Vox

Ruth Bader Ginsburg probably just dealt a fatal blow to the Equal Rights Amendment

A half-century-long fight for equality is likely at an end.

By Ian Millhiser | Feb 11, 2020, 12:30pm EST

Supreme Court Justice Ruth Bader Ginsburg speaks on stage during her induction into the National Museum of American Jewish History's Only in America Gallery. | Gilbert Carrasquillo/Getty Images

Justice Ruth Bader Ginsburg is the most important feminist lawyer in American history. Long before she became a judge, she convinced the Supreme Court to hold that gender discrimination can violate the Constitution. She spent many of the following years working to strengthen those protections for women.

Yet Ginsburg said on Monday that one of her life's goals — writing a strong prohibition against gender discrimination into the Constitution — **must be put on hold**.

At an event at Georgetown University's law school, moderator and federal appellate judge Margaret McKeown asked Ginsburg about an ongoing effort to **revive the Equal Rights Amendment** (ERA), which provides that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

Three-fourths of the states, or 38 total, are required to amend the Constitution. Last month, Virginia **became the 38th state to ratify the ERA** and one of only three states to do so since 1977 — but there's a catch. Congress imposed a 1982 deadline on states hoping to ratify the ERA, though there's **doubt** about whether this deadline is binding.

Ginsburg's comments on Monday suggest that she believes this 1982 deadline should be considered binding. "**I would like to see a new beginning**" for ERA ratification, the justice told McKeown.

"There's too much controversy about latecomers," Ginsburg added. "Plus, a number of states have withdrawn their ratification. So if you count a latecomer on the plus side, how can you disregard states that said 'we've changed our minds?'"

According to the Washington Post, five states — Idaho, Kentucky, Nebraska, Tennessee,

Ginsburg also made her somewhat surprising remarks in a moment when the bulk of her feminist accomplishments are endangered by an increasingly conservative Supreme Court.

Justice Ginsburg's feminist legacy teeters on a knife's edge

In ***Reed v. Reed*** (1971), a case that Ginsburg helped litigate while she was still a practicing attorney, the Supreme Court held for the first time in American history that the Constitution limits the government's ability to discriminate on the basis of gender. Ginsburg spent much of the 1970s convincing the Court to expand its holding in *Reed*. And she resumed this project shortly after the joined the Court.

Under Ginsburg's opinion in ***United States v. Virginia*** (1996), "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification."

Had the Equal Rights Amendment been ratified, it would have given women **somewhat stronger protections** than they enjoy under *Virginia*, but the bar on gender discrimination laid out in *Virginia* is still quite robust. As a practical matter, current legal doctrine achieves almost the same outcome that would have been achieved if the ERA were part of the Constitution.

But it's also unclear if there are still five justices on the Supreme Court who agree with *Virginia*. There may even be five justices who think *Reed* was wrongly decided.

Chief Justice John Roberts is the most moderate member of the Supreme Court's Republican majority. Yet as an aide to Attorney General William French Smith in 1981, Roberts prepared a draft article arguing that the Court's constitutional decisions protecting against gender discrimination were "**an unjustified intrusion into legislative affairs**." The future chief justice later argued, unsuccessfully, that the Justice Department should not intervene on behalf of female prisoners who alleged sex discrimination by Kentucky's prison system.

It's unclear whether these writings represented Roberts's beliefs or if he was merely a political aide advancing his boss' opinions. There is, however, at least some evidence that Roberts personally opposed constitutional gender equality. As a White House attorney in 1983, he **criticized a version of the ERA** because it would "ipso facto override the prerogatives of the states and vest the federal judiciary with broader powers in this area."

To be clear, Roberts's views may have evolved since the 1980s. It's also possible that one of his four Republican colleagues would vote to preserve a decision like *Virginia* either for an idiosyncratic doctrinal reason or out of respect for precedent. The fate of Ginsburg's feminist legacy is uncertain, but its doom is not inevitable.

Nevertheless, their fate is more uncertain than ever. And cases like *Virginia* and *Reed* are even less likely to survive if President Trump gets to fill more seats on the Supreme Court.

The question of whether the ERA was properly ratified is also uncertain

Setting aside Ginsburg's recent comments, it is also unclear whether the 1982 deadline Congress imposed on ERA ratification should be considered binding. The answer turns on

two rather dated Supreme Court opinions.

In ***Dillon v. Gloss*** (1921), the Supreme Court held that Congress may "fix a definite period for the ratification" of a constitutional amendment. But *Dillon* involved the 18th Amendment, **whose text states** that it "shall be inoperative" unless it is ratified "within seven years from the date of the submission hereof to the states by the Congress."

The ERA's text, by contrast, does not mention a deadline. The deadline is mentioned in the resolution proposing the amendment, but not in the text of the amendment itself. So it is not clear that *Dillon* applies to the ERA.

Less than two decades after *Dillon*, in ***Coleman v. Miller*** (1939), the Court suggested that Congress, and not the courts, has the final word on whether an amendment was properly ratified. "Congress, possessing exclusive power over the amending process, cannot be bound by, and is under no duty to accept, the pronouncements upon that exclusive power by this Court or by the [state] courts," the Court explained in *Coleman*.

That suggests that if Congress were to decide that the ERA was properly ratified, the courts would be bound by that decision. But Congress has not done so, and Senate Majority Leader Mitch McConnell says he is "**personally not a supporter**" of the ERA, so he may simply refuse to call a vote on whether the ERA is part of the Constitution.

And without congressional action, Ginsburg's statement that supporters of the ERA need to start over is likely to be dispositive.
