

TIME FOR THE EQUAL RIGHTS AMENDMENT

By Jessica Neuwirth[∞]

Unlike most other countries in the world, the United States does not have a constitutional equality provision guaranteeing equal rights for women.¹ It's time to fix our Constitution and correct this glaring omission. The moment of victory may finally be near—while states initially failed to meet the ratification deadline in 1982, the Equal Rights Amendment (ERA) is now one state shy of ratification.² For the first time since 1982, the ERA seems within reach even as soon as in the next twelve months.

If the Constitution's Founders were truly representative of the country, the Constitution no doubt would have included women. At the time, Abigail Adams warned her husband John Adams, "Remember the ladies. . . . [We] will not hold ourselves bound by any laws in which we have no voice or representation."³ The Fourteenth Amendment established the right to "equal protection of the laws," but it took another Constitutional amendment over fifty years later, the Nineteenth Amendment, for women to secure the simple right to vote. The suffragists who fought so hard for the right to vote immediately then drafted the Equal Rights Amendment (ERA) to give women equality in all other rights.⁴ The ERA was first introduced in Congress in 1923, and it took almost fifty years to secure its passage in 1972.⁵

A decade-long effort to get the Equal Rights Amendment (ERA) ratified came very close to success when thirty-five states—just three states short of the thirty-eight required—ratified the amendment before the extended deadline expired in 1982.⁶ But following an initial rush to ratify the ERA, ratifications ground to a halt when an unexpected initiative to stop the ERA mobilized against it using fear

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¹ See *Gender Equality Provisions in Constitutions Worldwide*, ERA Coalition, <http://www.eracoalition.org/files/GenderEqualityProvisionsConstitutionsWorldwide.pdf> [<https://perma.cc/J3RH-NEX8>].

² See Matthew Haag, *The Equal Rights Amendment Was Just Ratified by Illinois. What Does That Mean?*, N.Y. TIMES (May 31, 2018), available at <https://www.nytimes.com/2018/05/31/us/equal-rights-amendment-illinois.html> [<https://perma.cc/BE5Q-XBZL>].

³ Abigail Adams, *All Men Would Be Tyrants If They Could*, LAPHAM'S QUARTERLY, Spring 2014, <https://www.laphamsquarterly.org/revolutions/all-men-would-be-tyrants-if-they-could> [<https://perma.cc/A4B4-P8QE>].

⁴ JESSICA NEUWIRTH, *EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW* 3 (2015).

⁵ *Id.*

⁶ See Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. TIMES, July 1, 1982, at 12.

tactics—fear of women in combat,⁷ fear of gay marriage,⁸ and fear of losing the financial security of marriage.⁹

These fears are now greatly diminished, if not gone altogether: Women in the military have won the right to participate in combat¹⁰—which they want and need for equal opportunity in career advancement¹¹—and marriage equality is a constitutional right recognized by the Supreme Court.¹² Fear of losing the financial security of marriage has been overtaken by the aspiration for financial independence and an ongoing campaign for equal pay. And while the ERA effort of the 1970s was not successful in getting constitutional equality for women, it was successful in building a powerful national women’s movement which has revolutionized the country. Both women and men have changed, and 99% of millennials polled in 2015 support a constitutional equality amendment.¹³ For the first time, in 1971, the Supreme Court found that the Fourteenth Amendment could be applied to sex discrimination,¹⁴ and a long line of cases has followed expanding women’s rights under existing law.

Progress has in some instances even raised questions as to whether the ERA is even needed. It certainly is, for two reasons. Firstly, despite all the legal advances that have been made, many significant legal gaps remain, and the ERA would provide a much-needed solid constitutional basis for legislation advancing women’s equality. As several Supreme Court cases have made clear, for example, women have no right to federal recourse for gender-based violence.¹⁵ Moreover, the legal standard used by the Supreme Court to review sex discrimination cases is “intermediate scrutiny,” a lower level of review than the “strict scrutiny” standard

⁷ *E.g.*, Phyllis Schlafly, *Don’t Put Women in Military Combat*, PHYLLIS SCHLAFLY REP., Feb. 1980, at 1–4, <https://eagleforum.org/publications/psr/feb1980.html> [<https://perma.cc/V75Q-W95L>].

⁸ *E.g.*, Phyllis Schlafly, *ERA And Homosexual ‘Marriages’*, PHYLLIS SCHLAFLY REP., Sept. 1974, at 1–3, <https://eagleforum.org/publications/psr/sept1974.html> [<https://perma.cc/56XJ-8JRE>].

⁹ *E.g.*, Phyllis Schlafly, *What’s Wrong with “Equal Rights” for Women?*, PHYLLIS SCHLAFLY REP., Feb. 1972, at 1–4, <https://eagleforum.org/publications/psr/feb1972.html> [<https://perma.cc/87CC-FWN2>].

¹⁰ Bill Chappelle, *Pentagon Says Women Can Now Serve in Front-Line Ground Positions*, NPR (Dec. 3, 2015), <https://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in-frontline-ground-combat-positions> [<https://perma.cc/N5YV-EZTD>].

¹¹ Andrew Swick & Emma Moore, *The Mostly Good News on Women in Combat*, CTR. FOR NEW AM. SEC. (Apr. 19, 2018), <https://www.cnas.org/publications/reports/an-update-on-the-status-of-women-in-combat> [<https://perma.cc/YXB7-73XM>].

¹² *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹³ Press Release, ERA Coalition Fund for Women’s Equality, *Breaking: Americans—by 94%—Support the Equal Rights Amendment*, ERA, June 17, 2016, <http://www.eracoalition.org/files/ERAPollingPressRelease.pdf> [<https://perma.cc/FU77-QA6F>].

¹⁴ *Reed v. Reed*, 404 U.S. 71, 74 (1971) (striking down the Idaho Probate Code provision that said “males must be preferred to females” for appointment as estate administrators).

¹⁵ *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down the provision of the Violence Against Women Act that created a federal right of action for gender-based violence); *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that victims of domestic violence have no right of action under the Due Process Clause of the 14th Amendment for failure to enforce court orders of protection).

used to review cases of racial and religious discrimination.¹⁶ The legal framework for addressing sex inequality is a patchwork quilt of legislation that is full of holes—some that derive from narrow court interpretation and others from legal exemption. Title VII of the Civil Rights Act mandating equal pay for equal work, for example, exempts small businesses from the scope of its protection.¹⁷ Moreover, legislation can be rolled back with any change in the political winds of Congress.

Secondly, as a matter of principle, amending the Constitution to include sex equality as a fundamental human right will send a clear public message that women are no longer to be treated as second-class citizens. The intentional omission of women has perpetuated a lack of respect for women and engendered a culture that allows sexual harassment to continue unchecked. Law is the most formal expression of public policy, and the Constitution is the bedrock of our law. “If I could choose an amendment to add to the Constitution, it would be the Equal Rights Amendment,” Supreme Court Justice Ruth Bader Ginsburg said recently. “I would like my granddaughters, when they pick up the Constitution, to see that notion—that women and men are persons of equal stature—I’d like them to see that is a basic principle of our society.”¹⁸

The roots of the current campaign date back to the formation of the ERA Coalition in 2014, bringing together various organizations and individuals that had been working steadily for the ERA, in some cases since 1982. The ERA gained more popular support in 2015, when, after having won an Oscar, at the Academy Awards Patricia Arquette passionately appealed to an audience of millions in her acceptance speech, saying: “It’s our time to have wage equality once and for all and equal rights for women in the United States of America.”¹⁹ Across the world, audiences saw Meryl Streep and Jennifer Lopez spring to their feet cheering, and later that year, Meryl Streep sent a personal letter to every Member of Congress urging them to support the ERA.²⁰

Momentum grew across the country, and in 2017, the state legislature of Nevada voted to ratify the ERA, championed by Senator Pat Spearman.²¹ In 2018,

¹⁶ See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) (explaining the intermediate scrutiny standard for gender-based discrimination).

¹⁷ 42 U.S.C. § 2000e(b).

¹⁸ Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS & WORLD REPORT (Apr. 18, 2014), <https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution> [<https://perma.cc/BD9V-FXCB>].

¹⁹ Oscars, *Patricia Arquette Winning Best Supporting Actress*, YOUTUBE (Mar. 29, 2015), <https://www.youtube.com/watch?v=6wx-Qh4Vczc> [<https://perma.cc/4GS4-WWNV>].

²⁰ Helena Andrews-Dyer, *Actress Meryl Streep Sends A Letter to Each and Every Member of Congress*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/reliable-source/wp/2015/06/23/actress-meryl-streep-sends-a-letter-to-each-and-every-member-of-congress/?noredirect=on&utm_term=.44928c1c46ab [<https://perma.cc/J7ZC-UGHM>].

²¹ See David Montero, *Thirty-Five Years Past a Deadline Set by Congress, Nevada Ratifies the Equal Rights Amendment*, L.A. TIMES (Mar. 20, 2017), <https://www.latimes.com/nation/la-na-nevada-era-2017-story.html> [<https://perma.cc/6ND9-53RR>].

the Illinois legislature voted to ratify the ERA,²² bringing the number of state ratifications to thirty-seven, just one state short of the thirty-eight required by Article V of the Constitution. Ratification efforts are pending in many other states, and in January 2019, the Virginia Senate voted for the sixth time since 2011 to ratify the ERA.²³ Intensified efforts in the Virginia House of Delegates this year were unsuccessful, but only by one vote, and it is widely anticipated that the state legislature will vote to ratify the ERA in 2020, following elections later this year.²⁴ The thirty-eighth ratification could take place before then, as many other states are actively considering ratification including Arizona, Florida, Georgia, and North Carolina.²⁵ Initially known as the “three-state strategy,” organizers now call it “one state to thirty-eight.”

Momentum is also growing in Congress for legislative action to remove the 1982 deadline, a deadline that was created and subsequently extended by Congress.²⁶ Article V of the Constitution, which sets forth the constitutional amendment process, does not provide for a ratification deadline, and historically there had been no deadlines on ratification of amendments until the Eighteenth Amendment.²⁷ The Twenty-Seventh Amendment, introduced by James Madison in 1789 to restrict congressional salary increases, was finally ratified in 1992, more than two hundred years after it was passed by Congress.²⁸

Ratification deadlines began with Prohibition,²⁹ when the Eighteenth Amendment was passed by Congress in 1917 to prohibit the production, transport and sale of alcohol in the United States.³⁰ Reportedly the deadline was included for political reasons, to ensure that the amendment would fail so that politicians like future president and then Senator Warren Harding, who proposed it, could support

²² Rick Pearson & Bill Lukitsch, *Illinois Approves Equal Rights Amendment, 36 Years After Deadline*, CHI. TRIB. (May 31, 2018), <https://www.chicagotribune.com/news/local/politics/ct-met-equal-rights-amendment-illinois-20180530-story.html> [<https://perma.cc/Q9YJ-BVWR>].

²³ Laura Perrot, *Part 3: Virginia Could Become Final Vote for ERA*, CBS 19 NEWS (Jan. 24, 2019), <https://www.cbs19news.com/content/news/Part-3-Virginia-could-be-the-final-vote-in-the-ERA-504804041.html> [<https://perma.cc/MRA7-J2T6>].

²⁴ Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled House of Delegates*, WASH. POST (Feb. 21, 2019) https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html?utm_term=.251901534598 [<https://perma.cc/N3UJ-3HNA>].

²⁵ *Id.*

²⁶ See NEUWIRTH, *supra* note 4, at 96.

²⁷ See Mason Kalfus, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 438 (1999).

²⁸ See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 678 (1993) (“[The amendment] lay dormant—and presumed dead—for the better part of two centuries.”).

²⁹ THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 26 (2018), <https://fas.org/sgp/crs/misc/R42979.pdf> [<https://perma.cc/CC9B-NRRC>].

³⁰ Robert P. George and David A. J. Richards, *Eighteenth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xviii> [<https://perma.cc/BU3B-88R3>].

the amendment to appease its advocates.³¹ This strategy backfired when the amendment was ratified just thirteen months after its passage by Congress.³²

As the ERA ratification effort neared its seven-year deadline in the late 1970s, Representative Elizabeth Holtzman of New York sponsored a bill to extend the deadline to 1982.³³ Congress rejected a proposal to require that this bill be passed by a two-thirds majority,³⁴ and the bill was passed by a majority vote in each house of Congress: 233-189 in the House of Representatives³⁵ and 60-36 in the Senate a few months later.³⁶ It was signed by President Jimmy Carter in 1978, with a disclaimer indicating that his signature might not in fact be necessary.³⁷

In *Dillon v. Gloss*, the Supreme Court held, with regard to the Eighteenth Amendment on Prohibition, that the imposition by Congress of a ratification deadline was permissible even though it is not mentioned in Article V of the Constitution.³⁸ Article V indicates that Congress controls the “mode of ratification,” which would arguably include any deadline created, extended, or removed by Congress.³⁹ A strict constructionist argument can also be made that the “mode of ratification” was intended to apply only to the choice between ratification by state legislatures or state conventions—the two methods of ratification set forth in Article V. As no deadline was envisioned by the text of Article V, the imposition of a deadline by Congress would therefore be an unconstitutional infringement of states’ rights. The law provides that upon receipt of the needed number of state ratifications, it is the duty of the Archivist to certify that an amendment has been duly ratified and is part of the Constitution.⁴⁰ The amendment and the certificate of ratification are then published in the Federal Register.⁴¹

Regardless of whether the deadline is valid in the first place, Congress can still act now to remove it. In 2013, Senator Ben Cardin from Maryland introduced a bill to remove the deadline for ratification of the ERA altogether.⁴² Representative Jackie Speier from California sponsored a companion bill in the House of Representatives.⁴³ Both bills were reintroduced with bipartisan support in January 2019, and as of March 2019, Speier’s bill had 182 cosponsors.⁴⁴ Cardin’s bill was

³¹ See NEALE, *supra* note 29, at 26.

³² *Id.*

³³ H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

³⁴ 124 CONG. REC. 33, 187 (1978).

³⁵ 124 CONG. REC. 26, 264–65 (1978).

³⁶ 124 CONG. REC. 34, 314–15 (1978).

³⁷ Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 114 n.71 (citing Jimmy Carter, Equal Rights Amendment: Remarks on Signing H.J. Res. 638, 2 Pub. Papers 1800, 1800–01 (Oct. 20, 1978)).

³⁸ *Dillon v. Gloss*, 256 U.S. 368, 374 (1921).

³⁹ U.S. CONST. art. V.

⁴⁰ 1 U.S.C. § 106b (1951).

⁴¹ *Federal Register: Constitutional Amendment Process*, NAT’L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution> [<https://perma.cc/RXD4-4NU4>].

⁴² S.J. Res. 15, 114th Cong. (2015).

⁴³ H.R.J. Res. 51, 114th Cong. (2015).

⁴⁴ H.R.J. Res. 38, 116th Cong. (2019).

introduced with Senator Lisa Murkowski as the lead Republican co-sponsor and is moving forward on a bipartisan basis—as of April 2019, Susan Collins and Angus King, the Republican and Independent senators from Maine, had signed on.⁴⁵ With all Democrats expected to support this bill and two Republicans, the bill is nearing the majority of votes needed to pass. In the House, Judiciary Committee Chair Jerry Nadler has committed to holding a hearing on the bill in early 2019.⁴⁶

The other Congressional strategy, which circumvents the Supreme Court, is known as the “start-over strategy,” long championed by Representative Carolyn Maloney and Senator Ted Kennedy, and more recently by Senator Robert Menendez.⁴⁷ As of March 2019, Maloney’s bill had 129 co-sponsors in the House.⁴⁸ Menendez’s bill has not yet been introduced in the Senate. For many years, both of these bills re-introduced the same amendment language that passed Congress in 1972: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”⁴⁹ More recently, on the theory that if we have to start over, we should strengthen the text of the amendment, Representative Maloney added a new preceding sentence: “Women shall have equal rights in the United States and every place subject to its jurisdiction.”⁵⁰ In addition to the symbolic value of putting the word “women” in the Constitution, this language is an affirmative statement of rights that broadens the amendment to more readily cover substantive equality, as well as formal legal equality.

Even more broadly, in December 2016, a group of legal scholars and equal rights advocates led by Kimberlé Crenshaw and Catharine MacKinnon drafted an amendment that would address discrimination on account of race as well as sex.⁵¹ Race is explicitly defined to include ethnicity, national origin and color, and sex is explicitly defined to include “pregnancy, gender, sexual orientation and gender identity.”⁵² The draft also includes reference to other “like grounds of subordination” such as disability and faith, using the term “subordination” to highlight the power dynamics inherent in discrimination against vulnerable groups and to specifically address the misuse of anti-discrimination measures by powerful groups to entrench the status quo.⁵³ Other language in the draft mandates Congress and States to take “legislative and other measures to prevent or redress any disadvantage suffered by

⁴⁵ S.J. Res. 6, 116th Cong. (2019).

⁴⁶ Jerry Nadler (@RepJerryNadler), TWITTER (Dec. 11, 2018, 11:47AM), <https://twitter.com/repjerryadler/status/1072533392774873088?lang=en> [<https://perma.cc/WJ2G-4Z6G>].

⁴⁷ See NEALE, *supra* note 29, at 17.

⁴⁸ H.R.J. Res. 35, 116th Cong. (2019).

⁴⁹ See NEALE, *supra* note 29, at 2.

⁵⁰ H.R.J. Res. 35, 116th Cong. (2019).

⁵¹ *New Era Prefatory Note*, ERA COALITION, AFRICAN AMERICAN POL’Y F., AND COLUM. LAW SCH. CTR. FOR INTERSECTIONALITY AND SOC. POL’Y STUD., <http://www.eracoalition.org/files/ExpandedERADraft.pdf> [<https://perma.cc/W5EG-SXUJ>].

⁵² *Id.*

⁵³ *Id.*

individuals or groups because of past or present systemic discrimination.”⁵⁴ The draft also addresses the right of every adult citizen to vote and have his or her vote count equally.⁵⁵ Discussions with various members of Congress are underway, but this expanded Amendment for Constitutional Equality has yet to be introduced.

As Gloria Steinem put it,

[T]he greatest gift of the Founding Fathers was not democracy, but the contagious *idea* of democracy, not a perfect Constitution, but one that could keep changing. . . . Its first ten amendments, known as the Bill of Rights—freedom of speech, assembly, religion, and other protections for the individual—were added just after the Framers had finished the Constitution, and then realized it dealt with the state but not citizen power against the state. They went back and fixed it.⁵⁶

The arguments against the ERA that were used in the 1970s and early 1980s are virtually gone, and the scant opposition to the ERA that surfaces now is almost exclusively and mistakenly focused on abortion. A number of fervent abortion opponents, such as Representative Cynthia Lummis, who served as a Republican lead co-sponsor for the ERA while she was in Congress,⁵⁷ and Nevada State Assemblywoman Jill Tolles, who crossed party lines to vote for ERA ratification,⁵⁸ have demonstrated with their action that the ERA is not about abortion, which is protected as a privacy right under the Due Process Clause of the Fourteenth Amendment.⁵⁹ The ERA is about fulfilling the promise of gender equality, which is not only the right thing to do, but the smart thing to do. No matter what their race, class, political party, or economic status, women all have much to gain from the ERA. And men increasingly support the campaign for the ERA because they recognize that sex equality will benefit men as well as women.

Virtually no one today argues against the ERA as a matter of principle. The principle of sex equality is one that has largely been established as a fundamental right. The challenge is rather the misbelief that equal rights for women must already be in the Constitution and a widespread lack of awareness of the ERA. The truth often provokes a refreshing sense of outrage, especially among young people—men

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Gloria Steinem, *Foreword* to NEUWIRTH, *supra* note 4, at xiv.

⁵⁷ Jessica Ravitz, *Politics of Feminism, An Unlikely Partnership*, CNN (Apr. 16, 2015), <https://www.cnn.com/2015/04/09/us/era-womens-movement-unlikely-partners/index.html> [<https://perma.cc/LV4Y-2FES>].

⁵⁸ Seth A. Richardson, *Equal Rights Amendment passes Nevada Assembly; Senate Likely to Concur*, RENO GAZETTE J. (MAR. 20, 2017), <https://www.rgj.com/story/news/politics/2017/03/20/equal-rights-amendment-passes-nevada-assembly-senate-likely-concur/99422284/> [<https://perma.cc/X2XG-CY9A>].

⁵⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

as well as women. This new generation, skilled in using social media tools that were previously unimaginable, is capable of mobilizing action on an unprecedented scale. Added to that is the growing sense of frustration and urgency sparked by the #MeToo movement and the creation of Time's Up, a powerful collaborative effort calling for fundamental change in the patriarchal culture that has caused so much harm to women over the centuries. It's a perfect moment for the ERA.