

LESS THAN

AS THE 100TH ANNIVERSARY OF WOMEN GETTING THE RIGHT TO VOTE APPROACHES, THE EQUAL RIGHTS AMENDMENT MAY BE ONE STATE AWAY FROM BEING ADDED TO THE U.S. CONSTITUTION. COULD VIRGINIA BE THAT STATE?

BY JESSE RIFKIN

OR EQUAL TO?



“Mom, it says, ‘All men are created equal; not ‘all women.’” Kati Hornung’s then 9-year-old daughter, Ani, was studying the Declaration of Independence in elementary school. “Have we fixed that yet?”

“Um ... no.”

Her daughter replied, “What are we going to do about that?”

“It was a painful moment,” Hornung recalls of that after-school conversation with her daughter, “because I wasn’t planning to do anything.”

At the time, in 2014, most supporters weren’t. The long-stalled Equal Rights Amendment had fallen off the radar of many advocates. But that was before the first seemingly conservative majority Supreme Court since *Roe v. Wade*, before the #MeToo movement, before the Women’s March, before the most-female Congress in American history.

“So I told her, ‘OK, we can do this. Let’s make a plan,’” recalls Hornung, who has two daughters. “I called a leader in the movement, a woman in the Richmond area who was working on the Equal Rights Amendment and Virginia’s ratification. She invited us to a rally. Now, ‘rally’ is not a particularly comfortable word or space for me. I was an accounting major undergrad, and we are not known for rally cries. But I had a kid looking at me and holding me accountable for doing what I

said I valued. And so we showed up. And we showed up again and again and again.”

Her passion for the cause ignited, Hornung now serves as campaign manager for VARatifyERA, an all-volunteer organization based near Richmond fighting for Virginia to ratify the Equal Rights Amendment. VARatifyERA’s work includes community outreach, canvassing, organizing petitions, letter-writing campaigns, social media campaigns, lobbying at the state house and compiling a women’s equality scorecard for Virginia legislators.

Advocates like Hornung aren’t just fighting a philosophical battle. There’s an actual constitutional amendment on the table. First introduced in 1923, the Equal Rights Amendment states simply: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. This amendment shall take effect two years after the date of ratification.”

The ERA has had a number of false starts over the last nine decades, but a perfect storm of political shifts and policy maneuvers have made its potential passage a reality—and with just one state needed to finally ratify, Virginia seems primed to be the state that puts it over the top.

“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. This amendment shall take effect two years after the date of ratification.”



KATI HORNUNG
Campaign Manager, VAratifyERA

A CENTURY-LONG BATTLE

“There were two major purposeful historical exclusions in the original Constitution: women and men of color,” Hornung explains. “We fixed one, but we never fixed the other. Ever.”

The year 2020 marks the 100th anniversary of women gaining the right to vote thanks to the 19th Amendment. And just three years later, in 1923, Alice Paul, suffragette and a founder of the National Women’s Party, authored the language

for the Equal Rights Amendment, which was introduced to Congress. In a political maneuver that still rings true today, the amendment languished in committee and didn’t get a Senate floor vote until more than 20 years later, in 1946. In 1950, an in-name-only version (an attached rider nullified its equal protection aspects, effectively making it meaningless) passed the Senate—and it stalled from there.

In the late '60s, a newly formed organization, the National Organization for

Women (NOW) came on the scene and renewed efforts to get the amendment passed. By 1971, attempts to get it to the floor succeeded, and bipartisan votes nearly got it to the finish line. First it needed $\frac{2}{3}$ of the House. In October 1971, it got 83%. Then it needed $\frac{2}{3}$ of the Senate. In March 1972, it got 84%. Finally it needed $\frac{3}{4}$ of state legislatures, or 38 of the 50 states. Yet it only got 35.

It remained mired at that level for decades, three states short of passage. Most

people forgot about it, and an entire generation grew up barely knowing of its existence. Perhaps, depending on how you count, even two generations.

Until a domino effect of factors in 2017 changed everything. That March—with a new president in office and inspired by the massive Women’s March that again brought feminist issues to the forefront of national political discourse—Nevada’s legislature resurrected the ERA from the graveyard and ratified it, becoming the first state to do so in decades. Two states to go. In May 2018, Illinois followed suit. One state to go.

Which state would it be?

Local advocates are betting on Virginia.

WHY VIRGINIA?

Of the remaining states yet to ratify, Virginia seems by far the most likely, in terms of its politics and demographics. Conservative-leaning states like Alabama, Mississippi and Utah aren’t likely to take up ratification of the ERA anytime soon.

But surveys show the ERA has broad public support in Virginia. The Wason Center for Public Policy at Virginia’s Christopher Newport University last year found state residents are 81% in favor of the ERA. That included 72% of men and 69% of Republicans. Plus, the state has cast three consecutive votes for Democratic presidents, currently has two Democratic U.S. senators, a Democratic governor and a majority Democratic U.S. House delegation.

The 2019 congressional session at the state house in Richmond looked promising. First, it passed the state Senate in January by a vote of 26 to 14, including seven Republicans. It was even primarily sponsored in the chamber by a Republican, Sen. Glen Sturtevant of Richmond. Next, it moved to the State House, where more than half of the chamber had signed on as co-sponsors, including a few Republicans. What could go wrong?

Everything, it turns out. In late January, the House Privileges and Elections Committee voted along party lines to prevent

the bill from coming up for a vote in the full chamber, by 4 to 2. Undeterred, House Democrats—the minority party—used an obscure procedural move in February to force a vote by the entire House on whether to override the subcommittee’s decision. It tied 50 to 50, which means it failed.

Even though several House Republicans supported the ERA legislation, in the moment of truth, most proved unwilling to go against party leadership regarding whether it should receive a vote by the entire House. That opposition was led by Speaker Kirk Cox of Colonial Heights and the subcommittee’s chair, Delegate Margaret B. Ransone of Westmoreland.

Delegate David Yancey of Newport News was the only House Republican who voted in favor. (Yancey is most famous for tying in his 2017 reelection bid, but winning through the chairman of the State Board of Elections randomly drawing his name out of a bowl.)

“My mother, and other women like her, who have done so much to help me move forward in my life are the reasons why I support the ERA resolution, and not as some acquiescence, but appreciation and gratitude,” Yancey said in remarks on the House floor. “Like my mother, there are so many women in my district, who want a level playing field and to succeed on the merit of their humanity.”

The two House Republicans who had sponsored the actual legislation, but wouldn’t let it come up for a full vote were delegates Roxann Robinson of Chesterfield and Christopher Stolle of Virginia Beach. Had even just one more vote—likely Robinson’s or Stolle’s—gone the other way, the procedural vote would have passed 51 to 49.

That would have brought the ERA up for a vote by Virginia’s full House, where it almost certainly would have passed, considering more than half the chamber had co-sponsored it. And the Equal Rights Amendment would have been poised to become the 28th Amendment to the Constitution.

“I am a strong advocate, I just think it makes no sense not to pass it. In fact, all of our rights throughout history have

been secured in the Constitution,” Virginia Sen. Barbara Favola (D) of Arlington says. “There’s nothing to be afraid of with the ERA.”

“Of course, it got caught up in all the political shenanigans,” Favola continues. “What happened was a lot of the evangelical groups and some of those pro-life groups, those groups which provide the motivational juice on the Republican side, turned it into an abortion or pro-life issue. The Republican lawmakers froze.”

WHAT OPPONENTS SAY

Those “political shenanigans” as Favola called them, are what have seemingly stalled the ERA over the years. In an increasingly polarized political landscape, what once seemed like an inevitability with bipartisan support (President Nixon even publicly supported the cause in the 1970s) now has renewed opposition.

By 1981, the conservative tide was turning and President Ronald Reagan publicly opposed the amendment. While the ERA never lost support among Democrats, the once-fringe socially conservative faction of the GOP surged during the '70s and early '80s to control the party. (Presidents actually play no official part in enacting constitutional amendments, a process deliberately designed as such by the Founders, but their endorsement or opposition can make a significant difference among the public and party members.)

Opponents say the ERA is redundant in the modern world; is actually not supported by the public as advocates say; and could cause unforeseen consequences, including federal public funding of abortions, which has been illegal for more than four decades.

“The ERA could erase many of the gains women have made in employment, education and even sports,” Victoria Cobb, president of Richmond-based The Family Foundation of Virginia, said in an email interview. Cobb previously contended in a *Richmond Times-Dispatch* op-ed that the ERA could lead to the



VICTORIA COBB
President, The Family
Foundation of Virginia

banning of sororities and women's colleges, while others have claimed it could go as far as eliminating gender-segregated public restrooms.

Cobb also claims that the supposedly favorable public opinion surveys are actually misleading. "Polling [conducted by Mason-Dixon Polling & Strategy in 2018] shows the ERA is opposed by a majority of Virginians when they are informed that it could force taxpayer funding of abortion," Cobb says. "Women deserve better than to be pawns in yet another effort of the abortion industry

to profit."

Indeed, while abortion has been protected on a federal level since 1973's *Roe v. Wade*, public funding of abortions on a federal level has been banned since 1976 by the recently in-the-news-again Hyde Amendment. That's been renewed annually dozens of times with bipartisan support, even when Democrats were fully in power.

While supporters say that the ERA has nothing to do with abortion and that it's all just a scare tactic from the right, "[Wisconsin Republican Congressman Jim] Sensenbrenner and others pro-

posed a rewording of the ERA to make it abortion neutral, but it was voted down," notes Olivia Gans Turner, president of the Virginia Society for Human Life in Richmond.

"If the argument was truly only about providing greater protections under the law to women, women who might be facing legal issues or educational opportunities, then there really should be no discussion at all about putting an abortion-neutralizing language in the ERA," Turner continues. "But every time that's discussed, it's fought intensely by NOW and NARAL (National

Abortion Rights Action League)."

Opponents also say the amendment is unnecessary for women's advancement. "Did my grandmother ... envision that I would someday lead an organization, earning the same pay as my male colleagues, while having four children with associated maternity leave and a permanent family-friendly schedule? Probably not," Cobb wrote in her *Richmond Times-Dispatch* op-ed. "But did I do it without the ERA? Yes, I did."

Other arguments abound, including that the ERA would force women to register for the Selective Service and a potential military draft, from which they are currently exempt. A federal judge in February ruled the all-male draft unconstitutional, but the status quo remains intact as the Trump Administration has appealed the decision.

WHAT SUPPORTERS SAY

But advocates for the ERA contend the patchwork of laws and legal precedents already in place are simply not enough.

"Those laws and decisions can change as quickly as legislators and judges can change their minds," argues Lisa Sales, chair of the Fairfax County Commission for Women. "Without the Constitution, there's no guarantee of equality for women."

When prompted for specifics, Sales cited several decisions and laws whose existences she claims are precarious without the ERA's bulwark: *Roe v. Wade*, the Violence Against Women Act of 1994 and the Pregnancy Discrimination Act of 1978.

For example, while the ERA would not specifically address maternity leave or child care, advocates say it would make existing pregnancy discrimination laws less vulnerable. Paid maternity leave and family-friendly work schedules, as Cobb mentions in her argument against the ERA, are currently

up to private employer discretion.

Hornung echoes Sales, that explicit equal rights for women should be codified in the Constitution. "I actually come from a very conservative background in general," she says. "Society has started to move and act in a different manner, but our founding document has not kept up with that."

And perhaps VARatifyERA's official language describes it best. Its response to the question of why an official amendment is needed?

"The 14th and Fifth amendments require equal protection of the laws, but courts do not hold state and federal governments discriminating on the basis of sex to the same high standard courts apply to government discrimination on the basis of race, national origin or religion. Sex discrimination currently receives 'intermediate scrutiny' in the courts, whereas other forms of discrimination receive 'strict scrutiny.' Under intermediate scrutiny it is much easier for the government to discriminate."

COULD VIRGINIA PASS IT IN 2020?

Virginia's general assembly elections will take place in November and every single seat in the house and senate is up for reelection—realistically putting the ERA in play again.

If Democrats do take control of the legislature, what are the odds of ERA passage? "I think it's a hundred percent done deal here in Virginia," Hornung says. "What we ran into was the Republican leadership of the House, and their party fell in line. So, if you remove the Republican leadership, we had the votes."

They did indeed have the votes, and that was under Republican control. Even if Republicans maintain their slim majority after this November, the ERA could still potentially pass, if enough Republicans vote for the measure. It doesn't have

Of the remaining states yet to ratify, Virginia seems by far the most likely, in terms of its politics and demographics.

to be anywhere near half of Republicans—even just a few could do the trick, if all (or almost all) Democrats vote for it, too.

THE (NON) LOOMING DEADLINE

Even if Democrats win control of the state house and pass the ERA, another stumbling block remains: a long-passed deadline.

The original passage of the ERA came with a seven-year deadline of 1979 to obtain the requisite 38 state legislatures' approvals. As that deadline was closing in, the number still hadn't been met. So Congress, under President Jimmy Carter's administration, extended it by another three years to 1982, except by then the number still wasn't met. After 1982, Congress never officially extended the deadline again—nor did they remove it.

Even some fierce ERA supporters reluctantly agree that the original deadline was valid.

"When the Constitution itself contemplates an amendment process, assumes it will be begun and consummated in a reasonable period of time, not a multigenerational process," says Saikrishna Prakash, a University of Virginia law school professor

In this Associated Press photo from Jan. 13, 1980, ERA supporters march to Capitol Square in Richmond during a demonstration and rally that drew more than 7,000 participants.



ASSOCIATED PRESS



ASSOCIATED PRESS

Chairwoman Alice Paul, second from left, the author of the original Equal Rights Amendment language, and officers of the National Woman's Party hold a banner with a Susan B. Anthony quote in front of the NWP headquarters in Washington, DC, in this Associated Press photo from June 1920. The group of suffragettes, which also includes (from left) Sue White, Benigna Green Kalb, James Rector, Mary Dubrow and Elizabeth Kalb, were headed to the GOP convention to push for ratification of the ERA.

and Miller Center senior fellow who recently wrote the article "Of Synchronicity and Supreme Law" on the subject for the Harvard Law Review. "The idea that we want to have a consensus for a legal change, we can't say it's a consensus if people are giving consent across decades."

"Bills become stale every two years, and nobody on either side of the aisle seems to dispute that," continues Prakash, referring to the fact that if legislation isn't passed within a two-year session of Congress, it

has to start anew during the next session. "Although I actually support the ERA, because I don't think governments should casually draw distinctions on the basis of gender or sex."

Advocates counter the most recent constitutional amendment, the 27th Amendment, which deals with Congressional pay raises, was originally passed by the very first Congress in 1789, yet didn't receive the necessary number of state ratifications until more than two centuries later

in 1992.

Gregory Watson was a then-college sophomore at University of Texas when he started the one-person movement for states to ratify the amendment, which snowballed beyond his wildest dreams. He was inspired after writing a paper on the subject for a political science class, which received a "C" from the professor for being unrealistic. But Watson says that the analogy ERA opponents make to his own story aren't perfect.

"Many supporters of resurrecting the 1972 ERA point to the 202-year ratification of the 27th Amendment and claim that the 27th Amendment proves that an amendment proposed to the Constitution remains pending business for all eternity before the state legislatures," says Watson.

"They forget, however, that the 27th Amendment had absolutely no deadline whatsoever imposed by Congress upon its consideration in the state legislatures, while the 1972 ERA—depending upon who you talk to—either had one deadline (1979) or perhaps even two deadlines (1979 and 1982), both of which nevertheless came and went literally decades ago."

CLEARING THE PATH

Democratic Congresswoman Jackie Speier (CA-14) has an idea: if Congress introduced the original deadline, they can remove it, too.

"If you can amend it, you can repeal it," Rep. Speier says. "The question has been raised and opined by numerous constitutional scholars around the country, who have said this is appropriate. Congress has this power and has the opportunity here to assert it."

In January, she introduced a bill in the U.S. House of Representatives to repeal the ERA's original deadline. The legislation has attracted 193 co-sponsors, two of whom are Republicans: Reps. Brian Fitzpatrick (PA-1) and Tom Reed (NY-23). Now, about 82% of House Democrats have signed on as co-sponsors.

While Rep. Speier's bill hadn't received a House vote as of press time, if and when it does, it seems likely to pass the Democratic-controlled chamber. In April, the House held its first official hearing on the ERA since 1983, primarily intended to signal the Democrat majority's support to the public. The Republican-controlled Senate, on the other hand, is a different story.

Or is it? "I think many more Republicans could come on board," Speier says optimistically. "There's a timidity right now in

A judicial fight over the ERA's validity could be the most intense one the country has experienced since Bush v. Gore.

the Republican Party in Congress, where if the president hasn't come out in support of something, they're reluctant to get on board. I think more can, and I think more probably will. It's one of so many issues that we're dealing with right now, so it's just a matter of sitting down with members and explaining what we're trying to do here."

Then again, even if a Republican-controlled Senate indeed never removes the 1982 deadline, perhaps it could still be ruled invalid by the Supreme Court.

"Article V [of the Constitution] says nothing about any deadlines, but it does say after ¾ of the states ratify, it 'shall' be added," Hornung explains. "For law students, 'shall' is one of those big words they spend a full day of law school going over. It doesn't mean maybe. It means it has to happen."

WILL VIRGINIA LEAD THE WAY?

Even if Virginia passes the ERA, it wouldn't be added to the Constitution without a fight.

An ERA lawsuit is virtually guaranteed, though the outcome is unclear. "The Constitution does not specify who exactly determines whether an amendment is official," explains University of Virginia Law Professor Prakash.

"The courts have generally said it's

Congress, although who knows if that could change?" Prakash asks rhetorically. With a now-conservative leaning Supreme Court, for example, it's not as clear that the third branch of government would certify the ERA.

"The executive branch says it's the executive branch. Officially, that's the president, although in practice that usually means the White House Office of Legal Counsel." Similar to the above example, could either President Trump or a conservative Office of Legal Counsel decide the amendment wasn't official?

"In the case of the 27th Amendment, it was the Archivist of the United States [Don Wilson] who worked for Congress, rather than Congress itself," says Prakash.

That remains the only time the archivist has ever been the one to certify an amendment, but since it was also the most recent amendment, did that create a new binding precedent?

A judicial fight over the ERA's validity could be the most intense one the country has experienced since Bush v. Gore. And the stakes could arguably be higher: while the winner of a presidential election serves for only four or eight years, a constitutional amendment could remain intact for centuries to come.

Hornung, whose involvement was inspired by her two daughters, shared in a recent TEDx Talk how that inspiration keeps her going, as she fights for women today and the generations to come.

"Our history has always been shaped by children and youth, we just don't tell our stories that way. In 1776, the Marquis de Lafayette and James Monroe were both 18. And when Barbara Johns led that massive walk-out in Farmville, Virginia, she was 16. Children and their direct action led to the desegregation of our school system in America," she said.

That history impacts today's fight for the ERA, said Hornung. "I'm simultaneously leading and parenting my children, while following them: their clear-eyed vision, their open hearts, their open minds." 🐾