

Reconstituting the Equal Rights Amendment: Policy Implications for Sex Discrimination

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The Complete Text of the 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.*

As one whose efforts to educate people about the Equal Rights Amendment have generally fallen more into the activist than the academic category, I'd like to start with a short history quiz.¹ Can you identify the following?

This amendment to the U.S. Constitution was proposed not as an end in itself, but as a step on the way to equality of the sexes. In its words, the right it granted “shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation.”

Its supporters petitioned, lobbied, paraded, and picketed for it. However, it took over 40 years from the time the amendment was first introduced until it finally passed Congress. Before it took effect, a fourth of the states already had state versions of the amendment.

It steamrolled out of Congress, getting more than half the ratifications it needed in the first year after its passage. Then “a corps of impassioned lady orators, headed by a woman attorney ... charged to state capitals as needed to warn the populace in general and legislators in particular that ratification was the first step toward socialism, free love, and the breakup of the American

¹ Roberta Francis, “The Sexual Evolution,” *Chatham (NJ) Courier* (May 21, 1981).

family.”² Formal organizations against the amendment sprang up nationwide. Its opponents could kill the amendment by defeating it in 13 state legislatures, even if all the rest of the states wanted it in the Constitution.

Opposition was widespread among women, who for varied and complex reasons felt that their sex was not capable of all that they thought the amendment would require of them. They believed opponents’ claims that the amendment would topple women’s pedestals, end chivalry, and threaten the family. States’-rights advocates opposed the amendment on the basis that the second sentence was in their opinion a “federal power grab.” Others were against it because they felt it would cost business money by bringing higher wages for women.

As the amendment approached the necessary ratification by three-fourths of the states, the threat of rescission surfaced. Some states called for referendums to allow the voters to confirm or reject their state legislature’s ratification of the amendment. After the Supreme Court declared such referendums unconstitutional, the battle narrowed down to one state, Tennessee.

Had enough clues? It’s the Equal Rights Amendment, right? Wrong!

The amendment described above, as you may well know, is the 19th Amendment, whose affirmation of women’s right to vote is so taken for granted that many people are unaware that there was any opposition to it. But every sentence except the last one is also descriptive of the political struggle for the Equal Rights Amendment. The strong similarity between the two “scripts” becomes more understandable when the history behind the ERA is examined.

The historical continuum

The first highly visible demand for women’s equality in the United States was the Declaration of Sentiments, modeled on the Declaration of Independence, which was adopted at the

² Carol Lynn Yellin, “Countdown in Tennessee, 1920,” *American Heritage* (December 1978).

1848 Woman's Rights Convention in Seneca Falls, NY. Of the eleven resolutions considered by the 300 women and men in attendance, only one – the proposal for woman suffrage – created deep controversy. It was passed after impassioned speeches by Elizabeth Cady Stanton and former slave Frederick Douglass, who called the vote the right by which all others could be secured.

Ironically, this most controversial resolution is the only one that has thus far been written into the Constitution, and it remains the only specifically articulated constitutional guarantee of a right held by women equally with men.

After the 1920 ratification of the 19th Amendment, suffragist leader and lawyer Alice Paul proposed that freedom from legal sex discrimination required an amendment affirming that the Constitution applies equally to all citizens regardless of sex. She introduced the first ERA in 1923 at a National Woman's Party meeting in Seneca Falls celebrating the 75th anniversary of the 1848 Convention.

At that time she presciently warned, "If we keep on this way they will be celebrating the 150th anniversary of the 1848 Convention without being much further advanced in equal rights than we are. ... If we had not concentrated on the Federal Amendment we should be working today for suffrage. ... We shall not be safe until the principle of equal rights is written into the framework of our government."³

Opposition came from both ends of the political spectrum. Progressive reformers feared that the ERA would eliminate protective labor laws for women. Social conservatives considered women's equal rights, like their right to vote, a threat to existing public and private power structures. Nevertheless, in the early 1940s, the Republican Party and then the Democratic Party added support of the Equal Rights Amendment to their platforms.

³ "Women Open Campaign for Equal Rights," *Equal Rights*, Official Weekly of the National Woman's Party, July 28, 1923.

Over a century after the fight to end slavery fostered the first wave of the women's movement, the civil rights battles of the 1960s provided an impetus for the second wave. Women organized for social justice, and the ERA rather than the right to vote became the central symbol of their struggle for equality.

The ERA was passed and sent to the states for ratification on March 22, 1972, with a seven-year deadline in the introductory proposing clause. Like the 19th Amendment before it, it barreled out of Congress, getting 22 of the necessary 38 state ratifications in the first year. But the pace slowed as opposition began to organize – only eight ratifications in 1973, three in 1974, one in 1975, and none in 1976. In 1977 Indiana provided the 35th and so far the last state ratification.

The 15 states that have not ratified the ERA — Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia — constitute the block of states courted by the race- and gender-focused “southern strategy” of late-20th-century right-wing Republicans,⁴ augmented by three western states with a strong anti-ERA Mormon influence. Illinois, sometimes considered a surprising presence on the list, was the home state of anti-ERA leader and attorney Phyllis Schlafly. Though the ERA received multiple majority votes in the Illinois House, it was not ratified because the legislature required a three-fifths majority for approval of federal amendments.

Despite Congress's 1978 vote to extend the ratification period until June 30, 1982, the ERA was swamped by the conservative political tide that swept Ronald Reagan into the presidency in 1980. After the deadline passed, the ERA was reintroduced in Congress on July 14, 1982, and it has been before every session of Congress since that time.

⁴ Tanya Melich, *The Republican War Against Women: An Insider's Report from Behind the Lines* (New York: Bantam Books, 1998), 47.

Impact of the ERA

Many people who support legal equality for women are only lukewarm about the Equal Rights Amendment, believing that sufficient protection against sex discrimination exists in the 1963 Equal Pay Act, Title VII and Title IX of the 1964 Civil Rights Act, Supreme Court decisions based on the 14th Amendment's equal protection clause, and other anti-discrimination statutory and case law.

ERA supporters counter that legal sex discrimination is not yet a thing of the past, and the progress of the past 40 years is not irreversible. While some remaining inequities are more the result of individual behavior and social practices than legal discrimination, they can all be influenced by a strong message that the Constitution has zero tolerance for sex discrimination.

At a symbolic level, ratification of the Equal Rights Amendment would affirm that the bedrock principles of United States democracy – “all men are created equal,” “liberty and justice for all,” “equal justice under law,” “government of the people, by the people, and for the people” – finally and without question apply equally to women. Lacking this specific guarantee in the Constitution, women for more than two centuries have fought long and hard political battles to win rights that men (at least those in the majority with respect to race) possessed automatically because they were male. Even today, a major distinction between the sexes from the moment of birth is their different legal status regarding how their constitutional rights are affirmed.

It was not until as recently as 1971 (in *Reed v. Reed*) that the 14th Amendment's equal protection clause was first applied to sex discrimination. As demonstrated by the most recent major Supreme Court decision on that issue, regarding admission of women to Virginia Military Institute (*United States v. Virginia*, 1996), the law still operates primarily on the traditional assumption that males hold rights and females must prove that they hold them.

In practice, the impact of the ERA would be seen most clearly in court deliberations on cases of sex discrimination. For the first time, “sex” would be a suspect classification requiring the same high level of “strict scrutiny” and having to meet the same level of justification – a “necessary” relation to a “compelling” state interest – that the classification of race currently requires.

The VMI decision, written by Associate Justice Ruth Bader Ginsburg, told courts to exercise “skeptical scrutiny” requiring “exceedingly persuasive justification” of differential treatment on the basis of sex, but prohibition of sex discrimination is still not as strongly enforceable as prohibition of race discrimination. Ironically, under current court decisions, a white male claiming race discrimination by a program or action is protected by strict scrutiny, but a black female claiming sex discrimination by the same program or action is protected by only skeptical scrutiny (or what could irreverently be called “strict scrutiny lite”).

The ERA would clarify the law for the lower courts, whose decisions still sometimes reflect confusion and inconsistency about how to deal with sex discrimination claims. If the ERA were in the Constitution, it would influence the tone of legal reasoning and decisions regarding women’s equal rights, producing over time a cumulative positive effect.⁵

Another argument regarding the ERA’s impact can be expressed as a warning. Without the bedrock constitutional affirmation that equality of rights cannot be denied or abridged on account of sex, the political and judicial victories that women have achieved over the past two centuries are vulnerable to erosion or reversal, now or in the future.

⁵ A number of ideas in the preceding three paragraphs are based on the author’s 1997 discussion at the National Women’s Law Center in Washington, DC, with Judy Appelbaum, Director of Legal Programs, and Deborah Brake, then Senior Counsel, the two NWLC attorneys who produced the key *amicus* brief for the plaintiffs in the VMI litigation.

Efforts to turn back the clock on women's advancement include acts of both commission and omission, which range far beyond the controversial issue of eroding reproductive rights. Serious attempts have been made at the congressional committee level to cripple Title IX, which requires equal opportunity in education. The reauthorization of the Violence Against Women Act was recently accomplished after opposition and stalling tactics came close to defeating it. For nearly a decade the Senate Judiciary Committee has blocked U.S. ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In July 2001, the House of Representatives passed the Community Solutions Act, which under the guise of "charitable choice" would exempt faith-based organizations receiving federal funds to provide social services from obeying federal, state, or local anti-discrimination laws in the delivery of those services.

Because Congress has the power to replace existing laws by a simple majority, many current legal protections against sex discrimination could be removed by a one-vote margin. Courts in the near term would still apply the post-VMI standard of skeptical scrutiny to laws that differentiate on the basis of sex, but that precedent could be undermined or eventually abandoned by future conservative or reactionary Supreme Courts. With equal rights specifically guaranteed constitutionally, progress already made in eliminating sex discrimination would be much harder to reverse.

For those working to promote women's equality, the ERA would be of practical as well as symbolic assistance. While most laws explicitly discriminating against women have been removed from the books, many areas of the current legal and judicial systems still have a differential impact on women that works to their disadvantage, because those systems have traditionally used the male experience as the norm. The ERA would both inspire and require lawmakers and judges to include

equitable consideration of female experiences as they deal with Social Security, taxes, wages, pensions, domestic relations, insurance, violence, and other issues. Without the motivation provided by an ERA, the status quo will change more slowly, and women (and in some instances men) will have to continue to fight long, hard, and expensive political and judicial battles to establish their equal constitutional rights.

Ratification of the ERA would also improve the standing of the United States in the world community with respect to equal justice under law, since the governing documents of many other countries specifically affirm legal equality of the sexes (however imperfect the implementation of that ideal may be).

Policy implications

The application of a constitutional principle such as the Equal Rights Amendment (comparable, for example, to the free speech guarantee of the 1st Amendment or the equal protection guarantee of the 14th Amendment) is influenced by intersecting factors, including the specific facts of the issue in question, the interpretation of the guarantee in combination with precedent and other applicable constitutional principles, and even the legal or judicial philosophy of the persons empowered to decide the issue. However, some general conclusions about the ERA's policy implications can be drawn from its legislative history and from case law growing out of state equal rights amendments⁶ and other anti-discrimination guarantees.

⁶ The 19 states with equal rights amendments or guarantees in their constitutions are Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. [List from Claire Sherman Thomas, *Sex Discrimination in a Nutshell* (St. Paul: West Publishing Company, 1982), 380, expanded by 1998 adoption of state constitutional amendments in Florida and Iowa.] Of these states, four (Florida, Illinois, Utah, and Virginia) have not ratified the federal ERA.

Some of the major policy issues still highlighted by anti-ERA activists as reasons for their opposition are also issues discussed and sometimes debated by ERA supporters: reproductive rights (primarily regarding abortion), homosexual rights (especially in marriage), affirmative action, single-sex education, and women in the military.

The legislative history created in the 1970s and 1980s kept the ERA separate from the issue of abortion.⁷ While opponents claim that the ERA would strike down all restrictions on abortion, court decisions about reproductive rights have been based almost entirely on right of privacy and equal protection analysis, not on equal rights guarantees. Many states with state ERAs or equal protection guarantees in their constitutions, such as Pennsylvania and Missouri, still enforce significant restrictions on abortion. The three states (Connecticut, New Mexico, and Texas) which have applied a state ERA to an abortion funding decision have required public funding only of medically necessary, not of all, abortions. In fact, most such cases are argued under a combination of privacy, equal protection, and equal rights claims, and the presence of a state ERA is not necessarily the determining factor in those court decisions.

ERA opponents' claim that the amendment would require states to allow same-sex marriage is similarly contradicted by the evidence, since no state, with or without an ERA, recognizes such unions. The state of Washington rejected such a claim under its state ERA in the 1970s. After Hawaii's Supreme Court ruled in 1993, under its state ERA and equal protection analysis, that denial of a marriage license to a same-sex couple was sex discrimination, the state legislature proposed and voters in 1998 adopted a constitutional amendment stating that "the legislature shall have the power to reserve marriage to opposite-sex couples." In a further

⁷ Professor Ann Freedman of Rutgers University School of Law in Camden, NJ, embodied the meaning of reproductive choice when she testified on the ERA's lack of relation to abortion in 1983 at a U.S. Senate Judiciary Committee hearing while eight months pregnant.

uncoupling of the ERA from this issue, in 2000 Vermont — which lacks a state ERA because voters rejected one a decade earlier — became the first state to recognize same-sex domestic partnerships under the “common benefits” clause of its constitution.

Under the strict scrutiny triggered by an ERA, the status of both affirmative action for women and single-sex education would most likely parallel the status of race-based classifications pursuant to the 1995 Supreme Court decision in *Adarand Constructors, Inc. v. Peña*, which requires that affirmative action programs with benefits based on race must be narrowly tailored to serve a significant government interest. The VMI majority decision written by Justice Ginsburg established that justifications of sex-based classifications based on generalized assumptions about “the way men or women are” will not stand up to even skeptical, let alone strict, scrutiny,⁸ but some room remains for narrowly tailored government action that remedies rather than perpetuates past discrimination.

Perhaps no social context related to a discussion of the ERA’s impact has changed so much in the past 35 years as the position of women in the military. Only in 1967 did Congress permit women to make up more than 2 percent of military personnel. Over the succeeding decades, women entered the nation’s military academies, commanded both male and female troops, and served with distinction in the Persian Gulf conflict in 1991. In 1994 the Clinton administration opened many, but not all, combat positions to women.⁹ It is likely that strict scrutiny of the remaining areas of differential treatment of women and men in the military would require that

⁸ Claire Cushman, ed., *Supreme Court Decisions and Women’s Rights: Milestones to Equality* (Washington, DC: CQ Press, 2001), 259.

⁹ *Ibid.*, 99.

classifications be narrowly drawn using relevant characteristics other than the sex of the individual as a means of differentiation.

This brief overview of ERA's relationship to specific public policy issues underlines the reality that constitutional guarantees are applied under constantly evolving social conditions. The need for political rhetoric notwithstanding, neither supporters nor opponents can state definitively how the ERA will be interpreted as legislators and judges apply its principle over the years. As a comparison, the 14th Amendment was not written to prohibit sex discrimination, it was not applied for that purpose for over 100 years, and there are still "strict constructionists" who believe that its guarantee of equal protection should not reach so far.¹⁰

It is therefore incumbent on us to keep our eyes on the "forest" – the constitutional principle affirmed by the ERA – while still being conversant with the amendment's probable effect on the individual public policy "trees."

Current ratification strategies

Two routes to ratification, one traditional and one exploring uncharted constitutional waters, are currently being pursued by supporters of the Equal Rights Amendment.

The bills reintroducing the ERA in the 107th Congress (2000-2001) are S.J.R. 10 (Senator Edward Kennedy, D-MA, chief sponsor) and H.J.R. 40 (Representatives Carolyn Maloney, D-NY,

¹⁰ For example, Supreme Court Chief Justice William Rehnquist has dissented over the years from a number of landmark decisions that have advanced equal protection against sex discrimination, including *Frontiero v. Richardson* (1973), concerning equal benefits for women in military service; *Taylor v. Louisiana* (1975), concerning women's representation on juries; *Craig v. Boren* (1976), concerning males' equal access to 3.2 percent beer and establishing an intermediate standard of scrutiny for sex discrimination claims; *Los Angeles Department of Water and Power v. Manhart* (1978), concerning pension equity; *County of Washington v. Gunther* (1981), concerning pay equity; *California Fed. Sav. & Loan Assn. v. Guerra* (1987), concerning pregnancy benefits; *Johnson v. Transportation Agency, Santa Clara* (1987), concerning affirmative action; *Waterhouse v. Hopkins* (1989), concerning sex discrimination in employment; and *Davis v. Monroe County School Bd. Of Ed.* (1999), concerning peer sexual harassment in schools. *Ibid.*, passim.

and Stephen Horn, R-CA, chief co-sponsors). As of August 2001, the Senate bill has 20 co-sponsors, and the House bill has 170; both lists are bi-partisan but heavily Democratic. Neither of these bills attaches any deadline to the ratification period. Success in putting the ERA into the Constitution through this traditional process would require passage by a two-thirds vote in both houses of Congress and ratification by 38 states.

An alternative strategy for ERA ratification has arisen from the “Madison Amendment,” concerning changes in Congressional pay, which was passed by Congress in 1789 and finally ratified in 1992 as the 27th Amendment to the Constitution. The acceptance of an amendment after a 203-year ratification period led some ERA supporters to propose that Congress has the power to maintain the legal viability of ERA’s existing 35 state ratifications. The legal analysis for this “three-state strategy,” developed by three third-year law students at T.C. Williams School of Law at Virginia’s University of Richmond, is as follows.¹¹

- Article V of the Constitution gives Congress the power to propose an amendment and to determine the mode of ratification.
- A 1921 Supreme Court decision (*Dillon v. Gloss*) said that Congress may fix a time limit for ratification, that an amendment is part of the Constitution once ratified by the final state constituting a three-fourths majority, and that ratification should be within a “reasonable” and “sufficiently contemporaneous” time frame with respect to the “necessity” of the amendment.
- A 1939 Supreme Court decision (*Coleman v. Miller*) held that Congress, upon receiving notification of an amendment’s ratification by three-fourths of the states, may determine whether the amendment is valid or whether it “has lost its vitality through lapse of time.”

¹¹ Allison Held, Sheryl L. Herndon, and Danielle M. Stager, “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,” *William & Mary Journal of Women and the Law* (Vol. 3, Issue 1, Spring 1997), 113-136.

Congressional acceptance (“promulgation”) of an amendment is not required by the Constitution, however, and has occurred only with the 14th and the 27th Amendments (whose ratification histories contained elements of controversy over rescissions or time frame).

- Congress has imposed time limits on the ratification period only since 1917 (with the 18th Amendment, Prohibition). The 19th Amendment had no time limit. Seven-year time limits were placed in the text of Amendments 20-22, but were moved to the proposing clause of Amendments 23-26. The ERA’s seven-year time limit was in the proposing clause, not in the text ratified by 35 state legislatures.
- In 1978, Congress demonstrated its belief that it may alter a time limit in a proposing clause by extending the original ERA ratification deadline from March 1979 to June 1982. A challenge to the extension’s constitutionality (*Idaho v. Freeman*, 1982) was dismissed by the Supreme Court as moot after the deadline expired, and no lower-court precedent stands.
- Precedent regarding state rescissions of ratifications indicates that such actions are not valid. In promulgating the 14th Amendment in 1868, Congress listed as ratifying states both states which had rescinded their ratifications and states which had first rejected and then ratified the amendment.

Thus, under the principles of *Dillon* and *Coleman*, and considering that Congress voted to extend the ERA time limit and to accept the Madison Amendment’s 203-year ratification period as “sufficiently contemporaneous,” the three-state strategy proposes that it is probable that Congress could choose to legislatively adjust or repeal ERA’s time limit constraint, determine whether or not state ratifications after the expiration of a time limit in a proposing clause are valid, and promulgate the ERA after the 38th state ratifies. H.Res. 98 (Representative Robert Andrews, D-NJ, chief sponsor) in the 107th Congress promotes this strategy by stipulating that the House of

Representatives shall take any necessary legislative action to verify ERA's ratification when an additional three states ratify.

The credibility of the three-state strategy was examined in a 1996 report from the Congressional Research Service,¹² which concluded that acceptance of the Madison Amendment does in fact have implications for the premise that ratification of the ERA by three more states could allow Congress to declare ratification accomplished.

Despite Supreme Court rulings requiring a "sufficiently contemporaneous" time limit, the CRS analysis concluded that "Congress' acceptance of the ratification of the 27th Amendment ... appears to have disproved the assumption that, absent a deadline, an amendment ceases to be eligible to be ratified merely because of the passage of time." The three-state strategy expands on this concept to propose that amendments whose time limit is not in the text, such as the ERA, likewise remain viable for ratification indefinitely. While ERA opponents might argue that ratifications in 2001 or later could not be counted as contemporaneous with those from 1972–1982, the CRS report notes that "the acceptance of the Congressional Pay Amendment makes this argument much more difficult."

By extending the original ERA deadline from 1979 to 1982, Congress has already shown that it claims authority to alter time limits placed in proposing, or resolving, clauses. In light of that action, the CRS memorandum poses a key question: "Does this mean this (or another) Congress has the authority to recognize state ratifications of the ERA that may be received in the future, even though the deadlines have passed?"

The report, while taking no position, discusses three possible alternatives. (1) ERA proponents could ask Congress to pass a new ratification deadline, thereby reviving the process

¹² David C. Huckabee, "Equal Rights Amendment: Ratification Issues," Memorandum, March 18, 1996 (Washington, DC: Congressional Research Service, Library of Congress).

that has already produced 35 of the necessary 38 state ratifications. (2) Through the approach of H.Res. 98, Congress could be requested to “take any legislative action necessary to verify the ratification of the Equal Rights Amendment as part of the Constitution” if three additional states vote to ratify. (3) Proponents could pursue the legal argument in Held et al.’s “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,” which claims that because future Congresses can amend ratification deadlines in resolving clauses, those deadlines constitute no absolute closure on the process, and the ERA remains open to ratification.

The proposition that one Congress cannot bind a future Congress by means of a rule or law offers both possibilities and difficulties for the three-state strategy. While a deadline might be able to be extended or eliminated by a future Congress, the commitment of H.Res. 98 to affirm ratification after three more states ratify could also be overridden by a future Congress.

The CRS report sketches a possible scenario if three more states ratify the ERA. The U.S. Archivist, who maintains records regarding amendment ratifications, would likely file the new state ratification documents with the prior ones rather than rejecting them, but would probably not certify the amendment by a proclamation after the 38th state approval, as long as existing instructions from Congress indicate that the ratification deadline has expired. Further action would likely be required from Congress prior to or at that time in order to recognize the ERA as part of the Constitution.

This CRS analysis supports in general the premises of the three-state strategy:

- The ratification process of the Equal Rights Amendment might remain open because the time limit is in the resolving clause rather than in the text of the amendment.
- Ratification of the ERA over three decades can be considered sufficiently contemporaneous, since the 203-year time period for the 27th Amendment was accepted to be so.

- ERA's existing 35 state ratifications remain potentially viable if three more states ratify.
- Congress retains authority to declare the ratification process valid after the 38th state ratifies.

Action in unratified states

Pursuant to the three-state strategy, ERA bills have been introduced in five unratified states as of mid-2001. In Mississippi, a ratification bill was voted out of committee in 1995 but was referred back as soon as opponents became aware of its presence. In Illinois, ratification bills have been voted out of committee in the House during several legislative sessions in the past five years, but they have never been brought to the floor. In Virginia, ratification bills have been introduced in successive sessions since 1994 but have failed to receive enough votes to be released from committee. A ratification bill introduced in the Oklahoma legislature in 2000 was not taken up for consideration by the committee to which it was assigned.

The most extensive state legislative action based on the three-state strategy has taken place in Missouri. In 1998 State Representative Sue Shear, just before her retirement from the legislature in ill health, introduced an ERA ratification bill. (It was the first bill she had introduced at the start of her legislative career two decades earlier, and she wanted it to be her last.) After Shear's death, Representative Deleta Williams became the chief sponsor and has reintroduced the bill in each legislative session.

Lobbying efforts coordinated by the Missouri Women's Network through its ERA Campaign arm generated sufficient support to get the bill favorably out of committee in 1999, 2000, and 2001. Testimony was presented by traditional ERA supporters, including former Missouri Lieutenant Governor Harriett Woods and the National Organization for Women, League of Women Voters, ERA Summit, American Association of University Women, National Woman's

Party, Missouri Women's Political Caucus, ACLU, Older Women's League, and other groups and individuals. Proclamations in support of ERA ratification were issued by late governor Mel Carnahan in 1998 and current governor Bob Holden in 2001.

The reaction from traditional ERA opponents was predictably focused on the controversial issues of abortion and homosexual rights. Phyllis Schlafly, whose STOP-ERA offshoot of her right-wing Eagle Forum is an acronym for "Stop Taking Our Privileges," testified and sent letters to legislators on Valentine's Day 2001 saying, "Missourians do not want our courts to order tax-funded abortions or same-sex marriages. Please don't try to breath new life into a rotting corpse." The anti-choice position of many Missouri legislators across party lines provided strong leverage for lobbying by Missouri Right to Life on grounds that the ERA would require "abortion on demand." Concerned Women for America, founded by Beverly LaHaye, wife of a former Moral Majority leader, also opposed the bill.

In the first floor vote on ERA ratification in nearly 20 years, the Missouri House of Representatives in March 2001 rejected the bill by a tally of 57-84. Supporters have stated their intent to have the bill reintroduced in January 2002.

While no ERA ratification bill based on the three-state strategy has yet passed in the full house of any unratified state legislature, grassroots interest and political momentum are slowly increasing in a number of the 15 unratified states. In fact, it could be considered remarkable that the issue has seen as much political action as it has in the past five years, given the increasing conservative influence in many legislative bodies and the dearth of public and media attention to the ERA in general and the three-state strategy in particular.

Future prospects

At the 1999 “Women and the Law” Conference in Philadelphia, sponsored by the Women’s Law Project and the Greater Philadelphia Women’s Studies Consortium, Professor Ann Freedman of Rutgers University School of Law in Camden, NJ, co-author of a key ERA analysis as a law student at Yale¹³ and in a subsequent book,¹⁴ responded to an audience question by saying that the ERA would be a statement of principle and a commitment to equality “writ large,” and that its cultural power and legal influence for change would be tremendous. All efforts to put the ERA in the Constitution, she noted, provide an opportunity to describe how the glass is half empty or half full regarding specific policy issues.

That view was echoed by Jane Mansbridge, Adams Professor of Political Leadership and Democratic Values at Harvard University’s Kennedy School of Government and author of *Why We Lost the ERA*.¹⁵ In response to a recent query from this author, she explained, “I have always believed that it was better to have this wording in the Constitution than not — not because of any particular predictable change in the Court’s opinions, but rather because a general statement of rights will always, over time, have ... a good effect. ... Deliberations on key issues of concern to women, such as allocations for sports in publicly funded educational institutions, would have a tone more sympathetic to women if there were an explicit statement of equal rights in the

¹³ Barbara Brown, Ann Freedman, et al., “The Equal Rights Amendment: Constitutional Basis for Equal Rights for Women” (80 *Yale L.J.*, 871, 892).

¹⁴ Barbara A. Brown, Ann Freedman, et al., *Women’s Rights and the Law* (New York: Praeger, 1977).

¹⁵ Jane J. Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986).

Constitution and, just as importantly, a series of precedents and court opinions developing the meaning in practice of that right.”¹⁶

It is also possible that sex discrimination theory, not to mention political arguments and litigation strategies, may be influenced by a recent book by Linda K. Kerber, Professor of History at the University of Iowa,¹⁷ in which she contends that not only the rights but the obligations of citizens should be equal, since “privilege” is an underpinning of second-class citizenship.

Grassroots activism in support of the ERA has become more visible in recent years. Small but dedicated volunteer organizations working for ratification include the decade-old ERA Summit, a coalition of individuals and organizational representatives responsible for developing and promoting the three-state strategy, and the recently established ERA Campaign Network, an electronically linked group of ERA supporters whose latest project has been a national survey of support for equal rights.¹⁸

The National Council of Women’s Organizations (formerly the Council of Presidents), a Washington, DC-based coalition of over 120 groups representing more than six million women and men in support of the economic, social, and legal equality of women, was founded in 1982 in response to the expiration of the ERA’s ratification deadline. In 1999, the Council established an ERA Task Force that among its other networking and educational activities maintains an ERA web site (www.equalrightsamendment.org).

¹⁶ E-mail correspondence (July 12, 2001).

¹⁷ Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill & Wang, 1998).

¹⁸ Results of this survey will be announced in connection with the Women’s Equality Summit and Congressional Action Day sponsored by the National Council of Women’s Organizations in Washington, DC, September 24-25, 2001.

Perhaps history is once more repeating itself, and the ERA is again mirroring the 19th Amendment, whose supporters spent years “in the doldrums” as the primal energies of Elizabeth Cady Stanton, Susan B. Anthony, and other mothers of the movement waned. The three-state strategy and renewed attention in Congress may be the first moves in the end game of ERA ratification, as modern incarnations of suffrage’s Carrie Chapman Catt and Alice Paul are preparing to step forward and finish the fight.

In a 1998 educational video about the ERA,¹⁹ Justice Ginsburg reiterated the view that she had expressed in her 1993 confirmation hearings: “For most of our nation’s history, women did not enjoy full citizenship under the law. With few exceptions, women have gained that full citizenship in recent decades. Even so, the Equal Rights Amendment remains important in this symbolic sense. Every modern human rights declaration in the world, at least since 1970, contains a statement that men and women are persons of equal dignity, individuals entitled to the law’s equal respect. I would like the lawmakers of the United States, in Congress and in the states, to perfect our fundamental instrument of government in this regard.”

She concluded on a personal note, “For the sake of my daughter and granddaughters, and all the daughters in generations to come, I would like to see in our Constitution this clarion statement of bedrock principle: “Equality of rights ... shall not be denied or abridged ... on account of sex.”

¹⁹ “The Equal Rights Amendment: Unfinished Business for the Constitution,” a 17-minute educational video premiered in Seneca Falls, NY, during the celebration of the 150th anniversary of the 1848 Woman’s Rights Convention, is available from the Alice Paul Centennial Foundation, Mt. Laurel, NJ, 856-231-1885.

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