The Equal Rights Amendment: Is It Time for a "Fresh Start? A Policy Proposal for Starting Over On the Ratification Process of the Equal Rights Amendment

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PROBLEM FRAMING

In 2016 a survey done by the Equal Rights Amendment Coalition[1] asked Americans "True or False: Men and women are guaranteed equal rights under the United States Constitution". The results of the survey showed that 80% of people *mistakenly* believe that men and women have equal rights under the Constitution. A deeper look at these data show that support for an amendment to the Constitution that would provide equal rights to both men and women ("the Equal Rights Amendment" or "the ERA") is overwhelmingly positive and cuts across both gender and party lines. 90% of men and 96% of women polled said they would support such an amendment. When identified by political party, 97% of Democrats, 90% of Republicans and 92% of Independents all overwhelming support the amendment (ERA Coalition 2019). Despite what seems like nearly unanimous support, the century long battle to amend the Constitution through the ERA has not been successful. As of today women[2] must still rely on a patchwork of case law and statutes in their fight for equality. As the late Supreme Court Justice Antonin Scalia once stated: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.[3]" Fellow Supreme Court Justices and legal scholars disagree with Scalia's characterization of the protections that are offered in the Constitution bolstering even more the argument that gender equality lacks the explicit and

[1] The db5 poll was commissioned by Enso, an agency creating social impact though mission-driven creativity, on behalf of the ERA Coalition/Fund for Women's Equality. The poll was conducted in October 2015 using an online survey. Respondents were recruited through Critical Mix and accredited by True Sample to guarantee the quality of the survey's participants. A nationally representative sample of 1,017 people took part in the survey. The data was then weighted, to ensure that it was proportional to and representative of the population's political affiliation.
[2] While under the law the term "gender equality" would apply to both men and women equally, gender discrimination is overwhelmingly against women and not men. For purposes of this paper we will treat the term gender discrimination as discrimination against women.
[3] Interview with Antonin Scalia in the California Lawyer, January 2011

clear language that could easily be corrected with the passing of the ERA. Justice Scalia's colleague Supreme Court Justice Ruth Bader Ginsberg was quoted as saying "The words of the Fourteenth Amendment equal protection clause — 'Nor shall any state deny to any person the equal protection of the laws' — well, that word, 'any person,' covers women as well as men. And the Supreme Court woke up to that reality really in 1971." [4] Justice Ginsberg and Justice Scalia clearly interpret the Fourteenth Amendments differently. With the passage of the ERA justices would not have to rely on differing interpretations of the Fourteenth Amendment to determine what equal protection means, the plain language of the Constitution would state it.

The attempts to pass the ERA have gone on for almost a century. The ERA was introduced for the first time in Congress in 1923, and every year thereafter. It took until 1972, almost fifty years later, for the ERA to be passed by Congress. The 1972 ERA joint resolution ("Resolution") approved by Congress proposed that the ERA would become part of the Constitution when ratified by three-fourths of the states[5]. The Resolution passed by Congress was conditioned on a deadline that required the necessary number of states (thirty-eight) to approve the Amendment within seven years.[6] As the seven year deadline approached, only thirty-five states had ratified the ERA, and several had sought to rescind their initial approvals[7]. Congress then took the unprecedented step of voting with a simple majority in each House, to extend the

[4] Interview with National Public Radio, July 18, 2019
[5] See 86 Stat. 1523 (1972)("ERA Resolution") Article V of the United States Constitution requires that two-thirds of both Houses pass the amendment and then the amendment must be ratified by three-fourths of the states.
[6] See Id.
[7] Idaho, Kentucky, Nebraska and Tennessee voted to revoke their ratification prior to the original March 22, 1979 deadline. South Dakota sunset its approval on the original March 22, 1979 date which in effect meant that South Dakota was "taking back" their ratification unless the Amendment became adopted within the original time period or seven years.

deadline by three years to June 30, 1982.[8] Unfortunately for supporters of the ERA, the new deadline came and went without any additional ratifications and the ERA failed to secure the necessary number of states to be added to the Constitution.

Now over thirty years later because of various social and political influences there has been a resurgence in the fight for passage of the ERA. This resurgence has resulted in three more states[9] ratifying the ERA and bringing the final count of ratified states to the magic number of 38. The last and final state to ratify the ERA was Virginia who approved it on January 15, 2020. While certainly a symbolic victory for those in support of the ERA, Virginia's actions raise many questions as to the validity of the process surrounding their ratification and consequently if the Amendment should legally be adopted into the Constitution. While continuing the fight to have Virginia's final ratification count may seem like the correct approach it may result in more problems than it ultimately solves and may end with political and legal challenges that defeat the ERA entirely. In large part the success or failure of the 1972 ERA rests on the determination of if the ratification of the last three states, Illinois, Nevada and Virginia, will count towards the 38 states necessary to ratify the ERA. Given data that shows such overwhelming support for the ERA, the question becomes if a continued fight on the 1972 Amendment is the proper approach or if perhaps a fresh start is in order. This paper will propose that a more prudent approach to the passage of the ERA would be for Congress to pass a new amendment and work to obtain the necessary 38 states ratifications. This approach will capitalize on the public

[8] See 92 Stat. 3799 (1978)
[9] Illinois, Nevada and Virginia

support for the amendment as well neutralize any challenges to the existing Amendment based on procedural grounds.

BACKGROUND

History of the Equal Rights Amendment (ERA)

The fight for women's equality has been going on for centuries as women have chipped away at the wall standing between them and full equality (ERA Coalition, 2019). Starting in the mid to late 1800s and early 1900s the fight for women's equality was in full swing. Women had tested the courts under the newly adopted Fourteenth Amendment and had found no support for their cause. Women's advocacy group push hard for the right to vote stating the United States was not a democracy when 20 million adult women did not have the right to vote (ERA, 2019). After a hard fought battle, the Nineteenth Amendment was adopted in 1920 giving women the right to vote. After this victory women realized that there was more work to do and that voting was only the beginning. Using the momentum of the Nineteenth Amendment the concept of an Equal Rights Amendment was born.

The Equal Rights Amendment, very simply, seeks to ensure that women's rights are enshrined in the Constitution in the same way as men's are. The ERA was authored by Alice Paul and introduced to Congress in 1923. The ERA reads *"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"* (Ginsberg, 1975). The amendment failed in 1923 and was reintroduced in Congress every year from 1923 until 1972 when it finally passed. However, for an amendment to become adopted and a part of the

Constitution it must be ratified by two-thirds of the states, or 38 states. The initial passage by congress provided for a seven-year ratification timeline, which was then extended for two years and "expired" in 1982. At the time the ratification timeline expired in 1982 only 35 states had ratified the ERA. Advocates of the ERA have continued their push and the Equal Rights Amendment has been reintroduced in every session of Congress since 1982. On March 22, 2017, after more than two decades of advocacy, Nevada became the 36th state to ratify the ERA, 45 years to the day after Congress passed the amendment and sent it to the states for ratification. In May 2018, Illinois became the 37th state to ratify the ERA and in January of 2020 Virginia became the 38th and final state to ratify. (ERA, 2019).

Gender Equal Protection Under Federal Statutes

In discussions regarding the necessity, or lack thereof, for the ERA reference is often made to the many federal statutes that have been passed over the years to provide women equality. Currently there exists a patchwork of existing federal (and state) law protections for gender equality. This section will look briefly at the major federal laws. Many states have similar state laws, but an analysis of the individual states is beyond this paper.

In the 1960's Congress enacted two laws that began to focus national attention on the disadvantageous treatment women were encountering in the economic sector: The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 (Equal Pay, 1963, Title VII, 1964). Both of these laws mandate nondiscrimination of women by providing for equal wages between men and women. Title VII of the Civil Rights Act of 1964 has far greater protections than provided in the Equal Pay Act and was expanded after criticism over gaps in the law. Title VII protects

women and men against discrimination in hiring, firing, and all terms and conditions of employment. In contrast to the Equal Pay Act, which was created as a “woman's remedy”, Title VII was not drafted with gender-based discrimination in mind. Interestingly, as presented to the House of Representatives, the bill prohibited discrimination based on *race, religion and national origin* (not sex). The category of "sex" was added as a floor amendment, not by a supporter of the measure, but by a congressman who many speculate wanted to defeat the entire bill and thought such a category would be too controversial to allow the bill to pass. Ironically, his approach backfired and the gender classification was added. Title VII, strengthened by amendments, has become the most potent remedy against gender discrimination in employment (Title VII, 1964).

Building on the protections in the Civil Rights Act, Title IX was passed in 1972. Title IX stated that no person shall be discriminated against in an education program on the basis of sex. Originally in 1964 the idea of non-discrimination in education was contemplated and passed as Title VI of the Civil Rights Act but it did not include non-discrimination on the basis of gender. After years of advocacy efforts by the women’s movement the amendment was passed including gender in 1972 (Title IX, 1972).

Over the years history has shown that Congress has improved their attempts at remedying gender protection, but as evidenced by multiple failures to even identify gender as a category in need of protection the laws failed on many front. It took the advocacy efforts of women’s groups to point out those gaps and work to get them fixed.

Gender Protections Under the Fourteenth Amendment Equal Protection Clause

In addition to the federal and state statutes, opponents of the ERA will often hold up the Fourteenth Amendment Equal Protection Clause as the panacea to the ERA and use it as the basis for why the ERA is not necessary.

In 1886, the Fourteenth Amendment to the United States Constitution was passed and signaled a significant shift in the Constitutional restrictions applied to the states. The necessity for the Amendment was to validate the equality provisions guaranteed in the Civil Rights Act of 1886 brought about by the end of the Civil War[10] (U.S. Const., 14th Amendment).

The Fourteenth Amendment contains five sections, and the one which has come to be known as the "Equal Protection Clause" was the first of the five. The equal rights provision states "No State shall… *deny to any person within its jurisdiction the equal protection of the laws*[11] *(*U.S. Const., 14th Amendment*)*. The clause on its surface would appear to apply to women as the plain language clearly states *all persons*. However, the concern at the time of the introduction of the ERA (and still today) was that when read in conjunction with the second section of the amendment which introduced the word "male" into the Constitution for the first time, and always in conjunction with the word "citizen" , that women's rights would be interpreted to be limited by the intent of the Amendment applying only to males[12] (Ginsberg, 1975).

[10] At the time there was much debate about if Congress was overreaching in its authority by the passage of the Civil Rights Act of 1886. The Fourteenth Amendment was passed to ensure that the provisions of the Civil Rights Act would withstand a Constitutional challenge.

[11] The equal protection clause has also been judicially interpreted to apply to the federal government as well as the states

[12] There were advocates at the time of passage arguing that the use of the phrase "any person", and not "male", in the first section showed that the clear intent of the section was to apply to all persons, not only men, or that would have been specified as well. Unfortunately, as was predicted in 1886 that is not how the Supreme Court would interpret equal protection until 1971. See Reed v. Reed 404 U.S 71 (1971).

For over a century after the adoption of the Fourteenth Amendment the Supreme Court applied equal protection as women had feared – only to males. With rare exception there was no case that came before the Court with a distinctively drawn gender line that would not survive constitutional challenge (Ginsberg, 1975). Gender equality as always struck down. This meant that states could freely discriminate under what many women saw as motivations of protectionism and limited women in many areas including; property ownership, employment[13], jury service, and until 1920 even the right to vote. All of which was challenged and found at the time constitutional under the Fourteenth Amendment.

However, in 1971, under increasing social movement pressure, the Supreme Court made a shift in its analysis on the ruling in gender based equal protection cases. In the landmark case of Reed v. Reed[14] we saw the Supreme Court for the first time acknowledge that gender discrimination was in fact a violation of the Fourteenth Amendment Equal Protection Clause (Reed, 1971). The decade that followed this case continued to build on the precedent set in Reed v. Reed. During this time there was much judicial debate around what level of scrutiny these case should be judged by and when was it appropriate for a state to have a significant enough interest to impose a sex based classification. Unlike race, national origin and religion,

[13] To add color to the type of language being used as the basis of the Supreme Court's early Fourteenth Amendment opinions is provided the following excerpt from the Bradwell v. Illinois case of 1873. In this case Bradwell sued the state of Illinois saying she should be afforded the opportunity to practice law. She did not prevail and was met with language in the opinion by Justice Bradley that stated in part; "*The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband ... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator".* See Bradwell v. U.S. 83 U.S. 130

[14] Sally and Cecil Reed, a married couple who had separated, were in conflict over which of them to designate as administrator of the estate of their deceased son. Each filed a petition with the probate court in Idaho asking to be named. Idaho Code specified that "males must be preferred to females" in appointing administrators of estates and the court appointed Cecil as administrator of the estate, valued at less than $1,000.

which is given the strictest scrutiny by the courts, gender continues to this day to only have an intermediate level of scrutiny[15] making it easier for the state to find a compelling reason to uphold a discriminatory law (Craig, 1976).

Current Legal Posture of the Equal Rights Amendment

Recently with the ratification by Virginia of the ERA many questions have been raised as to the how and if the ERA will become a full blown Constitutional amendment the Constitution. Given the current circumstances there three unresolved questions that legally need to be answered.

First, can Congress impose a deadline on ratification of a constitutional amendment in the resolution proposing that amendment? When Congress drafted the resolution for the ERA in 1972 they placed into the resolution document a timeline for ratification (seven years, then extended to ten). If Congress is able to impose a deadline, then the three ratifications in recent years are of no effect—with one caveat, discussed below. But if not, then ratification remains pending before the states, and the post deadline ratifications should count just as much as those in the 1970s. If we look to the case law in the 1921 case Dillon v. Gloss, the Supreme Court unanimously upheld the seven-year time limit for ratification of the 18th Amendment, which was the first proposed amendment to include a deadline. However, there are three

[15] For five years 1971-1976, the standard for gender discrimination was the lowest level possible (rational basis), it was the case of Craig v. Boren that changed the standard to intermediate scrutiny. See Craig v. Boren 429 U.S. 190 (1976).

reasons to believe Dillon may not apply to the case of the ERA (Congressional Research Service 2019).

To start, the 18th Amendment was ratified by the requisite number of states well before its deadline. The challenger in that case argued that the entire amendment was invalid because the Constitution's Article V did not authorize Congress to propose ratification with a deadline. Arguably, therefore, the Court did not squarely address the question of what would happen if an amendment was ratified subsequent to a deadline (Congressional Research Service 2019).

Second, the Dillon Court concluded that Article V itself requires that proposal by Congress and ratification by the states must be close in time, in part because if they hadn't would mean that several amendments proposed over a century earlier, none of which had deadlines for their ratification, would still be pending before the states. As such, the Court concluded that Congress could specify the reasonable time period during which ratification must take place. But in 1992, one of those long-dormant amendments was ratified and is now the 27th Amendment today. History is this case shows that it may be difficult now to support the Dillion case a good law (Congressional Research Service 2019).

Lastly, the ratification deadline was included in the text of the 18th Amendment itself, whose third section stated that "this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." The ERA's deadline, on the other hand, is not in the text of the proposed amendment but in the resolution proposing it. This matters because arguably the 18th

Amendment's provision was not actually a ratification deadline at all. Even if the amendment was ratified after more than seven years, it would become a part of the Constitution—it would simply be inoperative (Congressional Research Service 2019).

The second question is if the deadline imposed by the resolution proposing the ERA is valid, can a subsequent Congress disregard or extend that deadline?

Even if the deadline for ratifying the ERA had legal force, it is possible that Congress today could pass a resolution removing that deadline (and has in the House) recognizing the ratifications by Nevada, Illinois, and Virginia as valid. In 1982, several lower federal courts held that Congress's action extending the deadline to ratify the ERA from 1979 to 1982 was invalid, but the Supreme Court stayed those cases until after the deadline had passed. Then, because no additional states had in fact ratified the amendment during the three-year extension period, the Court dismissed the cases as moot. As with the validity of the deadline itself, the validity of subsequent resolutions modifying or extending such a deadline has never been tested (Congressional Research Service 2019).

The last question is can a state rescind ratification of a proposed amendment?

Even if supporters of the ERA can overcome the ratification deadline the issue still becomes that Nebraska, Tennessee, Idaho, and Kentucky—voted to rescind ratification of the ERA during the original ratification period. Another state, South Dakota, stated that its ratification would lapse after the original 1979 deadline. If the Supreme Court determines that these rescissions are valid, then the ERA has today been ratified by only 33 states, not the 38 necessary.

Unlike the issues pertaining to the deadline itself, the question of rescinding ratification has come up before. Two states attempted to withdraw ratification of the 14th Amendment in 1868 (Congressional Research Service 2019).

But the question will also come before the courts, as litigants seek to invoke the ERA, and there are conflicting precedents as to whether the Supreme Court can adjudicate an amendment's validity. In Leser v. Garnett (1922), the Court considered three different challenges to the 19th Amendment's validity: that it was beyond the Article V amendment power because of its character; that some of the ratifying states could not legitimately have ratified it due to their state constitutional provisions against women's suffrage; and that the ratification in several states had been procedurally irregular. The Court rejected the first two arguments but held that as to procedural irregularities in particular states it must defer to the judgment of the Secretary of State. This could suggest that courts may consider purely legal questions concerning the interpretation of Article V, but not factual questions concerning whether a given state has actually ratified a particular amendment. The Court could reasonably view the disputes over Congress's power to set ratification deadlines, as well as the power of states to rescind ratification, as legal rather than factual. On the other hand, Coleman v. Miller suggested that many of these same issues are political questions that must be decided by Congress (Congressional Research Service 2019).

There are a number of ways this could play out. If Congress passes a resolution stating its position on the ERA's validity one way or another, the courts may defer to that judgment. But, if Congress deadlocks on the issue, leaving the Archivist's judgment to stand on its own, that

could force the courts to act even where they would rather defer. In that case, would Congress be able to weigh in? Or what if Congress declares that the ERA is not valid; could a future Congress reverse that determination? The questions raised by the ERA ratification are precedent setting and voluminous.

Is the Equal Rights Amendment Still Necessary?

Explaining why we need the ERA is complicated. We 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 (The Alice Paul Institute n.d.).

According tp Wendy Murphy this has two reverberating effects. First, 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, 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) (The Alice Paul Institute n.d.).

According to Murphy, 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," (The Alice Paul Institute n.d.).

Given all the laws and Constitutional protections that now exist for women the question becomes why is the ERA even necessary? Without the ERA in the Constitution, the statutes and case law that have produced major advances in women's rights since the middle of the last century are vulnerable to being ignored, weakened, or even reversed. Congress and state legislatures can amend or repeal anti-discrimination laws by a simple majority, the federal and state governments can negligently enforce such laws, and as we discussed the Supreme Court could use the intermediate standard of review to allow certain forms of gender discrimination. Further, a shift in the make-up of the Supreme Court could see new interpretations of existing precedent (Ginsberg, 1986).

As we learned it was not until 1971, in Reed v. Reed, that the Supreme Court applied the Fourteenth Amendment for the first time to prohibit sex discrimination. However, in Reed and

subsequent decisions[16], the Court declined to elevate sex discrimination claims to the strict scrutiny standard of review that the Fourteenth Amendment requires for the suspect classifications of race, religion, and national origin. Discrimination based on those categories must bear a necessary relation to a compelling state interest in order to be upheld as constitutional. The ERA would require courts to go beyond the current application of the Fourteenth Amendment by adding sex to the list of suspect classifications protected by the highest level of strict judicial scrutiny (Reed, 1971).

Additionally, and perhaps most importantly is the cultural impact that the ERA would have. Women and girls would understand that they too are as valuable as male citizens – and it would not be through a patchwork of complicated and ever changing laws, it would be through a very simple and important sentence that *"equality under the law shall not be denied or abridged by the United States on account of sex."*

The reality is that women are not on equal legal footing to men, and other than the right to vote there is no explicit Constitutional rights that protect them. As such women find themselves having to fight through what are at times unclear and not consistently applied standards of "equal protection" because there is not federal constitutional standard that says men and women are equal. If we look to the 1996 Supreme Court case of U.S. v. Virginia[17] we can see that there is debate as to the standard that should be applied to determine if a woman should have the right to be admitted to the Virginia Military Institute (VMI). In this case the Virginia Military Institute had a policy that limited enrollment to men. The state argued that this

[16] See Craig v. Boren, 1976, and United States v. Commonwealth of Virginia, 1996
[17] U.S. v. Virginia, 518 U.S. 515 (1996)

restriction was appropriate because women would not be able to withstand the rigors of its training programs. However, it seemed to acknowledge that there might be a potential problem with its policy, since VMI created an alternative program for women at Mary Baldwin College. This program, known as the Virginia Women's Institute for Leadership, was woven into the structure of that women's-only liberal arts institution, which by its inherent nature created a very different experience from VMI and arguably did not have the same prestige as VMI. In this case we see debate on three very different standards to apply. Justice Ginsberg determined the policy discriminatory on its face because it outright excluded one gender, Justice Rehnquist thought the policy was discriminatory but could be acceptable if an equal alternative was offered and Justice Scalia thought that the court used too high of a standard of review and that any rational basis for the policy could be deemed acceptable. This case is an example of the challenges that evolve from relying on the common law[18] idea of "equal protection" in the Constitution instead of a clear amendment requiring equality. If we look to the commentary in the case it sheds even further light on the challenges for women with institutional and historical inequality. Ultimately VMI was required to admit the female candidate, however the commentary noted that "the standard of review in this case seemed higher than the usual intermediate scrutiny for gender discrimination, perhaps because women were completely excluded rather than merely treated differently. This decision relied in part on an examination of the historical record, which showed a systemic pattern in Virginia of hindering women from pursuing higher education. The Court thus found this policy especially suspicious in the context.

[18] Common law is the development of standards over time through case law –and is often known as "precedent". This can be distinguished from case law which would be a statute or a rule

VMI, which was the last all-male public university in the nation, nearly decided to go private rather than open its doors to women, but an 8-7 vote by its Board decided that admitting women was (barely) preferable to giving up its public status"[19].

METHODOLOGY AND EVALUATIVE CRITERIA

While there will always be debate as to the best path forward for the ERA, a few themes begin to emerge as to what criteria are the most important to determine its success. This paper will examine three of what are arguably the most important factors to the success of the passage of the ERA. From a practical point of view, it is imperative that the legislation have a clear legal path forward. Without a clear legal path, the ultimate aim of passing the legislation is significantly minimized if not almost impossible. Next, research supports that the success of legislation is largely impacted by the pressure imposed on members of Congress or state governments by social movement actors. At what point in the legislative process social movements have the most impact may play a role as well, but for purposes of this paper the criteria will take the position that social movement impact is valuable at all stages of the legislative process. Lastly, this paper will look at what is being termed "cultural resonance", the idea that the ERA's passage contains a symbolic message that is being amplified and given cultural value when it is placed into the Constitution. Supporters of the ERA movement would claim they fight not only for technical equality, but symbolic equality as well.

[19]U.S. v. Virginia, 518 U.S. 515 (1996)

The method of analysis for the policy alternatives (outlined below) will be to examine each of the three policy alternative utilizing the evaluative criteria set forth in this section. The three evaluative criteria will be 1) a clear legal path 2) likelihood of social movement impact and 3) amount of cultural resonance.

For each of the three evaluative criteria outlined below a score of 1-3 will be assigned with the following meaning: 1= low, 2= medium and 3= high. Using this scoring system we will look at each policy alternative and give it a score of one to three for each evaluative criteria and then the three criteria will be summed to determine the total score for the policy alternative. The higher the total score the more likely the success of that policy alternative.

Evaluative Criteria -Clear Legal Path

In order for the ERA to become a part of the Constitution it is imperative that it have a clear legal pathway forward. While it is recognized that it is impossible to predict the future, it is reasonable to want to understand and evaluate the steps necessary for passage as well as obstacles that may get in the way as they may have an impact on the ultimate outcome. While all policy approaches will have a legal pathway to resolution, each may come with varying levels of complexity and/or uncertainly in the outcome. This criterion will look at the complexity of the legal path forward as well as if there is precedent to support the approach or not.

Evaluative Criteria -Social Movement Engagement

The literature supports the idea that a key component of the success of legislation largely depends on the impact that social movement forces have on introduced and pending

legislation. Social movements are a loosely organized but sustained campaign in support of a social goal, typically either the implementation or the prevention of a change in society's structure or values. Although social movements differ in size, they are all essentially collective. That is, they result from the more or less spontaneous coming together of people whose relationships are not defined by rules and procedures but who merely share a common outlook on society[20]. This criterion will ask if the structure of the policy alternative is one that social movements could impact in a meaningful way.

Evaluative Criteria - Cultural Resonance

A key factor to most supporters of the ERA is the idea that a fundamental right such as gender equality is something that should be clearly articulated in the United States Constitution. Opponents of the ERA will argue, incorrectly, that all the protections found in the Fourteenth Amendment Equal Protection Clause make the ERA unnecessary. While this statement is inaccurate, most supporters of the ERA will point to the fact that even if that were true, that that very fact alone that the Constitution does not contain equality language makes statements about the character of the nation. Ruther Bader Ginsberg speaking on equality and the ERA in an interview with USA News said "I think we have achieved that through legislation, but legislation can be repealed, it can be altered," Ginsburg continued. "So 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." Due

[20] This is the definition found in Encyclopedia Britannica for the definition of social movement

to the importance of this notion the idea of cultural resonance will be evaluated for each policy option. (Schwab 2014).

POLICY ALTERNATIVES

Continue the Fights with the 1972 Amendment

The first policy alternative is to continue the fight with the initial 1972 Amendment. This approach appears to be the approach most favored by the women's rights group such as The ERA Coalition and The Alice Paul Institute[21]. Let's look at the three evaluative criteria for this first alternative.

Clear legal path – From a legal perspective this approach is a complicated one and comes with some uncertainty. As was reviewed in the discussion on the current legal position of the ERA there is limited precedent to guide the understanding of the path this approach will take. Political and legal challenges to the ratification process must be resolved before the Equal Rights Amendment can be certified as part of the Constitution.

Technically, following the ratification by Virginia the Equal Rights Amendment has now met the standard in Article V of the Constitution[22] that states that an amendment is "valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states."

[21] The Alice Paul Institute is also known as www.equalrightsamendment.org
[22] See Article V of the United States Constitution

When a state approves a proposed amendment such as the ERA, it submits its ratifying documents to the National Archives and Records Administration (NARA), an independent agency. In accordance with law[23], when NARA receives notice of at least 38 state approvals, the U.S. Archivist is supposed to publish the amendment, with a certification of the ratification documents and a list of the ratifying states. The Archivist's certification is final and conclusive, and the amendment is part of the Constitution as of the date of the 38th state approval, with no further action by Congress.

The challenge in this case is that some circumstances of the ERA's history vary from Article V's ratification process. The ERA is the only proposed constitutional amendment to achieve approval by the required number of states after the expiration of a ratification deadline set (and extended) by Congress. Further complicating matters, five of the states that initially ratified the ERA subsequently voted to withdraw their ratification. As a result, several challenges to the validity of the ERA's ratification process remain to be resolved making a clear legal path forward challenging.

Currently three lawsuits have been filed against the Archivist, two of them arguing that he has a ministerial duty[24] to certify and publish the ERA as part of the Constitution and a third lawsuit which argues that he should not certify the ERA because the ratification process is invalid. On January 6, 2020 the Department of Justice's Office of Legal Counsel (DOJ) contended that the ERA was dead because its time limit had expired. This written opinion form the DOJ was in

[23] See 1 U.S.C. 106b

[24] Ministerial duty is defined as the action of a public officer who has no room for the exercise of discretion because the action is required by law

response to a request for clarification from the U.S. Archivist. ERA supporters have argued that Article V does not set forth a role for the Executive Branch in the amendment process and as such the DOJ's[25] opinion is not binding on the Legislative Branch (Congress). This challenge to this approach is that it is being fought on uncharted constitutional ground. If the cases are successful the ERA could become the 28th Amendment to the Constitution, but if not, supporters must begin all over. As with most legal battles this could drag on for years and ultimately be unsuccessful. Due to the challenges mentioned above the criteria of clear legal path gets a one out of three.

Social movement impact –

Turning to the social movement impact we look to the research of Sarah Soule and Susan Olzak who analyzed the impact social movements had on the ERA. In their research they observed that although the Fourteenth Amendment guaranteed equal protection of all laws, the rights of equal protection were not directly extended to women until Reed v. Reed[26]. After this significant 1971 ruling, the Supreme Court ruled that the equal protection clause made laws that distinguished on the basis of gender unconstitutional. With this ruling, legal scholars found reasons to support the passage of the ERA. According to Soule and Olzak this shift in legal history at least in part explains why the ERA, which had been introduced in every Congress in the United States since 1923, was not actually debated on the floor of the House until 1970–71. By 1972, according to most legal scholars, the situation had changed so that proponents of the Amendment believed that ratification was attainable. In 1972 after the Amendment passed

[25] The Department of Justice is an arm of the Executive Branch
[26] See Reed v. Reed 404 U.S. 71 (1971)

Congress twenty-two states ratified the amendment almost immediately. But after that the pace of ratification slowed, with only eight ratifications in 1973, three in 1974, one in each of the years 1975 and 1977, and none after that. By the 1982 deadline (which had been extended from the original date of 1979) thirty-five of the required thirty-eight states had ratified the ERA, not enough for it to become part of the Constitution (Olzak 2004). As you can see from this analysis the impact of the court ruling and the new support by legal scholars fueled supporters of the Amendment who in turn ramped up advocacy efforts, at least at the beginning.

This same phenomenon of social movement impact can be seen more recently with the passage of the rise of the #MeToo movement which is believed to have fueled the resurgence in the interest of the ERA that ultimately led to the ratification of the final three states from 2016-2020 (US Today 2017) as well as the passage by the U.S. House of Representatives of House Joint Resolution 79 which would dissolve the Equal Right Amendment deadline[27]. (Pereria 2020).

It is in the context of the importance of the impact of social movements that we turn to apply that evaluative criteria to the 1972 Amendment. From the history both in the 1970 and more recently there is reason to believe that social movement impact on the 1972 Amendment approach would be high, and as such it gets a three out of three.

[27] It should be noted that the control of the House of Representatives now lies with the democrats and this vote was mostly along party lines. There were however five GOP members that voted in favor of dissolving the deadline. Given the current extreme political dividedness that may be interpreted as a win. While some GOP members substantively did not agree with the ERA, there were GOP members that voted against based on procedural disagreement

Cultural resonance –

As outline above the third evaluative criteria is cultural resonance. The Alice Paul Institute, one of the oldest and most respected supporters of the ERA states on its website:

"Legal sex discrimination is not yet a thing of the past, and the progress of the past 60 years is not irreversible. Remaining gender inequities result more from individual behavior and social practices than from legal discrimination, but all can be positively influenced by a strong message when the U.S. Constitution declares zero tolerance for any form of sex discrimination. The reasons why we need the ERA are at one level philosophical and symbolic, and at another level very specific and practical." (ERA Coalition 2019).

To supporters of the ERA having a symbolic statement affirming the equality of men and women is imperative to any political alternative. If we turn to the measure of cultural resonance of the 1972 Amendment, it's placement in the Constitution would fulfill this symbolic and important goal. The criteria of cultural resonance is given a three out of three.

Table 1 shows the summary of all three evaluative criteria for the 1972 Amendment alternative with a total score of 7.

Table 1 – The 1972 Amendment

	Evaluation Criteria			Total
	Clear legal path	Social movement impact	Cultural resonance	
1972 Amendment	1	3	3	**7**

Key:

1	Low
2	Medium
3	High

The "Fresh Start" Approach – A New Bill

The "Fresh Start' approach would be a new bill that would start the process all over from the beginning. With this approach, under Article V[28], Congress would introduce and pass by a two-thirds vote a new bill to go to the states for ratification. In order for the bill to be place into the Constitution three-fourth of the states would have to ratify the bill for it to become law.

Clear legal path

If we look at the legal path for a new bill, while never an easy objective, the path is very clear. Unlike the 1972 Amendment which is fraught with areas lacking Constitutional precedent and multiple pending lawsuits, the Fresh Start approach has none of that. To the disappointment of many ERA supporters, long time women's rights advocate and Supreme Court Justice Ruth Bader Ginsburg in a recent interview stated that she "would like to see a new beginning. I'd like to start over" Ginsburg went on to explain that there is "too much controversy" around the

[28] See Article V of the United States Constitution

question of whether three-fourths of the states had actually ratified the ERA. "If you count a latecomer on the plus side, how can you disregard states that said we've changed our minds[29]?" (Beran 2020).

While this thinking certainly does feel like it disregards almost a century of effort, if we look to the criteria of clear legal path it is a more compelling position that that of the 1972 Amendment and for that reason it gets a three out of three on clear legal path.

Social Movement Impact and Cultural resonance

Turning to social movement impact and cultural resonance for the Fresh Start approach the analysis is almost identical to that of the 1972 Amendment. As such both of these get a three out of three.

A summary of the Fresh Start approach in Table 2 below shows a total score of 9 out of 9. This approach has a perfect score in all three areas.

Table 2 – A Fresh Start

	Clear legal path	Social movement impact	Cultural resonance	
New Amendment	3	3	3	**9**

Key:

1	Low
2	Medium
3	High

[29] Ginsburg was criticized by many supporters of the ERA not only for the fact that they disagreed with her statements, but also that these statements may provide grounds for her having to recuse herself should the matter come before the Supreme Court.

Focus on the States - Individual ERA's in State Constitutions

The third policy alternative is to look to the states that have passed state-level equal rights amendments and assess the potential effect of these laws. Instead of a federal solution equal rights amendments could be left up to the individual states to draft and enforce. As of the date of this paper there were currently twenty-six states with state-level equal rights amendments to their state constitutions as well as three states that have passed an equal rights amendment through at least one house of the state legislature.

Clear legal path

As with the federal government all states have a process by which to make an amendment to their state constitution. To date the states that have taken action to create a state level equal rights amendment, as would be expected, have all taken a somewhat different approach. Some states limit its applicability[30], some states make broad statements like the federal ERA[31], and surprisingly even some states that refused to ratify the federal ERA have state equal rights amendments[32]. Looking at this policy alternative it is clear to see how a clear legal path could begin to get complicated. While all states have a legal pathway, it may be challenging to take on a full fifty state approach and completely understand all the legal and political technicalities that would come with such an effort. While a clear legal pathway does exist, it is a bumpy and resource intensive one, as such this criterion gets a two out of three.

Social Movement Impact

[30] This is currently the case with New York, but there is legislation underway now that would change that.
[31] Pennsylvania, Colorado and Massachusetts are a few examples
[32] Florida has done this but was careful to only allow for the middle tier of scrutiny as is currently provided in the Fourteenth Amendment for gender equality, not the strict scrutiny/highest level advocated for by the ERA.

In analyzing the social movement impact of a fifty state approach a few of the similar challenges to the clear legal pathway arise. Different regions of the country have different political tendencies requiring advocacy efforts to be much more localized. Without localized efforts social movements that may work in New York may not work in Alabama and the platform of a more general federal message approach may get lost. Social movement like the #MeToo movement may serve to marginalize certain areas of the country and empower others. To this end the social movement impact may not be as effective and gets a two out of three in the analysis.

Cultural resonance

In many ways looking at the experiences that states have had with their own equal rights amendments may serve as a proxy to the impact or effectiveness that a federal ERA could have, but the question remains that even if all fifty states had a state-level equal rights amendment would that offer the same impact and validity of a federal ERA.

In January 2020 the Washington Post and political scientists Lee Epstein and Andrew D. Martin got together and examined all the state level constitutional sex-discrimination cases that reached states' top courts between the years of 1960 and 1999 (Baldez 2020). Their review looked at both the legal standard the court applied as well as how the cases were decided. The finding of their review was that having a state level equal rights amendment significantly increases the likelihood that judges will apply a higher standard of law in sex discrimination cases, leading more often to courts ruling in favor of the person claiming sex discrimination. The interesting part of this review is that this is true even when controlling for factors that may

influence justices such as ideology, percentage of women on the bench, if the state ratified the federal ERA and the types of litigation. While these data need updating the results certainly show that state-level equal rights amendments are effective and imply that a national level ERA could have a similar impact.

While these data are informative, and provide a bit of hope for a federal ERA, they lack a central unified message to the nation in support of gender equality. No matter how effective a 50 state approach is, by its very definition it is missing the necessary federal equality statement important to so many ERA supporters. Based on this review the cultural resonance gets a one out of three.

Below in Table 3 is a summary of the results of the State-Only approach which resulted in a total score of 5, the lowest of the three policy alternatives.

Table 3 – State-Only Approach

	Clear legal path	Social movement impact	Cultural resonance	
State-Only Approach	2	2	1	**5**

Key:

1	Low
2	Medium
3	High

POLICY RECOMMENDATION

By looking at Table 4 below it is clear to see that the policy recommendation that scores the highest given the evaluative criteria is the New Amendment (the Fresh Start) approach. This alternative allows for a clear legal path forward free from existing law suits, it carries with it the

social movement pressures that are so important to moving the ERA forward and finally it sends a clear message of gender equality on a national level.

Table 4: ***Evaluation of Policy Alternatives to Passage of the ERA***

		Evaluation Criteria			Total
		Clear legal path	Social movement impact	Cultural resonance	
Policy Alternatives	1972 Amendment	1	3	3	**7**
	New Amendment	3	3	3	**9**
	State-Only Approach	2	2	1	**5**

Key:

1	Low
2	Medium
3	High

CONCLUSION

In some ways the century long battle for the ERA is closer to the finish line than ever, but there is still yet work to be done. The passage of the ERA by Virginia set off a cascade of questions and new legal and political challenges that will need to be overcome. Looking to the analysis in this paper the most prudent course of action for ERA supporters is to move forward with a new ERA amendment and start the process over. With advocacy and hard work hopefully it will not be another one hundred years until it is passed.

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