The Equal Rights Amendment: It's Not Over 'Til It's Over

If you think the Equal Rights Amendment died in the 1970s, do we have a story for you. It's alive. And all we need is one more state before a feminist dream becomes actual American law.

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What do Alyssa Milano, Rupert Murdoch, Congresswoman Carolyn Maloney, and the Women's March movement all have in common? They all support the Equal Rights Amendment.

I'm not kidding.

If you think the 98-year-old attempt to solidify women's rights in the U.S. Constitution died in the 1970s, you are wrong. A number of diehard activists *never* gave up, and over the past decade, a movement-within-a-movement to pick up where we left off has been traveling from state to state, lobbying legislators to ratify the amendment that would finally affirm that men *and* women are created equal.

Just last month, as the state of Virginia was embroiled in a controversy over a governor caught in blackface, the statehouse almost made Virginia the 38th state to pass it — that's just enough to make it the law of the land, advocates (and the National Archives) say. Although the amendment shared what was mostly bipartisan support, two Republicans effectively killed it after overnight silent vigils and the arrest of one woman for baring her breasts.

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> "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 1 OF THE EQUAL RIGHTS AMENDMENT

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"It's not over until it's over," says Toni Van Pelt, president of the National Organization for Women (NOW), who spent the night before the vote outside in the freezing rain with protestors. "We've been working on this for so very long. We have to go forward with it."

"It was not devastating this time. This is just the prelude to it passing in January," adds Carol Jenkins, co-president of the ERA Coalition, who flew down from New York for the vote. "There's an election in November. At this point we're planning an upheaval in representation."

But the point here is not about two unctuous Virginia Republicans. No, the point is that the ERA is a legal phoenix. It is the Maya Angelou of the law: You can block it in committee. You can bury it in Congress. You can set an arbitrary deadline, throw in a fearmongering female conservative icon and Ronald Reagan — and *still*, from the ashes, it will rise.

It is now 2019, and the ERA just needs one more state on board before it amends the U.S. Constitution, triggering what advocates hope will be a fundamental reset for our patriarchal society. Just one! Aside from the near certainty that it will be introduced in Virginia in 2020, there are also active campaigns in North Carolina, Florida, and Arizona, where last week, 38 women marched 38 miles to support the ERA. Believe it or not, it's not unlikely that at least one of these states will be able to push it through — and soon.

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The story of how this all happened is one that spans almost a century, and it involves a wild assortment of supporters, including an actress-turned-activist who played an iconic witch on TV, the media mogul responsible for Tucker Carlson, and a ghost. "Rupert couldn't believe women don't have equal rights," says Kamala Lopez, director of the 2015 documentary *Equal Means Equal* and founder of the ERA advocacy organization of the same name. "After I showed him our film, he paid for seven of our newspaper ads, most recently two big full-page ads in the *New York Post*, so we can get this done," Lopez says. Ads also ran in Arizona, Illinois, and Virginia. (Multiple attempts to reach the man himself went unreturned, but last year a "source close to him" confirmed to *The Daily Beast* that Murdoch paid for the ads.)

Over the past two years especially, the fight for the ratification of the ERA has gained stunning momentum: In March 2017, the state of Nevada ratified it seemingly out of nowhere. Few took it seriously. But then in May 2018, Illinois also ratified it. Then came the press releases and press conferences. During a June "shadow" hearing hosted by New York Rep. Maloney and the ERA Coalition in Washington, D.C., Milano served as a witness while Jessica Lenahan, a woman whose three children died after her ex-husband abducted them and police refused to act, testified about how the ERA may have protected her.

If you haven't heard about this yet, you may be forgiven. "It's not part of the national narrative," admits Carol Robles-Roman, a former ERA Coalition co-

president (she recently left full-time ERA activism to take a job at Hunter College). When a North Carolina state senator tweeted his support of the ERA a few days ago, "What year is this tweet from?" was the first reply.

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But ERA advocates know what you think and they simply don't care. "It's just not okay that we disregard the *millions* of women-hours over the past 100 years that have been put into making sure that this basic principle that all people are equal be added to the Constitution," Lopez says. "We cannot abrogate our responsibility to adopt that principle as a nation."

The states in black are those who have yet to ratify the ERA. Advocates say that Florida, North Carolina, Arizona, and Virginia are their main targets for the 38th (and final) state needed to make the ERA law.

I first learned the ERA was still a thing at the 2017 Women's Convention. Back then, I was working on trying to define what the "new" women's movement was all about, and how the nascent (and already controversial) Women's March organization, which hosted the event, fit into the big picture. To my millennial mind, it was fun to see young women wearing "Black Lives Matter" T-shirts sitting in workshops with older women wearing "ERA YES" buttons. It felt like this incredible joining of past and present, but I will be brutally honest here: I did not for a second take the ERA women seriously. Wearing their historic buttons and passing out their stickers at their booth on the lower level of the Cobo Center in Detroit, they seemed like relics of feminism's past mistakes, pushing for a cause that no longer mattered.

That was then, though. After Illinois ratified it last year, I found myself on a median in Downtown Manhattan watching Alyssa Milano and Rep. Maloney

pontificate about the ERA in front of the Fearless Girl statue. And since then, I've become sure of this: We *need* the ERA.

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I say this because I know what you're thinking reading this right now: Sure, it'd be nice to "put women in the Constitution," but isn't it mostly a symbolic gesture at this point? We already have a ton of laws and protections on the books, against pay inequality, violence against women, and so on, and yet we can all see what little good they've done. How would adding a few lines to the Constitution be the thing that changes anything? Today, we also have a completely new understanding of "women's rights," which include the rights of transgender and gender non-conforming people. How would an amendment that says "on account of sex" possibly do *anything* to answer our modern concerns?

After all, the Equal Rights Amendment really is a relic of history — it made its debut in 1923, at the annual Women's Convention in Seneca Falls, NY, after being introduced by the suffragist and leader of the National Woman's Party Alice Paul. From there, it took another 50-plus years, with a few rewrites in-between, to gain enough momentum to finally pass the U.S. Senate in 1972.

The process requires that two-thirds of the states ratify an amendment to make it official, and so from there, Betty Friedan's National Organization for Women (NOW) went to work in all 50 states. Congress, in the meantime, set a deadline for state ratification, March 22, 1979, despite the fact that the Constitution doesn't say anything about deadlines (a fact that haunts ERA opponents today — more on this later.)

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No problem, feminists thought. After winning thorny legalization fights for the birth control pill (1972) and abortion (1973), the ERA seemed inevitable — and like the culmination of all of it. Enshrining women's rights would be the real revolution. In addition to making it very difficult to roll back the gains of the women's movement, the ERA would also trigger a broad reassessment of every law, which is why a two-year waiting period was written into the text of the amendment. You have to remember that back then, marital rape was legal in many states, and women were not allowed to have credit cards in their own names. States would need time to comply. Hawaii was the first state to ratify — on the same day the ERA passed through Congress. Within the first year, 30 states ratified it; by 1977, it was 35.

Then came Phyllis Schlafly.

Schlafly is a conservative icon — and like Ann Coulter and Tomi Lahren, a troll, too. "I'd like to thank my husband for allowing me to be here tonight," is how she liked to open her many speeches. A constitutional lawyer, and founder of the Eagle Forum and the National Committee to Stop ERA, Schlafly believed in traditional roles for women, and that equality would actually hurt women by removing important protections, like alimony, and the custom of children being placed with mothers in the case of divorce, and make the male-only draft immediately unconstitutional. We may want to blame the men, but it was really Schlafly who killed the ERA.

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As the 1979 deadline approached, feminist organizers began to lobby Congress for an extension. In July 1978, 100,000 women and ERA supporters — at the time, the largest women's demonstration ever — marched through the streets of D.C. in support of the deadline extension. By October, Congress had extended the deadline to June 30, 1982.

Over the next few years, things got heated. Arizona, Idaho, and Washington jointly filed suits arguing the extension is unconstitutional, a case that made it all the way

to the Supreme Court, which ruled in NOW's favor. Five states voted to rescind their ratification, moves that most scholars agree are illegal and don't count, but *do* tell you something about Schlafly's power. The ERA became a central and divisive issue in the presidential race. Until 1979, every single president supported it — even Nixon. But not Ronald Reagan. After Reagan won the presidency in 1980, the deadline came and went in 1982, and despite broad public support, activists were still three states short.

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> KAMALA LOPEZ, FOUNDER OF EQUAL MEANS EQUAL

The loss of the ERA was devastating to the women's movement. Although the ERA diehards vowed to never give up, the women's movement splintered and the culture moved on. It wasn't all bad. Women have flourished in many ways, winning many piecemeal fights for gender equality along the way. Today, women influence 83% of all spending, and four in 10 families are led by female breadwinners. Same-sex marriage is legal. To Schlafly's horror, American women have served in combat roles in the military since 2013, and just last month a federal judge ruled the male-only draft illegal (the case was brought by a men's rights group, so add that to the list of wild characters here).

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It would be a lie to say we haven't made *any* progress without a constitutional amendment. But the truth is, as far as we've come, we haven't gone far enough: Violence against women and sexual discrimination are rampant. Female representation in boardrooms and in government is still paltry. And do not get me started on pay parity.

All of these problems stem from the lack of constitutional equality for women. This is the life-changing conclusion that Kamala Lopez came to after a run-in with Alice Paul's ghost back in 2009.

The encounter happened at a screening of Lopez' *A Single Woman*, a film about Jeannette Rankin, the first American woman to hold federal office, at the Smithsonian's National Portrait Gallery. The museum was celebrating the "Women of Our Time" exhibit, and in addition to showing Lopez' film, it had also hired actresses to dress as the ghosts of feminist icons of yore to mingle with the crowd.

Being an actress herself (Lopez' credits include *Lie to Me* and *Walker, Texas Ranger*), she approached the ghost of Alice Paul at first out of pity. "I just thought, *Oh God, this is what happens to actresses after 40. This is gonna be me,*" Lopez told me over the phone in February. But the ghost of Alice Paul suffered no fools:

"My name is Alice Paul, and I've come back to haunt you because you've done nothing to pass the ERA," she said to her.

This simple bit of theater immediately and irreparably gutted Lopez. "From that first anachronistic moment, meeting the ghost of Alice Paul, it was like complete certainty. *This is what I need to do*," Lopez says. She spent a few months learning about the ERA and ever since, she has been working tirelessly to get the ERA fully ratified, both through the creation and promotion of her next film, the documentary *Equal Means Equal*, and through direct advocacy via her organization. "My original idea was just to wake people up, with a tone of *Isn't this ridiculous*?" she says.

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It turns out, explaining why we need the ERA is complicated. It's not as though we don't already have many laws against maltreatment of women, explains Wendy Murphy, director of the Women's and Children's Advocacy Project at New England Law School and Equal Means Equal's legal advisor. Women are also already protected, in some sense, by the Equal Protection clause of the 14th amendment ("nor shall any State...deny to any person within its jurisdiction the equal protection of the laws"). But the rub is that equal *enforcement* of any of the

existing laws against sex discrimination is not required. That is because sex, specifically, is not a protected category explicitly mentioned in the Constitution the way, for example, religion or race are.

This has two reverberating effects. First of all, it allows the government to get away with laws and policies that treat men and women differently, often to the detriment of women. For example: Back in 2010, you'll remember that the government passed the Affordable Care Act, which required employers to cover birth control in insurance plans. Religious groups balked, and sued on the grounds that the government was infringing on their constitutionally protected rights. In the end, the religious groups won the case and the government had to amend the law to provide a less restrictive option for religious employers (they can opt out of that provision of the law).

They won because in cases in which constitutionally protected categories are the main issue, the court must apply what's known as "strict scrutiny" to judge whether or not a law is constitutional. Strict scrutiny requires the court to apply something called the "least restrictive means test," which means that the law can only stand if there is a good reason for the law *and* there is no other less restrictive or imposing way for the government to accomplish its cited aim. "If you can put forth a single other way the government can accomplish their goal, the law is immediately struck down," Murphy says.

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Now compare the Affordable Care Act's birth control provision to a Massachusetts law that allows convicted rapists who impregnate their victims to seek custody and visitation rights to the child through the family court system. It should be easy to argue that this is a grave injustice and a huge imposition on women — if the father is a convicted rapist, why should the mother be legally bound to face her attacker (again and again for 18 years) in yet another courtroom?

Without the ERA, and without the strict scrutiny that comes with it, the woman's right to cut all ties to her rapist is less important than the government's interest in forcing the rapist to pay child support. "The law clearly has a disproportionate impact on women," Murphy says, who's been trying to sue the state on behalf of a woman in this very situation for more than six years now. "My argument is: Fine, child support and forcing the rapist father to pay it is not an illegitimate government interest. However, there's an alternative," Murphy says. Easily, the judge in the criminal court could order the rapist to pay fines or restitution at sentencing. This way, there's no need to go to family court. "It's a less restrictive imposition on women," Murphy says. "If I had strict scrutiny, I could win. But because women aren't entitled to that, there is no reason for the court to even consider this a violation of someone's constitutional rights."

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> CAROLINE FREDRICKSON, PRESIDENT OF THE AMERICAN CONSTITUTION SOCIETY

If that isn't bad enough, the absence of the ERA and the strict scrutiny that would come with it also makes it much harder for individuals to sue employers. Let's say you are being sexually discriminated against at work — whether you're being sexually harassed, or your male counterpart is being paid more than you, or you've been fired because you got pregnant. The bar you as a victim must meet to prove that the harassment was a violation of your rights under laws such as Title VII, and even the equal protection clause of the Constitution, is much higher than if you were accusing someone of discriminating against you on the basis of religion or race. "The state of play right now is that men and women are different, so some discrimination is allowed," says Caroline Fredrickson, president of the American Constitution Society. In the end, what this means in practice is that, even if a law says sex-based harm is technically illegal, the law lacks teeth.

With the ERA, there would be this added (and very powerful) layer of protection: not just state or federal law, but an explicit, inarguable, statement that discrimination on the basis of sex is a violation of constitutional rights.

These benefits wouldn't just extend to women, either. The fact is, the language of the amendment — it says "on account of sex"— is vague. Without a doubt, women stand to gain the most from making sexual discrimination truly illegal simply because of the facts of our society, but sexual discrimination against men (like outdated alimony laws and policies that hurt fathers) would also be harder to justify. Likewise, there's a chance that the LGBTQ+ community would benefit from the vague wording as well. "For years, LGBTQ people have tried to use the courts to establish their own rights. But time and again, the courts have interpreted their cases in terms of sex, so with an ERA all of our rights should level up," Murphy says. Also: "There is a line of case law around sex discrimination based on this understanding of sex discrimination as a product of stereotypes; a woman not acting or presenting how we feel a woman should act or present," Fredrickson adds. In that way, the ERA represents an opportunity to argue that this same logic should apply to, say, someone who was assigned a gender at birth and found themselves unable to conform to that, or someone who doesn't identify with the traditional view of romantic relationships.

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None of this is without argument, however. Virginia Tech constitutional law professor Brandy Faulkner, PhD, cautions that a lot of the effects of the ERA are

hypothetical because the wording gives the courts a lot of leeway. "If you look at the text of the ERA, it is very broad and very, very, simple and it would be up to the courts in years to come to determine what the scope would be." Still, "the magnitude of passing a constitutional amendment is still there." Faulkner says. "It would put us on more solid footing, for sure."

What we know for certain is that once adopted, every state in the union would have two years to go through and evaluate government programs, policies, and laws to make sure they are not discriminatory based on sex. "The ERA doesn't force them to go through their books," Fredrickson says. "But for those states that aren't going through the process willingly, the ERA definitely gives litigants an opportunity to sue, if need be." This process could open up the doors of opportunity even further for women who work in government and the military, for example. It could also help us force jurisdictions to prioritize the rape kit backlog.

In the end, what's exciting is that the possibilities are there, even if the ERA wouldn't necessarily lead to overnight changes. "We have to start somewhere, and we have to start now," says Robles-Roman. "What the ERA is going to do is create a principle. It's going to give us the mechanism to change the culture."

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So, to recap: The ERA is not dead yet (cool), and it very well could finally move the needle on a lot of gender discrimination (amazing, wow) — but wait, what about the deadline? (Sad trombone noise.)

For many years, ERA activists thought that because of the deadline, they'd need to start the process completely over. Article Five of the Constitution, which lays out the amendment process, says nothing about deadlines; the practice was established by a 1921 Supreme Court ruling which said Congress can set a deadline for reasons of "contemporaneity." But then in 1992, something big happened: The 27th amendment, which deals with congressional pay raises, was ratified two centuries since it was initiated in 1789. This changed everything — slowly, of course, because everything involving lawyers takes forever.

Over the next few years, a legal argument began to develop. If contemporaneity is not important for Congress' pay, then why is it important for something as fundamental as women's equality? Another fun fact from the history books that suddenly became super-important: The deadline is not even included in the text of the amendment. It was passed as two separate add-on resolutions, one for the original 1979 deadline *and* one for the 1982 deadline.

This was a eureka realization for a cadre of activists, who started to take it to lawmakers, before it landed with Nevada State Sen. Pat Spearman. Sen. Spearman is an ordained minister, army veteran, and the first openly lesbian woman to be elected to the Nevada Senate. She started advocating for the ERA in Nevada in 2015. (Back then, the legislative body was 40% female. Following the 2018 midterms, it's now the first legislature in history to be majority-female — no wonder it's the state that put the ERA back on the map.) "I can remember when the ERA didn't pass. It was heartbreaking, so when I knew this was still a possibility, I was just over the moon," Sen. Spearman says. "I thought, *Here's a chance we can right this wrong*."

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For two years, Sen. Spearman advocated for the ERA to no avail. When it finally passed in Nevada, though, it was *the* sign that ERA advocates needed to know that they really could get to 38. Also helpful: the reinvigorated women's movement (whispers: Thank you, Donald Trump). It took some time to convince the new guard of intersectional feminists to take the ERA seriously, but they did come around.

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>
> NEVADA STATE SEN. PAT SPEARMAN

The Chicago chapter of March On, for example, rallied around the Illinois ratification in 2018. And this year, Women's March, Inc., the most visible Women's March organization, adopted the passage of the ERA in its Women's Agenda platform for 2020. "We're committed to making it a 2020 issue. It's something we'll be pressing all the candidates on," says Bob Bland, co-president of Women's March, Inc. But, she admits, it took some education for the organization to understand the importance of it. "With the feminist movement of the '60s and '70s not being fully inclusive, that prevented us from winning things," Bland says. "We can learn from that and be more resilient this time."

The good news is women of color are, in fact, leading the charge this time (most of the modern ERA advocacy organizations, including the ERA coalition, are WOC-led). "What people need to understand is that women of color have the most to gain from an ERA," says Lopez, who is Indian and Latinx. "We are the most likely to be discriminated against."

"As an African-American, and a woman, and a member of the LGBTQ community, this is personal to me," adds Sen. Spearman. She reminds me that, yes, it's true that harkening back the beginning of the ERA's story, there were many instances in which the concerns of women of color, and lesbian and bisexual women, and trans women, for that matter, were pushed aside. "But here we are once again, and what I would ask people is: Will we be divided again, or will we stand united for equality?"

Some ERA advocates say Congress simply needs to pass a resolution lifting the deadline, and currently Rep. Jackie Spier as well as her partners in the senate, Sens. Ben Cardin and Lisa Murkowski, are sponsoring a bill to do just that. Rep. Maloney, meanwhile, also has a bill ready to re-start the ratification process. Some, like Wendy Murphy, are adamant that they must file a suit challenging the

deadline's legality before involving Congress at all. Others, like the ERA Coalition, feel the strategic move is to pursue all paths and see what happens.

By this point, the ERA warriors are unfazed by the deadline fight—they're ready for whatever obstacles come next. "I expect there to be court battles. I expect people who do not think equality is important to become more vociferous in their opposition," Sen. Spearman says. "But the fact will remain, we have done this. The bulk of the battle will be complete." In other words, sure, the ERA may be blocked or stalled or delayed once again, but in the end history shows that no matter what, it will rise.

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