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The Long Fight for the Equal Rights Amendment

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With the Equal Rights Amendment (ERA) finally receiving its 38th affirmative vote in January from the Virginia General Assembly and the resulting litigation to have the amendment added to the Constitution, it is worth revisiting the question that proponents and opponents alike have asked for nearly 100 years: why do we need the ERA?

To discuss the importance of and challenges to its passage, Proskauer partnered with the Women's Bar Association of the State of New York to host a panel discussion moderated by the Honorable Betty Weinberg Ellerin, retired New York Appellate Division Judge. Panelists included Maria Vullo, adjunct professor of law at Fordham University and co-founder of the ERA Coalition, Katharine Bodde, Senior Policy Counsel, NYCLU, and Wendy J. Murphy, adjunct professor of sexual violence law at New England Law, Boston.

Constitutional protection for gender equality has sweeping implications. Although there are various state-level equality provisions, a U.S. Constitutional amendment would serve as a legal framework for challenging laws that threaten equality based on gender, while preventing the Supreme Court from diminishing the power of existing laws. The proposed amendment would require strict scrutiny on matters of gender discrimination, thereby advancing pay equity, preventing pregnancy discrimination, promoting parity in parental leave, and supporting gay and transgender rights as well as protections for victims of sexual assault and domestic violence

The panelists discussed current legal questions surrounding the amendment's long-belated ratification and subsequent rescissions of support since its first introduction. Congress originally set a seven-year deadline for ratification by the states, which was later extended; however, as the panelists explained, the Constitution nowhere accords Congress the power to limit the ratification process by setting deadlines. And even if such power could be implied in the congressional power to propose amendments, the ERA deadline was set by a simple majority, not the required supermajority of both houses. This is not an unprecedented scenario: the 27th Amendment, which governs increases and decreases in congressional salaries, was passed by Congress in 1789, and finally ratified 202 years later, in 1992. Another question is raised by the fact that five states claim to have rescinded their original ratifications. The panelists pointed out that the Constitution does not provide for rescission, and commented that the framers may not have expected the process of constitutional amendments to be vulnerable to political caprice. Historically, purported rescissions have not been honored, including those by Ohio and New Jersey of the 14th Amendment.

Will 2020 be the year to accomplish what the past few decades could not? Champions and organizers of the ERA appear to have done some critical self-reflection, as well as adapt the most effective strategies of their past opponents. Phyllis Schafly spearheaded the anti-ERA movement in the 1970s, relying heavily on affiliations of shared, traditional values to make arguments that the ERA would purportedly lead to drastic change in American society, including a dangerous blurring of the lines between genders and their expected roles. However, with the advent of broad-based coalition-building in the era of #MeToo and the Women's March, ERA advocates can now bridge racial and class divisions through appeals to shared values – the same tactic that Schlafly once employed. If the ERA can keep this momentum, and this alliance stays intact, equality may finally be explicitly preserved in the Constitution as the law of the land.

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