



PERSPECTIVES

A Magazine for and about Women Lawyers



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100 Years on, the ERA Rises from the Ashes

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Perspectives: March 2020

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100 Years on, the ERA Rises from the Ashes

By Hannah Hayes

Hannah Hayes is a Chicago-area freelance writer.

In March 2017, Nevada became the 36th state to ratify the Equal Rights Amendment (ERA). The move came just two months after the Women’s March on Washington drew hundreds of thousands to Washington, D.C., to protest President Donald Trump’s inauguration, as millions of women joined in simultaneous marches worldwide.

The vote also came 45 years after Congress passed the constitutional amendment, a move requiring ratification by three-fourths (38) of states before it became law. That year, 22 states immediately jumped on board; eight states ratified the ERA in 1973, followed by three states in 1974, with only two more states in 1975 and 1977.

After the decades-long gap, Nevada was followed by Illinois in 2018, and in January of this year, Virginia became the 38th state, technically making the amendment a reality. However, approval has been stalled because the amendment was introduced with a proposed two-year deadline for state ratification, and five states rescinded approval in the 45 years following their approval.

Many credit the #MeToo movement and the election of President Trump with re-invigorating the women’s movement. “[Former President Barack] Obama claimed we were post-racial, but 2016 woke people up,” says Senator Pat Spearman, the democratic Nevada senator who introduced the resolution and who has since championed ratification across the country.

Others say, however, a persistent ground game that involved flipping seats and working state by state kept the amendment alive when many thought it had died a quiet death in the late 1970s. “I think the Women’s March helped inject vigor and also turned average people into activists,” says Kate Kelly, a human rights lawyer in the New York office of Equality Now, an international women’s rights organization, and a member of the national ERA Coalition. “Most people said it came out of nowhere, but people had been working on the ground in many states for many years. It just wasn’t getting any attention.”

What Took So Long?

While the Nineteenth Amendment, which was ratified in 1920, recognized women’s right to vote, it did not make women equal under the law. Further, it was only one strand of a series of demands made by Elizabeth Cady Stanton and abolitionist Lucretia Mott at the historic Seneca Falls Constitutional Convention in 1848 that included a broad list of social and civil rights, such as no-fault divorce and equal marital property rights. The Equal Rights Amendment was authored by Quaker abolitionist Alice Paul in 1923 and revised in 1943.

“Paul had a group of women lawyers from every state who analyzed the statutes in each state, and they came up with 350 statutes in 30 different areas of law where there was inequality,” says Tracy Thomas, director of the Center for Constitutional Law at the University of Akron (Ohio) School of Law.

According to Thomas, the ERA was met with opposition from the beginning. ERA advocates clashed

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with the labor movement, which was fighting for minimum wage and workplace safety. “The way they had been successful was by saying that women needed protection because legislators could understand that, so there was the fear that if you said the women were equal to men, nobody would get workplace protection,” Thomas explains.

Eventually, those issues faded following the passage of the Fair Labor Standards Act in 1938 and the rise of the civil rights movement.

When the ERA passed both houses of Congress in 1972, it had bipartisan support but stalled in 1977 with pressure from the conservative right and Phyllis Schlafly’s vigorous anti-ERA campaigning. According to Linda Coberly, managing partner at the Chicago offices of Winston & Strawn LLP and chair of the national ERA Coalition’s Legal Task Force, Schlafly was particularly active in Illinois. “It was soon after the civil rights movement in the ’60s and the sexual revolution, so she was able to organize around a lot of fear about what those ‘women’s libbers’ would do to our culture.”

The deadline for ratification was extended to 1982, but ratification remain stalled at 35 states.

A Slow but Steady Ascent

In 1982, a University of Texas student set out to write an undergraduate paper on whether or not the Equal Rights Amendment deadline should be extended. In his research, Gregory Watson uncovered an obscure amendment concerning congressional salaries introduced by James Madison in 1789 that had never been ratified. What if, Watson argued, an amendment introduced 193 years ago was still valid?

Watson abandoned his topic on the ERA and argued that based on a 1939 U.S. Supreme Court decision (*Coleman v. Miller*, 307 U.S. 433), an amendment with no deadline could still be ratified. He received a C on his paper, and, in fact, never finished college. But he spent the next 10 years proving his point until 1992—203 years after it was introduced—when the so-called Madison Amendment went into effect.

Five years later, an article in a law review journal suggested the same logic could be applied to the Equal Rights Amendment, and the “three-state strategy” was born.

At the time, many groups had been working at the local level to ratify state constitutions, with much discussion about starting the process over. “We focused on states that had not yet ratified and where there were opportunities for ratification,” says Maria Vullo, a co-founder and chair of the board of the ERA Coalition, a national organization of women’s groups working on equality and justice issues at every level.

Vullo, who is a former superintendent of the New York State Department of Financial Services and former partner in the Litigation Department of Paul, Weiss, Rifkind, Wharton & Garrison LLP, explains: “The strategy has been and was developed to be an inclusive strategy to bring under the fold as many diverse groups and people as possible.”

In Nevada, Senator Spearman ran her re-election campaign on ERA ratification. She won and introduced the bill immediately. It was ratified 45 years to the day that Congress passed the ERA. What’s more, in the fall of 2019, Nevada became the country’s first majority-women-led state legislature.

In Illinois, Linda Coberly recalls being called into the Chicago offices of the chairman at Winston & Strawn after he heard about Nevada’s ratification. Appalled that Illinois had not ratified the ERA, he told her, “we have to do something,” and Coberly agreed. They opened a pro bono case, and Coberly led the

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charge working with groups on the ground, providing research, legal, counsel, and training.

One year after the Nevada vote, Illinois ratified the ERA. With one state left, the focus turned to Virginia, where ratification bills had been introduced a half dozen times over the past decade, only to languish in committee. In August 2019, an all-volunteer, nonpartisan grassroots campaign kicked off with the sole purpose of “injecting the ERA into all of the campaign conversations,” according to campaign chair Kati Hornung.

“If there was a town hall, people asked about it; letters were written, and whether you were pro- or anti-ERA, [you] became a huge part of it,” she continues. “I was really surprised to see how many campaigns shaped up around this issue.”

The houses flipped from red to blue, and in January 2020, Virginia became the 38th state to ratify the ERA.

Not Your Mother’s ERA

So why did it take so long, and then why did it spread like wildfire? While some credit the #MeToo movement and women’s marches, others point to the wide umbrella and emphasis on diversity and inclusion. In each state, the championing legislators were women of color.

Not that this was unusual, says Equality Now’s Kate Kelly. African American participation in earlier movements was “whitewashed in the truest sense of the word. The reason it was seen as a white middle-class thing is that history was intentionally written to exclude African American women, when women of color were actually very active in the suffrage movement but sidelined by the ERA. Now what’s happening is the black women are taking the movement forward in every state where a resolution is pending.”

In Virginia, black sororities such as Delta Sigma Theta and Alpha Kappa Alpha formed social action committees that were heavily involved in campaigning. Hornung points out that Delta Sigma Theta’s first public action was marching in the 1913 suffrage parade.

“I think in many ways it’s poetic justice,” says Spearman, who, as an African American, openly lesbian woman, says she’s as “marginalized as a Disney character.”

Spearman points out that in the 1970s, Shirley Chisholm, the first black woman elected to Congress, was powerfully outspoken about the ERA, and the testimony before Congress made it crystal clear that the words “on account of sex” included the LGBTQ and trans communities. “It’s about equality period, and if you don’t understand that, then you were simply born into privilege.”

What’s at Stake with the ERA

While some question whether the passage of the ERA is merely symbolic, proponents and activists are clear that the legal implications of a constitutional amendment are far-reaching. While some cases argued under the Fourteenth Amendment have been successful and Title VII and Title IX offer some protection, Vullo notes that “lawyers all know that the constitution is a higher authority than a statute.”

She adds that pregnancy discrimination in the workforce is not considered sex discrimination, and courts have a “very bad record” when it comes to victims of domestic violence. “There is still a large gender pay

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gap,” Vullo explains, “and while more than 50 percent of law school graduating classes are women, that is not the percentage of leadership in law firms or in corporations.”

Tracy Thomas agrees. “We have a lot of gaps not protected when it comes to pregnancy, sexual harassment—things that are on the border because of the lack of a constitutional foundation in gender equality.”

While some states have passed their own Equal Rights Amendments to their constitutions, the protections offered are not as robust because most gender discrimination laws are litigated in federal courts.

What Happens Next

With 38 states ratifying the Equal Rights Amendment, the next step would be for the archivist to certify the amendment, a largely clerical procedure. However, Trump’s Department of Justice issued an opinion that the 1982 deadline stands, and the most recent ratifications are moot. The attorneys general of Nevada, Illinois, and Virginia filed a lawsuit in January 2020 asking the court to force the archivist to certify, pointing out that his role is clerical in nature.

To further complicate matters, in February 2020, five states filed a motion to block the lawsuit, saying they have since rescinded their ratification over that last several decades. However, proponents say that attempts to rescind other ratifications have been discounted, and many legal scholars say that the ratification by the 38th state is enough based on the approval of the Madison Amendment 203 years after its introduction.

Also in February, the House voted to remove the deadline imposed back in 1979. A similar bill is awaiting a hearing in the Senate, but Senate Majority Leader Mitch McConnell has said he will not call it to the floor.

“There are a lot of constitutional scholars who are quite clear that a deadline can’t possibly stand in the way of an amendment,” Coberly says, particularly because the deadline was in the preamble and not the amendment itself. “One way or another, we’re going to see court rulings or action by Congress, and they’ll impact on one another.”

Ultimately, things could carry on until the November elections, and the ground game is likely to pick up again with the possibility of the ERA shaping some contested Senate seats. While unwilling to predict which way things will go, Kate Kelly says she prefers to think of Susan B. Anthony’s words: “Failure is impossible.”

VOICES

I Had a Plan

By Tracey Mihelic

Tracey Mihelic is currently an attorney with Husch Blackwell based out of the newly-opened Salt Lake City, Utah, office. She focuses on assisting clients with the development, acquisitions, and sales of renewable energy projects, while also enjoying the great outdoors.

I had a plan. I went to college and then straight to law school. My plan was to be a partner at a law firm—forever. I joined a firm, got married, waited to have kids, made partner, and had two kids. I moved to a larger firm and had two more kids. I thought life might be easier as an in-house counsel. I moved to another state with four kids ages five and under. As an in-house counsel, I never worked harder in my life.

A year later, I learned my two-year-old daughter could not speak. She could not say “mmm,” much less “mom.” My career was on track. My plan was to be general counsel. So, I found a speech school, handed my daughter to my husband, and asked him to take care of the situation. I kept traveling and came home on weekends or for a few weeks at a time. A year later, my daughter still could not say “mmm” or “mom.” She used pictures instead of words to communicate. I realized that my husband was raising four kids alone, one who was now labeled “special needs.”

I took a few weeks off to take my daughter to experts around the country. Not one would accept her into their practice. Speech schools also refused to admit her. Then we discovered the “speech whisperer,” a tiny woman with a school in our backyard (okay, 1.5 miles away). Her school was for children no one else wanted. My husband and I were told the woman worked miracles. We enrolled my daughter, and I went back to work.

The speech whisperer told me my daughter needed more of my attention. I quit work, and I believed my 17-year career was over. My family took our first real vacation in years. On the beaches of Costa Rica, my daughter said, “I see a boat.” We came home, sold everything, and moved there. The plan was to live there for two years.

While on the beach one day, a former client called and asked me to review contracts. I said I was an environmental lawyer living in Costa Rica. He did not care. Then a former partner called and asked for help on a deal. I was suddenly drafting contracts for forestry and renewable energy projects—from Costa Rica. Two years became five.

In year five, my client informed me its general counsel was leaving. They wanted me to move back to the states. We did. I was finally “general counsel.” For a minute. The former general counsel, whom I had replaced, lost his new job because new owners took over that business. He asked my employer if he could have his old job back and, because he was family, they gave it to him. I thought my career was over—again. But then the renewable energy client called. She needed counsel. I changed my plan and opened a solo law practice.

Four years later, with too much work, three sons in college, and a 16-year-old who did not need me “at all,” a headhunter called. A firm in the Midwest was looking for a renewable energy lawyer. I laughed,

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said no . . . , but then said why not. I was starting over, again, not as general counsel, not as partner. Senior counsel (I'm still uncomfortable with that title). A year later, I find myself opening a new office for this firm in Salt Lake City. Another new plan.

Careers go up, down, and sideways. I have learned that when a job ends, a career does not. I have learned that I can practice law anywhere and change what I practice. I no longer fear taking time off, changing course, or even being fired (well, maybe a little of the latter). I have learned that it is okay to change the plan or have the plan changed for me. Life really does work itself out, as long as I remain flexible and open to what it offers.

CHAIR'S COLUMN

What the 1920s Can Teach Us about the 2020s

By Stephanie A. Scharf

Stephanie A. Scharf is a founding partner of Scharf Banks Marmor LLC in Chicago and chair of the ABA Commission on Women in the Profession.

This is a hectic and scary time. We are all grappling with many new challenges and decisions about our health and well-being and those of family and friends. Sometimes it helps to take a few minutes, step back, and focus on challenges that we have faced in the past and overcome by working together.

This year, the Commission on Women in the Profession has focused on the history and meaning of the Nineteenth Amendment, which was ratified just 100 years ago. While many people think of the 1920s as a time of hot jazz, gangsters, Prohibition, and the stock market crash, that decade was also a critical time for the advancement of women.

The Nineteenth Amendment states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.” Ratifying the Nineteenth Amendment meant that 26 million American women became first-time voters in the 1920 U.S. presidential election. Even so, not all women had that opportunity. Millions of women of color remained disenfranchised for many decades. Nor did the federal right to vote readily translate into other civil rights, such as the right to serve on a jury, the right to contraception, the right to work in any profession, and more.

The right of women to vote has deep meaning, even today, as recognized by the Nineteenth Amendment activities fostered by ABA President Judy Perry Martinez. For an array of learning resources, please visit https://www.americanbar.org/groups/public_education/Programs/19th-amendment-centennial.

March is Women’s History Month, and the Commission on Women in the Profession is posting and tweeting about historical milestones and important figures in women’s struggle for equality in society at large and the legal profession in particular.

Although elections do not occur very often, there are many everyday opportunities to “vote.” Women vote with their wallets when they support businesses that align with their values. They vote with their feet when they leave companies that do not treat them equally and take new positions at more inclusive workplaces. They vote with their time, effort, energy, and grit when they pursue a career in law and make difficult decisions about balancing work with their caretaking responsibilities and their own wellness.

Each of us has a personal story to tell about how we vote in our everyday lives. What we say or what we do not say, what we do or what we do not do—each action, or inaction, can be a vote one way or the other. It’s often difficult to step up and vote. I wish for all of us to have the courage, interest, and grit to vote the way we feel is right. Here at the Commission, we honor each person’s contribution to a more just and equitable society and profession.

My hope is that each of us moves forward with strength and in health and, together, overcome the challenges we face—just as our grandmothers and great-grandmothers did 100 years ago when they fought for and won ratification of the Nineteenth Amendment.

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CWP NEWS

2020 Brent Honorees Announced

The Commission on Women in the Profession is proud to announce the recipients of the **30th Annual Margaret Brent Women Lawyers of Achievement Awards**. The award was established in 1991 to recognize and celebrate the accomplishments of women lawyers. Each year, this award honors up to five outstanding women lawyers who have achieved professional excellence in their area of specialty and have actively paved the way to success for other women lawyers. These women demonstrate excellence in a variety of professional settings and personify excellence on either the national, regional, or local level. The honorees will receive the award at a luncheon during the ABA Annual Meeting in Chicago, Illinois, on August 2, 2020.

- **Ruthe Catolico Ashley**—executive director emeritus; California LAW; Sacramento, CA
- **Hon. Anna Blackburne-Rigsby**—chief judge, District of Columbia Court of Appeals; Washington, D.C.
- **Deborah Epstein**—professor of law and co-director; Domestic Violence Clinic; Georgetown University Law Center; Washington, D.C.
- **Wendi Lazar**—partner, Outten & Golden LLP; New York, NY
- **Regina Montoya**—CEO, Regina T. Montoya, PLLC; Dallas, TX

Information about how to support the Commission and its 2020 Margaret Brent Luncheon can be found at <http://www.ambar.org/brentawards>.

CWP NEWS

“Men in the Mix Project” Preliminary Results Released

The Commission on Women in the Profession’s program **Men in the Mix: How to Engage Men on Issues Related to Gender in the Profession** took place at the ABA Midyear Meeting in Austin, Texas, in February.

Anne Collier of Arudia presented the preliminary findings from the Men in the Mix focus groups that were conducted throughout 2019, indicating why some men do not participate in activities that would support equality for their female colleagues. Interestingly, the most-often-cited reason men do not advocate for women lawyers or attend affinity group events was simply because they are not personally invited or asked to do so.

Katherine Larkin-Wong, CWP commissioner and associate at Latham & Watkins LLP, moderated the panel, which included Evan Anderson, CEO, Placed Legal Career Strategies; Chris Brown, chair-elect, ABA Young Lawyers Division; Paulette Brown, senior partner and chief diversity and inclusion officer, Locke Lord LLP; and the Honorable Rodolfo A. Ruiz II, U.S. district judge, U.S. District Court, Southern District of Florida.

At the program, the panel had a robust discussion about many facets of the gender equity topic, such as what women look for when they enter the lateral market, generational differences in how millennial men relate to their female colleagues versus baby boomers or Generation Xers, the unique challenges faced by women of color in the profession, and how judges can influence those who argue before them so women lawyers have more opportunities.

The event was video recorded and covered by ABA News; at the time of the writing of this report, they indicated that the link to the footage will be available soon. Approximately 70 people attended the program, which carried CLE credit.

CWP NEWS

Successful Spring Summit for Advancing Women in the Law

The Commission on Women in the Profession and the Women’s Bar Association of Illinois co-sponsored the **Spring Summit for Advancing Women in the Law** on March 3, 2020, at the Everett McKinley Dirksen U.S. Courthouse in Chicago, Illinois. The summit brought together legal professionals from firms, corporations, and the judiciary to discuss the current landscape for women in law and what research from the ABA Long-Term Careers for Women in the Law tells us about the need for change. More than 250 lawyers registered for this event.

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