SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SJR 12 (Skinner)
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TSG

SUBJECT

Equal Rights Amendment

DIGEST

This joint resolution makes a series of legislative findings and declarations about the history, potential benefits, and current status of the Equal Rights Amendment (ERA) to the U.S. Constitution. The ERA provides that neither the federal government nor the states shall deny or abridge equal rights under the law on the basis of sex. The resolution goes on to urge Congress to pass a resolution of its own finding that the requirements for ratification of the ERA have been met and that the ERA is now part of the U.S. Constitution.

EXECUTIVE SUMMARY

Congress may initiate a proposal to amend the U.S. Constitution by a two-thirds vote of both houses. The proposed amendment is then transmitted to the states for ratification. When three-fourths of the states have ratified the proposed amendment, it becomes part of the Constitution. The ERA prohibits the federal and state governments from denying or abridging equality of rights under the law based on sex and empowers Congress to enforce its terms through legislation. The ERA has potentially profound implications for gender equity in the country. Congress proposed the ERA in 1972, but it was not until 2020 that the requisite number of states had ratified it. In the meantime, a deadline for ratification contained in the proposing clause of the ERA (but not in the Constitution or text of the ERA itself) expired and five of the states that had ratified the ERA at one time attempted to rescind their ratification. As a result, there is controversy over the status of the ERA and whether it should now be considered part of the Constitution. This resolution details this history, extols the potential benefits of the ERA, and calls upon Congress to pass pending legislation, House Resolution 891, finding that the ERA has been ratified and now constitutes the 28th Amendment to the Constitution.

The resolution is author-sponsored. There is no support or opposition on file.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that the U.S. Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. (U.S. Const., art. V.)

2) Establishes that whenever official notice is received at the U.S. National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with the Archivist's certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States. (1 U.S.C. 106b.)

This joint resolution:

1) Makes legislative findings and declarations that:
   a) Explain that the ERA provides a constitutional guarantee that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."
   b) Set forth some of the potential benefits of the ERA for gender equity in the United States.
   c) Detail the history of passage of the ERA by Congress, its ratification by the states, and where the ERA stands today.

2) Requests that the U.S. Congress pass House Resolution 891, resolving that the requirements have been met to ratify the ERA and that is shall now be known as the "Twenty-Eighth Amendment to the Constitution."

3) Directs the Secretary of the Senate to transmit copies of the resolution to the President and the Vice President of the United States, and to the Members of the United States Congress.

COMMENTS

1. The relevant process for proposal and ratification of an amendment to the U.S. Constitution

The U.S. Constitution sets forth two ways by which it can be amended. (U.S. Const., art. V.) One – never used to date and not relevant to this resolution – involves the initiation

of a constitutional convention. The other – which lies at the heart of this resolution – begins when two-thirds of each house of Congress votes to propose the amendment to the states. According to the text of the U.S. Constitution, that proposed amendment "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

To these procedures expressly set forth in the text of the Constitution, Congress has added another statutory requirement which is not in that text. Specifically, Congress has assigned the Archivist of the United States the duty of receiving the states' formal notice when they have ratified a proposed amendment as well as the role of certifying the moment when the requisite number of states have ratified the proposed amendment for it to become part of the U.S. Constitution. (1 U.S.C. 106b.)

2. The substance of the ERA

As proposed by Congress in 1972 for ratification by the states, the text of the ERA is as follows:

> Section 1: 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 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3: This amendment shall take effect two years after the date of ratification. (86 Stat. 1523.)

According to the findings of this resolution, the ramifications of the incorporation of the ERA into the U.S. Constitution are profound and strongly benefit the goal of equity for women, girls, and gender-expansive individuals. Among other things, the resolution states that the ERA provides individuals a fundamental legal remedy against sex discrimination and clarifies the legal status of sex discrimination for the courts. Absent the ERA, the resolution finds:

> [l]egislation and case law that has resulted in extraordinary progress for women has the potential to be ignored, weakened, or reversed. Congress can amend or repeal legislation advancing equality with a simple majority vote, the presidential administration can weakly enforce these laws, and the United States Supreme Court can continue to use intermediate scrutiny when reviewing cases concerning gender […].

3. Complications on the journey to ratification

As the resolution points out, the ERA was first introduced in Congress in 1923. It was brought before Congress nearly every year after that until it finally received the requisite two-thirds approval of the House of Representatives and the Senate in 1972. The ERA then went out to the various states for ratification.

Initial momentum for the ERA was strong, including early ratification by California. Over time, however, that momentum began to slow. By 1977, ERA ratifications had come to a halt with just three more ratifications needed to meet the required threshold of 38. That is the way things remained for four decades until, in 2017, a renewed push led Nevada to ratify the ERA, followed by Illinois in 2018, and, finally, Virginia in 2020.

Virginia's ratification may have given the ERA everything it needs to be incorporated into the U.S. Constitution, but there are two complicating factors.

a. The deadline issue

First, when Congress first proposed the ERA to the states, it established a seven-year deadline for the states to provide the requisite number of ratifications. ("[T]he following article… shall be valid… when ratified by the legislatures of three-fourths of the several states within seven years…" H.R.J Res. 208 (1972) 92d Cong., 2d Sess.) Though Congress later extended that deadline for an additional period when it became clear it could not be met, ultimately the deadline expired long before the ERA reached 38 ratifications.

The legal significance of the deadline is a subject of debate, however. On the one hand, the U.S. Supreme Court has given its blessing to congressionally-imposed deadlines for ratification and even suggested that in the absence of such a time limit, a proposed constitutional amendment might not be valid if not ratified by the requisite number of states within a "sufficiently contemporaneous" time "to reflect the will of the people in all sections at relatively the same period." (*Dillon v. Gloss* (1921) 256 U.S. 368, 375.) On the other hand, nothing in the text of the Constitution empowers Congress to set such deadlines and, in subsequent rulings, the U.S. Supreme Court has taken a slightly different approach, holding that the determination whether a proposed amendment has been ratified by the states within a sufficient period of time is a "political question" best left to Congress. (*Coleman v. Miller* (1939) 307 U.S. 433.) In fact, apparently drawing on this authority, Congress passed a resolution in 1992 adopting the so-called Madison Amendment into the Constitution as the 27th Amendment after it received its 38th ratification – nearly 203 years after Congress first proposed it to the states for consideration. (H.Con.Res.320 — 102nd Congress (1991-1992; S.Con.Res.120 — 102nd Congress (1991-1992).) As an additional argument for why the ratification deadline has no binding legal effect, at least in the case of the ERA, some legal scholars point out that the congressional deadline for ratification of the ERA is set forth in the proposing clause, not within the text that the states actually ratified.

b. The ratification rescission issue

The second complication is that, before and after Virginia provided the 38th ratification of the ERA, a number of states have attempted to rescind their ratifications. If counted against the total, these rescissions would leave the ERA still short of the three-fourths threshold. Here again, however, there is room for debate. It is not crystal clear that states can rescind their ratification of a proposed amendment. Some historical precedent suggests they cannot. Proponents of the ERA highlight the fact that, during the ratification process for the 14th Amendments to the U.S. Constitution, two states claimed to have rescinded their ratifications, but the amendment was incorporated into the U.S. Constitution anyway. On the other hand, as the one federal district court to confront the question concluded (in a decision later vacated when the U.S. Supreme Court concluded that the case has become moot): "[u]ntil the technical three-fourths has been reached, a rescission of a prior ratification is clearly a proper exercise of a state's power granted by the article V phrase 'when ratified' […]." (*Idaho v. Freeman* (D.Idaho 1981) 529 F.Supp. 1107, 1150; vac'd as moot by *NOW, Inc. v. Idaho* (1982) 459 U.S. 809.)

4. Where the ERA stands today

Two years have now passed since Virginia submitted its ratification of the ERA to the National Archivist, David Ferriero. To date, however, Ferriero has declined to publish or certify the ERA as the 28th Amendment to the U.S. Constitution. Based on a 2020 Office of Legal Counsel opinion (Ratification of the Equal Rights Amendment (2020) 44 Op. O.L.C. ___, slip op., https://www.justice.gov/olc/file/1232501/download [as of Mar. 19, 2022]), Ferriero has taken the position that he will not certify the ERA unless ordered to do so by a final court order. (*Virginia v. Ferriero* (D.D.C. 2021) 525 F. Supp. 3d 36, 43.) Nevada, Illinois, and Virginia, as the last three states to ratify the ERA, have filed a lawsuit seeking precisely such a court order. (*Id*. at 40.) Earlier this month, however, a federal district court for the District of Columbia dismissed that case, ruling that the National Archivist could refuse to certify the ERA based on the fact that only 35 states had ratified it by the congressionally imposed deadline. (*Ibid*.) The states have appealed to the D.C. Circuit.

5. About House Resolution 891

The key request in this resolution is for Congress to pass House Resolution 891, 117th Congress (2021-2022 Sess.). Introduced by Representative Jackie Speier, H.R. 891 would formally express the view of the House of Representatives that the ERA "has met the requirements of the Constitution and become valid to all intents and purposes as a part of the Constitution, and shall be known as the 'Twenty-Eighth Amendment to the Constitution.'" Addressing the issues surrounding expiration of the ratification deadline and the rescission of some ERA ratifications, H.R. 891 explains that no time limit exists within the text of the proposed amendment that was ratified by more than three-fourths of the States; the Fourteenth Amendment in 1868 was published to the

Constitution despite two States purporting to rescind their ratifications; and the Archivist of the United States has a statutory and ministerial duty to certify that a proposed amendment to the Constitution is valid and has become part of the Constitution once it is ratified by more than three-fourths of the States.

6. Arguments in support of the bill

According to the author:

> The time is now to enshrine an explicit prohibition on sex discrimination. The ERA advances justice for women, girls, and gender expansive individuals, and will make clear that that laws inconsistent with equality for women can be deemed unconstitutional as they perpetuate inequality and illicit stereotypes about gender roles. The ERA would bring us closer to a world where all people can make important decisions about their health, employment, lives, families, and futures—free from political interference. SJR 12 affirms the need for the Equal Rights Amendment, urges the National Archivist to certify and publish the ratification of the ERA, and also urges Congress to pass House Resolution 891 – a federal resolution that would ensure the ERA is added to the U.S. Constitution as the 28th amendment.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AJR 18 (Skinner, Res. Chap. 111, Stats. 2013) set forth the history of prior efforts to enshrine the ERA in the U.S. Constitution, extolled the potential legal benefits of the ERA, and requested Congress to pass a resolution proposing a new attempt at ratification of the ERA.

AJR 1 (Speier, Res. Chap. 114, Stats. 1993) urged the President and Congress to pass a resolution proposing to the states a new attempt at ratification of an ERA.

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