

The Equal Rights Amendment:

- Increasing Profitability
- Creating Value
- Attracting Capital

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Virginia Equal Rights
Coalition

Executive Summary

Why Should Virginia Ratify the ERA?

Increasing certainty. The Virginia state constitution has provided for equal rights for 47 years without ill effects. Federal alignment with state terms will increase certainty and efficiency for businesses in human resources, hiring, and attracting capital investment. While laws can be reversed, a constitutional amendment provides lasting clarity.

Virginia can ratify, with legal effect. A legal opinion letter delivered this spring by Virginia Attorney General Mark Herring confirmed the door remains open to ratification.

Virginia's historic role in Constitutional amendment makes it a fitting final state to ratify. James Madison wrote the Bill of Rights, influenced by the Virginia Declaration of Rights. Virginia's state constitution has protected equal rights almost half a century. Ratification by 38 states is required for approval. The ERA has been ratified by 37 states, most recently Illinois in June 2018. Virginia can make history by taking this important amendment across the finish line.

Equal rights benefit businesses. As found in studies from McKinsey and Ernst & Young, gender parity increases productivity by increasing use of valuable resources. ERA ratification is logical for a state interested in **sustaining and growing business profits.**

Unleashing income. The government workers who live throughout Virginia are enabled to spend more on consumer purchases, business services, and investments when their salaries and benefits are predictably commensurate with the merits of their work.

“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”

- Text of the Equal Rights Amendment

Benefits to Business



Studies show gender parity increases **productivity and profitability**.

- “Not only do individual businesses stand to gain from more fully capitalizing on the talents of women, **the economy as a whole gains.**”¹
- **A uniform standard** of predictable government wages and benefits will give businesses a consistent model and a predictable partner in workforce initiatives.
- **Predictability increases** as the talents of women as well as men are unlocked. In government, this should result in the ability to deploy labor resources more efficiently, and in companies, this has the added benefit of improving **profits**.
 - **Companies in the top quartile** for gender diversity in top management and board participation are **15% more likely to outperform** the average financial returns for their industry, according to McKinsey.²
 - **Having women in at least 30% of company leadership positions** tends to **add 6% to net profit margin** according to a study supported by Ernst & Young.³
- **Growth increases** when underutilized assets become more productive. “[T]argeted gender equality promotion creates a particularly strong impact on GDP.”⁴ Price Waterhouse Coopers found gender parity could add **\$1,750 billion to U.S. GDP**,⁵ and McKinsey found it could add \$12 trillion to global GDP by 2025.⁶

“Not capitalizing on women as workers and as consumers has real impact on the bottom line and overall success of an organization.”

- Sharon Allen, Chair, Deloitte LLP (2011)

Why Would the ERA Help?

Federal alignment with state terms will increase certainty and efficiency for businesses in human resources, hiring, business location, and attracting capital investment.

Most legal scholars believe the Supreme Court, when applying the ERA, will apply “strict scrutiny,” its highest level of review. This is not an absolute. While strict scrutiny should reduce discrimination in states that lack state ERAs,⁷ it permits discrimination when necessary to achieve a compelling government interest. In fact, a study of federal strict scrutiny decisions found that laws survive strict scrutiny more than 30% of the time.⁸

Lasting Protection. Statutes and legal theories are temporary and can be diluted or revoked. An amendment will establish lasting and consistent protection of equal rights, prohibiting government discrimination based on sex except when narrowly tailored and necessary to achieve a compelling government interest.

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

- U.S. Supreme Court Justice Antonin Scalia (Jan. 2011)

Why Virginia?

Equal rights are a strong Virginia value. For almost half a century, the Constitution of Virginia has foreclosed sex-based discrimination by the state government.⁹ This does not deter discrimination by the federal government, however. The ERA will bridge that gap.



As the birthplace of the Declaration of Rights that became the model for the U.S. Bill of Rights, Virginia has a historic leadership role in amending the Constitution to protect shared American values. By formally joining the majority of states that have ratified the ERA, Virginia will protect equal rights, strengthening the growth of well-trained worker supply lines, productivity, and profitability.

Timing

Is the deadline an issue?

While the enacting language of the Amendment included a deadline, later extended to 1982, it is not in the active language of the Amendment itself, but in the proposing resolution, and accordingly may not be valid.¹⁰

- Even if it were valid, legal scholars have concluded that Congress can extend, ignore, or eliminate it.¹¹ Legislation in Congress now would eliminate the deadline.
- Virginia Attorney General Mark Herring recently released an official opinion that the state legislature can still ratify the ERA.¹²

“The General Assembly may still pass a resolution ratifying the [ERA] despite the lapse of the ERA’s ratification period. Congress has substantial power over the process for amending the Constitution and may choose to further extend the ERA’s ratification deadline and recognize as valid a State’s intervening ratification”

- ***Staff Summary, Official Opinion of Virginia Attorney General Mark Herring, Letter to Virginia Senator Richard H. Black, May 11, 2018***

Endnotes

¹ See G. Pellegrino, S. D'Amato & A. Weisberg, "The gender dividend: Making the business case for investing in women," Deloitte Touche Tohmatsu (2011),

<https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/public-sector/gender-dividend-en.pdf>

("Not capitalizing on women as workers and as consumers has real impact on the bottom line and overall success of an organization." ... "American women already control over 50 percent of personal wealth" ... "[W]omen either make or influence up to 80 percent of personal buying decisions, on everything from appliances to cars and medical services." ... "not only do individual businesses stand to gain from more fully capitalizing on the talents of women, the economy as a whole gains.")

² Vivian Hunt et al., "Why Diversity Matters" (2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>

³ Marcus Noland, Tyler Moran, and Barbara Kotschwar, "Is Gender Diversity Profitable? Evidence from a Global Survey," WP 16-3 (Feb 2016), <https://piie.com/publications/wp/wp16-3.pdf>

⁴ World Economic Forum, 2017 Global Gender Gap Report, at 27, 29 (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf (WEF Report).

⁵ WEF Report, *supra*; accord PwC, Women in Work Index 2017, at fig. 4, p. 12 (2017),

<https://www.pwc.co.uk/economic-services/WIWI-2017/pwc-women-in-work-2017-report-final.pdf>

⁶ Jonathan Woetzel et al., "The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion to Global Growth," McKinsey Global Institute (September 2015),

https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Full%20report_September%202015.ashx

⁷ Compare "intermediate scrutiny:" applying this standard, the Court upheld different citizenship requirements for children born abroad to unmarried male and female citizens, in *Nguyen v. Immigrat'n and Naturalizat'n Serv.*, 533 U.S. 53 (2001), and a California statutory rape law that criminalized sex with underage girls, but not boys, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

⁸ See Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," *Vanderbilt L. Rev.*, Vol. 59, p. 793, 2006; UCLA School of Law Research Paper No. 06-14, <https://ssrn.com/abstract=897360>

⁹ Constitution of Virginia, Sec. 11, Art. 1.

¹⁰ See Allison L. Held et al., "The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States," 3 *Wm. & Mary J. Women & L.* 113, 128 (1997),

<http://scholarship.law.wm.edu/wmjowl/vol3/iss1/5>; *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009), https://scholar.google.com/scholar_case?case=8910590074858139443&hl (quoting *D.C. v. Heller*, 554 U.S. 570 at 578 n.3 (2008); *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 33 L.Ed. 302 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up"))).

¹¹ See *Held, supra*; see also, e.g., "The Equal Rights Amendment: Common Legal Questions," Winston & Strawn (2018), <https://www.winston.com/images/content/1/3/v2/137207/ERA-Common-Legal-Questions.pdf> (*Winston & Strawn Q&A*).

¹² Letter from Virginia Attorney General Mark R. Herring to Virginia Senator Richard H. Black (May 11, 2018),

<https://www.oag.state.va.us/files/Opinions/2018/18-006-Black---ERA-opinion-issued.pdf>