Movement Advancement Project (Jan. 2021), <https://www.lgbtmap.org/file/2021-report-equality-act.pdf>; Margaux Johnson-Green, *Gender and Racial Justice in SNAP*, National Women’s Law Center (Oct. 2020), <https://nwlc.org/wp-content/uploads/2020/10/Gender-and-Racial-Justice-in-SNAP.pdf>; Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment is Pervasive in the Restaurant Industry. Here’s What Needs to Change*, Harvard Business Review, <https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change> (last visited June 27, 2021); *Sexual Harassment in Bars and Restaurants*, McOmber McOmber & Luber, <https://www.redbanklegal.com/practice-areas/sexual-harassment-in-the-workplace/sexual-harassment-in-bars-and-restaurants/> (last visited June 25, 2021); *Sexual Harassment on Public Transportation: The University Student Experience*, MINETA, <https://transweb.sjsu.edu/press/Sexual-Harassment-Public-Transportation-University-Student-Experience> (last visited June 25, 2021).

⁸ *Id.*; Equality Act, H.R.5, 117th Cong. §3(a)(2-5) (2021-2022).

⁹ *New Report Outlines Why the Equality Act Is the Civil Rights Update Needed Now for Women, People of Color, and People of Faith, in Addition to LGBTQ People*, National Women’s Law Center (Jan. 27, 2021), <https://nwlc.org/press-releases/ew-report-outlines-why-the-equality-act-is-the-civil-rights-update-needed-now-for-women-people-of-color-and-people-of-faith-in-addition-to-lgbtq-people/>. (Sephora’s Racial Bias in retail study found that Black retail shoppers are 2.5 times more likely than white shoppers to receive unfair treatment based on their skin color, while BIPOC shoppers are 2 times more likely than white shoppers to receive unfair treatment based on their ethnicity.)

¹⁰ Equal Rights Amendment, Article I, H.J. Res. 208. (1972).

As a starting point, the ERA would usher in changes in sex equality protections by:

- Adding an explicit guarantee of sex equality in the Constitution, which would provide the strongest legal protection against future legislative attempts to roll back gender equality rights.
- Providing the opportunity for courts, the executive, and Congress to modernize the idea of equality and equal citizenship protected by the constitution, embracing a broader, more modern concept of substantive, not just formal, equality.
- Empowering advocates and the courts to challenge discriminatory laws based on sex at the federal, state and local levels.
- Providing a basis for courts to recognize pregnancy discrimination as a form of prohibited sex discrimination.
- Requiring courts to apply the most exacting level of judicial review on discriminatory laws that are based on gender and sex stereotyping and bias.
- Supporting an inclusive definition of sex that encompasses sexual orientation, gender identity and expression, and others.
- Bringing the United States in line with the more than 100 other countries with constitutional protections against sex-based discrimination.

How are the Equality Act and the ERA related and why do we need both?

The ERA and the Equality Act are mutually reinforcing pillars of equality. The Equality Act will modernize our civil rights laws and strengthen our democracy. In turn, as a constitutional protection, the ERA would insulate sex equality protections from the whims of Congress and changing political climates, and solidify the foundations of existing equality provisions in our laws as well as proposed laws such as the Equality Act.

The history of the ERA movement shows why a broad and inclusive view of sex equality is so important. The same types of reactionary politics that stalled the ERA are being recycled by opponents of the Equality Act. The ERA was passed by Congress in 1972 with overwhelming bipartisan support and ratified by 30 states within one year. But shortly thereafter an anti-ERA movement gained momentum. By 1979, as the 7-year time limit initially imposed by Congress passed, the ERA was 3 states short of the 38 state ratifications needed to ratify the amendment in the Constitution. It was not until Nevada ratified the ERA in 2017, Illinois in 2018, and Virginia in 2020 that the ERA gained 38 state ratifications. The legitimacy of the time limit imposed by Congress and the validity of attempts by some states to rescind their prior ratifications of the ERA are contested issues that are currently being litigated in the federal courts and debated in Congress.¹¹

¹¹ *Virginia v. Ferrero*, 466 F. Supp. 3d 253 (D.D.C. 2020); *Equal Means Equal v. Ferrero*, 478 F. Supp. 3d 105 (D. Mass. 2020); H.J. Res. 17, 117th Cong. (2021-2022); S.J. Res. 1, 117th Cong. (2021-2022); H.J. Res. 79, 116th Cong. (2019-2020). (On February 13, 2020, the House of Representatives passed H.J. Res. 79 to declare inoperative any deadline on the ERA's ratification. However, the companion bill in the Senate, S.J. Res. 6, was prevented by Republican leadership from being brought up for a vote before the end of that session).

The anti-ERA movement of the 1970s succeeded through fearmongering, appeals to sex and gender stereotypes, and pitting women against each other. ERA opponents framed sex equality as a threat to traditional values and family structures in which women stayed at home to take care of their children and husbands. The ERA, opponents threatened, would legalize gay marriage, force women to get jobs outside the home, require women to join the military, and do away with gendered bathrooms, among other claims. Anti-ERA messaging shaped gender equality discourse as a zero-sum game, sowing fear that the ERA would benefit women who worked in the wage-labor market at the expense of those who worked in the home.¹²

How can the ERA and the Equality Act Work Together to Strengthen and Protect a Broad and Inclusive Concept of Sex Discrimination?

In the 50 years since Congress first passed the ERA, social understandings of the meaning of equality have evolved considerably. The fears that were so effectively weaponized by anti-ERA opponents—LGBTQ+ rights, women’s military service, and gender-neutral bathrooms, for example—have become widely accepted as necessary aspects of a more equal society, and have come to pass without destroying the family as the ERA’s opponents predicted.¹³

While conservatives use LGBTQ+ rights as a scare tactic to defeat the ERA movement, some trans-exclusionary radical feminists (commonly referred to as TERFs) view opposition to trans rights and the Equality Act as a way to strengthen the women’s movement. In the end, what is lost is the fundamental principal of equality, which is gravely lacking for transgender people, for whom 2020 was the deadliest year on record.¹⁴

In 2021 alone, lawmakers in 30 states have introduced more than 80 bills targeting the rights of transgender youth to participate in sports and receive medical care. Opposition to medical treatments for transgender youth and the rhetoric of transgender youth having an unfair advantage in sports are harmful, unfounded, and extremely dangerous.¹⁵ Advocates who oppose equal rights for transgender people, and thus oppose the Equality Act, represent a problematic cooperation between social and political conservatives and transgender-exclusionary radical feminists (commonly referred to as TERFs) who believe that “real” women are assigned female at birth. Transgender exclusion groups characterize the Equality Act’s expansive definition of sex discrimination as something that would weaken equality protections for “real” women. In their view, there are two sexes (male and female); one’s sexual identity is established at birth and is not something one can

¹² Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, History.com, updated Feb 9, 2021, <https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly>; Bailey Iaccarino, *Why a Woman Was Against Her Own Equality: Understanding Phyllis Schlafly's Opposition to the Equal Rights Amendment*, Transformations: Research Papers, April, 2020, at 6, <https://digitalcommons.cortland.edu/cgi/viewcontent.cgi?article=1004&context=programs>; The Eagle Forum, Phyllis Schlafly Bio-founder of Eagle Forum, <https://eagleforum.org/about/bio.html>.

¹³ *Obergefell v. Hodges*, 576 U.S. 644 (2015); Assembly Bill A5240A (2019-2020); Gwyn Harries-Jenkins, *Women in Extended Roles in Military: Legal Issues*, Current Sociology, vol. 50(5): 745, 745 (2002).

¹⁴ *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, Human Rights Campaign, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited June 24, 2021).

¹⁵ Sarah Jones, *Fake Feminists Fight the Equality Act*, New York Magazine (Mar. 19, 2021), <https://nymag.com/intelligencer/2021/03/the-fake-feminists-fighting-the-equality-act.html>. (These fears and arguments are unfounded – transgender population is 2% and an even smaller number participate in sports, science does not support the proposition that transgender athletes have a blanket advantage in all sports since every individual’s unique physical and physiological attributes create a unique set of strengths and weaknesses in athletics.)

change, “just because you feel like it.”¹⁶ They claim that the Equality Act will “undermine women’s rights because if sex is optional women cease to exist as a stable political class of people.”¹⁷ The logic and political valence of this position grossly misconstrue the meaning of trans identity, which is not a matter of feelings or choice. Even the Supreme Court has refused to embrace a biological-at-birth definition of sexual identity that renders trans people as some kind of third sex or a mere simulacrum or distortion of “real” men and “real” women.¹⁸

In important ways, the divisive objections raised by trans equality-denying advocates today echoes the arguments raised by ERA opponents in the 1970s, who maintained that “real” women were destined for a life at home providing care to their husbands and children, and that there was something unnatural about women who defended a right to a life beyond the domestic sphere.¹⁹ This argument, advanced most prominently by ERA opponent Phyllis Schlafly, promoted a kind of “separate spheres” doctrine previously developed in the 19th century grounded in a notion of “true womanhood.” As historian Barbara Welke has described, women’s magazines and public teaching maintained that a woman’s true identity drew her, and tied her, to domestic pursuits such as keeping a clean house, raising pious children, and being submissive and obedient to her husband. Real women were assigned the role of the moral protector of home and family life.²⁰ Women who defied these roles and this identity risked being punished for violating their “true natures.”

Whether advanced by today’s trans equality-denying advocates, ERA-opponents of the 1970s, or separate spheres advocates of the 19th century, the idea of a “true” or “real” womanhood has often fueled campaigns to limit and even deny gender equality rather than preserve and advance it. The sex-based essentialism upon which it rests is the exact kind of thinking that sex equality advocates such as Ruth Bader Ginsburg, Pauli Murray, and supporters of today’s ERA have aimed to vanquish to an ignoble past.

Finally, the premise of the trans-exclusive argument assumes that a kind of stability of identity is required to justify protection from anti-discrimination laws. In fact, the law prohibits religion, marital status, and citizenship-based discrimination even though one can change one’s religion, marital status, or citizenship. Immutability of identity has never been a *sine qua non* for eligibility for equality protections. The fact that trans people claim an authentic gender identity that may be different from their sex declared at birth does not in any way undermine the legitimacy of their claims to discrimination, nor does it implicate the legitimacy or authority of the law to address discrimination claims raised by cisgender women.²¹

¹⁶ Wendy Murphy, *Congress’ Approach On Equality Act Would Erode Protections For Women*, Boston Herald, (June 13, 2021).

¹⁷ Id.

¹⁸ The Supreme Court – including some of its most conservative members – has already rejected the argument that protecting trans people’s rights to equality somehow undermines rights to sex equality. In *Bostok v. Clayton County*, 140 S. Ct. 1731, 1741 (2020), the Supreme Court found that the very idea of “sex discrimination” contained in federal laws prohibiting discrimination in employment necessarily includes sexual orientation and gender identity discrimination: “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

¹⁹ Ryan Hite, Jordan Henry, John & Andy Schlafly, *Real Women’s Rights Protected*, The Phyllis Schlafly Report, (Aug. 4, 2017) <https://www.phyllisschlafly.com/family/real-women-s-rights-protected-820/>.

²⁰ See, Barbara Welke, *The Cult of True Womanhood: 1820-1860*, American Quarterly, The Johns Hopkins University Press, vol. 18, no. 2, Part 1, 151-174 (1966); George Burnap, *Sphere and Duties of Woman*, (5th ed. 1854); *Woman*, Godey’s Lady’s Book, II, 1, 110 (1831).

²¹ Cisgender means a person whose [gender identity](#) corresponds with the sex the person had or was identified as having at birth.

The ERA seeks to reinforce and modernize the fundamental principal of equality that lies at the heart of the U.S. Constitution. Historically, gender equality has been advanced and defined by the contributions of Black, queer, trans, and gender-nonconforming individuals, not only by cisgender white women.²² What is more, Black and queer women spearheaded the ERA’s most critical period of revitalization, and the ERA is more relevant now to the equal rights of sexual minorities and groups outside of the gender binary than ever before.²³

Fear tactics and a zero-sum mentality around civil rights limit the equality movement, giving in to the playbook of conservatives who have used these tactics time and again to pit marginalized groups against one another, citizens against immigrants, and white people against people of color. Instead, history teaches us that the fates of all marginalized people—including people of color, women, the LGBTQ community, and gender-nonconforming people—are tied to one another.

Principles of feminism and transgender rights are based on the shared ethics of equality, dignity, bodily autonomy, and self-determination—challenging conventional norms of gender that confine all marginalized genders in a second-class status. The unity and diversity of the ERA movement is its greatest strength and should be leveraged to build a robust and sustainable movement for equality for all, rather than appealing to a notion of rights that privileges the most privileged among us.

²² Pauli Murray, *Song in a Weary Heart* (1987); Shirley Chisholm, *The Good Fight* (1973); Janet Mock, *Redefining Realness: My Path to Womanhood* (2014).

²³ Barbara Rodriguez, *How a New Generation of Lawmakers Led by Black Women Revived the Equal Rights Amendment*, *The 19th*, (Mar. 15, 2021), <https://19thnews.org/2021/03/black-women-era-revival/>; Fabiola Cineas, *The Equal Rights Amendment May Have Found Its Moment*, *The New Republic* (Jan. 16, 2020), <https://newrepublic.com/article/156238/equal-rights-amendment-may-found-moment>.