Advocates Reignite the Fight for an Equal Rights Amendment

Justice Ginsburg scrolled through the hand-sized Constitution, explaining infirmities in the post–Civil War language of the Fourteenth Amendment, which inserted “male” in the second section. She described how every constitution around the world since 1950 has guaranteed that women and men are treated as equal citizens. Then, she made it personal.

“Just like freedom of speech [and] freedom of the press, a fundamental tenet of our society should be the equal citizenship stature of men and women, and that’s what the Equal Rights Amendment would do,” Justice Ginsburg said. “Now I take this pocket Constitution and show it to my granddaughters, and I can’t point to a provision that says explicitly men and women have equal rights and obligations under the law. I would like to be able to (do that).”

ERA Comes Back

The text of the ERA is simple: “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.” The language was developed by lawyer and suffrage fighter Alice Paul in 1943, although the equality amendment was first introduced in 1923.

When, under the amendment process, it was approved in 1972 by two-thirds of the members of the U.S. House of Representatives and Senate, a deadline for ratification by the states was inserted—at first seven years, then extended to 10 years. The ratification fell three states short of the 38 needed, and in 1982, the ERA was declared dead.

Now, new impetus is reviving it. Two key strategies have emerged to make the ERA a reality: One approach is to gain the final three ratifications and amend the original congressional time limit; the other is to “start over” with a vote in Congress and gather 38 new state ratifications.

“All along, since 1982, there was a little hum of energy,” says lawyer Jessica Neuwirth, author of the 2015 book *Equal Means Equal: Why the Time for an Equal Rights Amendment Is Now* . “It went from a hum to a whisper,” Neuwirth notes, “and now it’s an ascendant line. It’s steady and it’s strengthening. Not like a roar, but a much greater awareness than there used to be.” Neuwirth is cofounder of the ERA Coalition, a D.C.-based entity that serves as a resource for more than 70 organizational members working on the issue. [http://www.eracoalition.org]

With new logos, T-shirts featuring Gloria Steinem and Dorothy Pitman Hughes, branding, online resources, a movie (*Equal Means Equal*, directed by Kamala Lopez), and events, renewed efforts are aiming to secure this long-term structural fix. But it’s not easy. “It’s surprisingly gotten little news coverage,” says Katherine Franke, director of the Center for Gender &

Sexuality Law at Columbia Law School in New York City. “Substantive and meaningful law reform gets lost as the most salacious or more sensational news stories swallow the news cycle.”

Equal Protection and Laws Fall Short

Public opinion leans heavily toward a constitutional guarantee of equal rights for men and women—a 2016 poll by the ERA Coalition shows that 94 percent support it, and other polls also show strong support.

The problem is that 80 percent don’t know it is lacking. “Many people, including lawyers, think the ERA is in the Constitution. I was stunned to hear that,” says Linda T. Coberly, Chicago managing partner of Winston & Strawn LLP, which in 2017 began a pro bono effort to support ERA efforts.

Lawyers, Coberly contends, have a critical role in educating the public. Winston & Strawn created a fact sheet to translate legal concepts for laypeople, beginning with a 2011 quote from late Supreme Court Justice Antonin Scalia: “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.”

In the absence of the ERA, in the past decades litigators turned to the Equal Protection clause of the Fourteenth Amendment to challenge sex discrimination. More than 100 years after it was adopted, the Fourteenth Amendment was first applied to sex discrimination in *Reed v. Reed* (404 U.S. 71 (1971)), which held that a state probate law wrongly favored male administrators over female ones.

But sex-based classifications have not benefited from the same rigorous review in the courts as classifications based on race, religion, or national origin, where the government must demonstrate a compelling reason for discrimination. “The rights women have under the Fourteenth Amendment are lesser than the rights other discriminated groups have,” Coberly explains. “Discrimination against women will be subjected to intermediate scrutiny, whereas a law that discriminates on the basis of race or national origin or religion will be evaluated under strict scrutiny.”

While the courts have applied “heightened scrutiny” to sex-based discrimination in some cases, the application is uneven. State ERAs give a window into the possible effect of a constitutional equality on judicial interpretation. “Most of them are using strict scrutiny. They have been very effective in cases involving reproductive rights and pregnancy discrimination,” says Linda Wharton, an associate professor of political science at Stockton University in Galloway, New Jersey, and former managing attorney of the Women’s Law Project in Philadelphia, who has studied the topic extensively. State ERAs or state constitutional equivalents exist in nearly half the states (Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming).

Apart from a constitutional inclusion, specific laws provide a measure of protection against sex discrimination, such as Title VII of the 1964 Civil Rights Act on workplace discrimination, Title IX on educational equality, the Equal Pay Act, and the Pregnancy Discrimination Act. All face limitations. “They provide patchwork protection and have been subject to different levels of enforcement and judicial interpretation,” wrote Thomas Susman, director of the ABA Governmental Affairs Office, in a June 2018 letter to Congress that also described a 2016 ABA Resolution reaffirming support for the ERA. [https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_10B.docx]

New Paths to the Constitutional Equality

Women’s rights advocates looked again at the ERA after claims of unequal treatment based on sex crashed into judicial brick walls—for example, in the denial of a class action to chain-store employees with sex discrimination claims (*Wal-Mart v. Dukes*, 564 U.S. 338 (2011)) or in the failure to hold a police department accountable for the systemic failure to enforce domestic violence protection orders *(Castle Rock v. Gonzales*, 545 U.S. 748 (2005).)

“We had a litigation-focused strategy. I realized that the courthouse should not be perceived as the sole path to justice,” says lawyer Carol Robles-Román, who in March 2018 became copresident and CEO of the ERA Coalition after leading the legal advocacy group Legal Momentum.

Two intersecting approaches to securing an Equal Rights Amendment are underway. Neither is simple.

A “three-state strategy” aims to gather three more ratifications to add to the 35 passed from 1972–1982 and reach the magic number of 38. The concept was developed in 1992 after the Twenty-Seventh Amendment (the “Madison” amendment) on congressional pay was added to the Constitution, 203 years after it was first passed by Congress.

In May 2017, Nevada became the 36th state to ratify the federal ERA, and the first since 1977. In May 2018, Illinois followed suit to become the 37th state. “It’s part of Illinois voicing its view that we don’t want to live in the Dark Ages. We do want the U.S. Constitution to protect gender equality. Or at least that’s what I hope,” says Lorie Chaiten, director of the Women’s and Reproductive Rights Project of the Illinois ACLU, which supported the measure.

During the latest ratification process in Illinois, Anne Schlafly Cori of the anti-ERA Eagle Forum wrote to the *Chicago Tribune* to reiterate objections from the 1970s. Cori’s late mother, Phyllis Schlafly, helmed the Stop ERA campaign at that time, arguing, among other things, that the ERA would require unisex bathrooms and an expansion of gay rights.

Cori wrote that the ERA would lead to the end of sex-segregated prisons, women’s shelters, and accommodations for pregnant women, and it would “mandate taxpayer-paid abortions” and equal representation of women in military combat. “Nothing in (the) ERA would ever give

women a pay raise or stop any sexual harassers," Cori wrote.

ERA groups countered her arguments in testimony and literature, and the vote easily passed in the Illinois Senate, but only squeaked by with one vote above the threshold in the state's House of Representatives.

Now one more state is needed. Activists are focused on Virginia or North Carolina; the other states that await ratification are Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, Oklahoma, South Carolina, and Utah. In Virginia, women wearing suffragist outfits joined a rally in Richmond in August, and the topic will be discussed at a day-long symposium at William & Mary Law School in November. And in late October, two Virginia officeholders will join a panel at CUNY Graduate Center in New York for a program called "A New Era for the ERA: Women of Color Lead the Way."

In North Carolina, state representative Deb Butler, a Wilmington, N.C., lawyer, introduced a ratification bill, although, she says, the conservative legislative leadership is intent on pushing it aside. "I wanted to at least file and get the conversation started," she says. "The public will drive this discourse."

The Equal Rights Amendment North Carolina Alliance has gathered a roster of 21 organizations and is holding a fall forum on the subject.

If one more state passes the ERA, the attention will shift to Congress. Proponents argue that Congress has the authority to repeal or waive the original ratification deadline. Currently, resolutions H.J. Res. 53 in the House and S.J. Res. 4 in the Senate sponsored by Rep. Jackie Speier (D–CA) and Sen. Ben Cardin (D–MD), respectively, seek to remove the deadline.

Whether this novel approach will withstand a constitutional challenge is a matter of debate among scholars. ERA proponents argue that waiving the deadline is within congressional power. Skeptics say that ratification today fails a test of being "sufficiently contemporaneous" and differs from the Madison amendment, which had no time limitations. Other questions arise over the validity of rescissions—five states passed rescission resolutions after their initial pro-ERA vote, but rescissions have been considered null in other amendment fights.

Starting Over

An alternative strategy is to begin again by getting two-thirds of both chambers of Congress to propose a new constitutional amendment on equal rights and gathering the requisite 38 state ratifications. Since 1992, when she was first elected, Rep. Carolyn Maloney (D–NY) has introduced legislation in every congressional session to do just that. The current H.R. Res. 33 keeps the ERA intact with one additional sentence that references women—"so women would be in the Constitution," Maloney says.

When new versions are discussed, additional concepts come into play, too. Should the overarching concept relate to "gender" equality instead of "sex" equality? Or, as suggested by the African American Policy Forum, a group co-founded by UCLA and Columbia law professor

Kimberlé Crenshaw, should it refer to “women in all their diversity” and define “sex” as “including pregnancy, gender, sexual orientation, or general identity,” and add classifications related to race or other categories?

In June 2018, in order to gain traction on a new ERA—now sometimes called the Women’s Equality Amendment—representatives Maloney and Speier announced an informal “shadow” hearing. “We’ve waited too long,” Maloney notes. “We’ve been totally stalled since the ’80s.”

Among those testifying was actress Alyssa Milano, known for her #MeToo movement activism. “Lack of recognition of women’s equality in our Constitution perpetuates this idea that women are less than men, which then leads to unequal treatment, abuses of power, sexual harassment, and assault,” she said.

Maloney is passionate in her ERA advocacy. “It’s the most important thing we could do to help women. It would be bedrock firm in our Constitution; it could not be taken away from us,” she says. “I’d like it to be the legacy of every woman in America.”