Congressional Research Service
Informing the legislative debate since 1914

The Equal Rights Amendment: Background and Recent Legal Developments

July 11, 2023

Congressional Research Service
https://crsreports.congress.gov
R47619

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

SUMMARY

R47619

July 11, 2023

Jon O. Shimabukuro
Legislative Attorney

The Equal Rights Amendment: Background and Recent Legal Developments

In 1972, Congress approved a constitutional amendment to guarantee that "[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." This amendment, known as the Equal Rights Amendment (ERA), provided for a seven-year ratification period in its proposing or resolving clause. The ratification period was subsequently extended until 1982, but only 35 states ratified the amendment by the extended deadline (fewer than the three-fourths or 38 states required by the Constitution).

Despite the 1982 deadline, supporters of the ERA continued to seek its ratification. In 2017, acting upon the notion that the ratification deadline could be disregarded, Nevada became the 36th state to ratify the amendment. After Illinois and Virginia, acting upon the same premise as Nevada, ratified the ERA in 2018 and 2020, respectively, the states (Illinois, Virginia, Nevada) moved the Archivist of the United States to publish and certify the amendment as part of the Constitution. The states asserted that the Archivist had the authority to publish and certify the amendment under 1 U.S.C. § 106b, which provides that

> Whenever official notice is received at the 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 his 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.

After the Archivist's failure to publish and certify the amendment, Virginia, Illinois, and Nevada filed a lawsuit, asking the U.S. District Court for the District of Columbia to order the Archivist to act. In *Virginia v. Ferriero*, the district court dismissed the states' case primarily on procedural grounds, concluding that the states lacked standing to invoke the court's jurisdiction. In February 2023, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed the lower court's dismissal of the states' case.

This report reviews *Virginia v. Ferriero* and the D.C. Circuit's decision, *Illinois v. Ferriero*. The report also provides background on the ERA and the ratification process for constitutional amendments and discusses some potential considerations for Congress. Legislation has been introduced in the 118th Congress that contemplates the removal of the amendment's original ratification deadline and the continued vitality of the 35 state ratifications completed before that deadline. For example, S.J. Res. 4, introduced on January 24, 2023, provides that "notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States." A Senate vote to end debate on a motion to proceed to S.J. Res. 4 was held on April 27, 2023, with 51 Senators voting to end debate, fewer than the 60 needed to proceed. H.J. Res. 25, which is similar to S.J. Res. 4, was introduced on January 31, 2023, and referred to the House Committee on the Judiciary.

Contents

Contacts

On March 22, 1972, Congress approved, by a vote of two-thirds of the Members of both houses, a constitutional amendment to guarantee equal rights for men and women.[1] The Equal Rights Amendment (ERA), which was submitted to the states for ratification after congressional approval, would amend the U.S. Constitution to provide that "[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex."[2] The ERA further provided for a seven-year ratification time limit in its proposing or resolving clause.[3] Although this time period was subsequently extended, only 35 states ratified the amendment by the new 1982 deadline, fewer than the three-fourths or 38 states required by Article V of the Constitution for adoption.[4]

Supporters of the ERA continued to seek its ratification after the 1982 deadline. In 2017, contending, in part, that the ratification deadline could be disregarded, Nevada became the 36th state to ratify the amendment.[5] Illinois and Virginia similarly disputed the deadline and ratified the ERA in 2018 and 2020, respectively.[6] Following their ratifications of the amendment, the three states argued that the Archivist of the United States should publish and certify the amendment as part of the Constitution.[7] After the Archivist declined, the states filed a lawsuit seeking mandamus relief, asking the U.S. District Court for the District of Columbia to order him to act.[8] The court dismissed the states' case primarily on procedural grounds in *Virginia v. Ferriero*.[9]

This report reviews *Ferriero* and a February 2023 decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirming the lower court's decision.[10] The report also

[1] *See* H.R.J. Res. 208, 92d Cong. (1972); *see also* 117 Cong. Rec. 35,815 (1971), 118 Cong. Rec. 1598 (1972).

[2] H.R.J. Res. 208, 92d Cong. § 1. For additional discussion of the Equal Rights Amendment, *see* CRS Report R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, by Thomas H. Neale.

[3] *Id.* ("Resolved ... That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.... "). The seven-year ratification time limit appeared in the ERA's prefatory language, which has been described as both its "proposing clause" and "resolving clause." *Compare* Illinois v. Ferriero, 60 F.4th 704, 712 ("Notably, the proposed amendment included a seven-year ratification deadline in the proposing clause, as added by the Senate resolution during the previous session of Congress.") *with* S.J. Res. 4, para. 5, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf ("Whereas, The restricting time limit for the Equal Rights Amendment ratification is in the resolving clause and is not a part of the amendment proposed by Congress and already ratified by 35 states.").

[4] Cong. Rsch. Serv., *Overview of Article V, Amending the Constitution*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artV-1/ALDE_00000507/ (last visited June 21, 2023).

[5] S.J. Res. 2, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf.

[6] S.J. Res. 4, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf; H.J. Res. 1, 2020 Sess. (Va. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HJ1+pdf.

[7] *See* 1 U.S.C. § 106b ("Whenever official notice is received at the 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 his 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."). Based on the *Virginia v. Ferriero* complaint, it appears that states notify the National Archives and Records Administration by transmitting certified copies of their ratifications to the agency.

[8] Complaint, Virginia v. Ferriero, 525 F.Supp.3d 36 (D.D.C. 2021) (No. 1:20-cv-00242). The term *mandamus relief* refers to a judicial order directing a person to perform a ministerial duty imposed by law. *See Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[9] Virginia v. Ferriero, 525 F.Supp.3d 36 (D.D.C. 2021).

[10] Illinois v. Ferriero, 60 F.4th 704 (D.C. Cir. 2023).

provides background on the ERA and the ratification process for constitutional amendments and discusses some considerations for Congress.

Background

The power to amend the Constitution is established in Article V.[11] Article V empowers Congress to propose an amendment when two-thirds of both chambers "shall deem it necessary" or to call for a convention to propose an amendment upon the request of two-thirds of the state legislatures.[12] A proposed amendment becomes part of the Constitution when ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.[13] While Article V provides for the proposal and ratification of constitutional amendments, it is silent regarding other procedural matters, such as any time limitations for ratification. Following ratification by three-fourths of the states, the Archivist of the United States, pursuant to 1 U.S.C. § 106b, is to identify the ratifying states, publish the amendment, and certify that the amendment has become part of the Constitution.[14]

Two-thirds of the Members of both the House and the Senate passed H.R.J. Res. 208 in 1972 during the 92nd Congress.[15] In its proposing or resolving clause, H.R.J. Res. 208 provided that three-fourths of the states would have to ratify the amendment within "seven years from the date of its submission by the Congress" for the amendment to be adopted.[16] In accordance with this provision, the ratification deadline became March 22, 1979, seven years after the Senate approved H.R.J. Res. 208.[17]

By the fall of 1977, only thirty-five states had ratified the ERA, three fewer than the thirty-eight needed for adoption.[18] On October 26, 1977, Representative Elizabeth Holtzman introduced H.R.J. Res. 638 to extend the ERA's ratification deadline until June 30, 1982.[19] Representative Holtzman indicated that the extension would provide an "insurance policy to assure that the deadline will not arbitrarily end all debate on the ERA."[20] H.R.J. Res. 638 passed the House and Senate in 1978,[21] but no additional states ratified the ERA before the proposed June 30, 1982 deadline.[22]

---

[11] U.S. CONST. art. V.

[12] *Id.* ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.... ").

[13] *Id.* ("Amendments to this Constitution ... shall be valid ... when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof ... "); *see also* Cong. Rsch. Serv., *Overview of Ratification of a Proposed Amendment*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artV-4-1/ALDE_00013053/ (last visited Apr. 10, 2023).

[14] 1 U.S.C. § 106b.

[15] H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

[16] *Id.*

[17] 118 Cong. Rec. 9598 (1972).

[18] *See* H.R. REP. NO. 95-1405, at 3 (1978).

[19] H.R.J. Res. 638, 95th Cong. 2d Sess. (1978).

[20] *Equal Rights Amendment Extension: Hearing on H.R.J. Res. 638 Before the H. Comm. on the Judiciary*, 95th Cong. (1978) (statement of Rep. Elizabeth Holtzman).

[21] *See* 124 Cong. Rec. 34, 314–15 (1978) (House passage of H.R.J. Res. 638 by vote of 233–189); 124 Cong. Rec. 26, 264–65 (1978) (Senate passage of H.R.J. Rest. 638 by vote of 60–36).

[22] Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html.

Notwithstanding the 1982 deadline, ERA supporters continued to urge states to ratify the amendment.[23] Nevada and Illinois ratified the ERA in 2017 and 2018, respectively, identifying several factors to support their position that the amendment was still viable.[24] First, in their joint resolutions, the states noted that the 1992 ratification of the Twenty-Seventh Amendment[25] occurred nearly 203 years after it was first submitted to the states.[26] Next, Nevada and Illinois indicated that the ERA's ratification deadline could be disregarded because it was included in the amendment's resolving clause rather than the amendment itself.[27] According to the states, this evidenced Congress "demonstrat[ing] that a time limit in a resolving clause can be disregarded" when it "passed a time extension for the Equal Rights Amendment on October 20, 1978."[28]

The Nevada and Illinois joint resolutions also cited *Coleman v. Miller*,[29] a 1939 U.S. Supreme Court decision, maintaining that Congress can "determine the validity of the state ratifications occurring after a time limit in the resolving clause.... "[30] In *Coleman*, the Court evaluated the validity of Kansas's 1937 ratification of a proposed child labor amendment after the state previously rejected it in 1925. The amendment, which would have empowered Congress to restrict child labor, did not include a ratification deadline in its resolving clause or in its text.[31] Recognizing that Article V does not address a state's prior rejection of a constitutional amendment, the *Coleman* Court considered whether the child labor amendment "lost its vitality through lapse of time" and could not be ratified in 1937.[32] The Court indicated that Congress has the ability to establish a "reasonable time" for ratification and that identifying such a time involves "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice.... "[33] In their joint resolutions, Nevada and Illinois observed that "it is for Congress under the principles of *Coleman v. Miller* to determine the validity of the state ratifications" occurring after the ERA's ratification deadline.[34]

---

[23] *See, e.g.*, Jackie Speier, *Not Just Your Mother's Equal Rights Amendment*, SAN MATEO DAILY J. (Sept. 6, 2019), https://www.smdailyjournal.com/opinion/guest_perspectives/not-just-your-mother-s-equal-rights-amendment/article_332063ee-d058-11e9-aea6-d3eaef213713.html.

[24] S.J. Res. 2, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf; S.J. Res. 4, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf.

[25] U.S. Const. amend. XXVII. *See also* Cong. Rsch. Serv., *Overview of Twenty-Seventh Amendment, Congressional Compensation*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt27-1/ALDE_00001016/ (last visited Apr. 26, 2023).

[26] S.J. Res. 2, para. 3, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf.; S.J. Res. 4, para. 3, 100th Gen. Assemb. (Ill. 2018).

[27] S.J. Res. 2, para. 4, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf.; S.J. Res. 4, para. 5, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf.

[28] S.J. Res. 2, para. 5, 79th Sess. (Nev. 2017) , https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf.; S.J. Res. 4, para. 6, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf.

[29] Coleman v. Miller, 307 U.S. 433 (1939).

[30] S.J. Res. 2, para. 7, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf; S.J. Res. 4, para. 8, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf.

[31] *Coleman*, 307 U.S. at 435.

[32] *Id.* at 451.

[33] *Id.* at 453.

[34] S.J. Res. 2, para. 7, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SJR/SJR2_EN.pdf.; S.J. Res. 4, para. 8, 100th Gen. Assemb. (Ill. 2018), https://www.ilga.gov/legislation/100/SJRCA/PDF/10000SC0004lv.pdf.

On January 27, 2020, Virginia became the thirty-eighth state to ratify the ERA.[35] As introduced, the state's joint resolution to ratify the amendment cited the Twenty-Seventh Amendment and indicated that Congress's 1978 extension of the ERA's ratification deadline demonstrated that it could modify a time limit for ratification.[36] These references do not appear, however, in the joint resolution later adopted by the Virginia legislature, and the reasons for their removal are unclear.[37]

Prior to Virginia's ratification of the ERA, the National Archives and Records Administration's (NARA's) general counsel sought guidance on the Archivist's role under 1 U.S.C. § 106b "in the event that 38 or more states ratify the Equal Rights Amendment."[38] The Department of Justice's Office of Legal Counsel (OLC) issued an opinion concluding that "Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States."[39] Following the OLC's opinion, NARA released a press statement, stating that, under 1 U.S.C. § 106b, the Archivist "performs a ministerial role with respect to certifying the ratification of amendments" and that it would "abide by the OLC opinion, unless otherwise directed by a final court order."[40]

Virginia v. Ferriero

On January 30, 2020, following the Archivist's failure to publish and certify the ERA, Virginia, Nevada, and Illinois filed a complaint in federal district court seeking relief that would have ordered the Archivist to comply with 1 U.S.C. § 106b. In *Virginia v. Ferriero*, the U.S. District Court for the District of Columbia dismissed the lawsuit, concluding that, pursuant to Article III of the Constitution, the states lacked standing to invoke the court's jurisdiction.[41] Article III of the Constitution generally requires a plaintiff in federal court to establish standing to invoke the court's jurisdiction.[42] Standing is designed to guarantee that a court will exercise its jurisdiction only when a plaintiff has suffered an actual injury traceable to the defendant's challenged conduct and that the injury would likely be redressed by a favorable judicial decision.[43] In *Ferriero*, the states' assertion of standing rested on the contention that the Archivist's refusal to certify the amendment interfered with their sovereign interests.[44] The states argued that, as "sovereign states in the Constitution's federal system," they have an interest in how they participate in that system, including their authority to amend the Constitution under Article V.[45]

[35] H.R. Res. 1, 2020 Sess. (Va. 2020).

[36] H.J. Res. 1, 2020 Sess. (Va. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HJ1+pdf (as introduced, Nov. 18, 2019).

[37] *Id.* (as passed by House of Delegates and Senate, Jan. 27, 2020).

[38] Letter for Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., from Gary M. Stern, Gen. Couns., Nat'l Archives and Recs. Admin. (Dec. 12, 2018).

[39] Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. at 1 (Jan. 6, 2020), https://www.justice.gov/d9/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf. OLC opinions render legal advice to the various executive branch agencies but not other branches of the federal government.

[40] Press Release, Nat'l Archives, NARA Press Statement on the Equal Rights Amend. (Jan. 8, 2020), https://www.archives.gov/press/press-releases-4.

[41] Virginia v. Ferriero, 525 F.Supp.3d 36 (D.D.C. 2021).

[42] U.S. CONST. art. III.

[43] Cong. Rsch. Serv., *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Apr. 10, 2023).

[44] *Ferriero*, 525 F.Supp.3d at 46.

[45] *Id.* at 46–47.

The district court determined, however, that the states failed to allege an actual injury caused by the Archivist's refusal.[46] Citing decisions by the Supreme Court and the D.C. Circuit, the district court maintained that an amendment becomes law when ratified by three-fourths of the states and not when published and certified by the Archivist.[47] According to the court, the Archivist's actions are merely "formalities with no legal effect."[48] Consequently, the court indicated that the states "cannot show that his refusal ... caused the injury that they claim.... "[49]

The court also provided "an alternative holding to streamline appellate review" with regard to the ERA's ratification deadline issue—that the ERA's original ratification deadline was effective and that the Archivist has the authority to determine whether an amendment was properly ratified.[50] The court maintained that the Archivist could consider whether a state's ratification complied with a congressionally imposed deadline before publishing and certifying an amendment: "The ministerial nature of the Archivist's obligations does not mean that he must rubberstamp any ratification he receives but rather that, once he has determined that a proposed amendment has met Article V's requirements, he must publish it. A contrary result would be absurd."[51]

According to the court, the states' "ratifications came after both the original and extended deadlines that Congress attached to the ERA, so the Archivist is not bound to record them as valid."[52] As such, the court held that "the Archivist has no duty to publish and certify the ERA."[53]

Following the court's decision, the plaintiffs appealed to the D.C. Circuit. Virginia subsequently moved to be dismissed from the appeal, and the court granted Virginia's motion in February 2022.[54] The remaining states continued with the appeal, and the D.C. Circuit heard oral argument in *Illinois v. Ferriero* in September 2022.

Illinois v. Ferriero

On February 28, 2023, the D.C. Circuit affirmed the district court's dismissal of the states' lawsuit.[55] Rather than focus on the states' lack of standing, however, the appellate court based its decision on the states' failure to establish an entitlement to mandamus compelling the Archivist to certify and publish the ERA.[56] The court explained that where standing and subject matter jurisdiction are both at issue, it may dismiss a case if one is lacking without consideration of the other requirement. In this case, the court focused on subject matter jurisdiction and the "relatively easier evaluation of whether the States have met the stringent requirements for mandamus relief."[57]

To establish an entitlement to mandamus relief, a plaintiff must demonstrate a "clear and indisputable" right to the relief sought from the federal official, that the official is violating a clear

[46] *Id*. at 47.

[47] *Id*.

[48] *Id*. at 40.

[49] *Id*. at 47.

[50] *Id*. at 45.

[51] *Id*. at 56.

[52] *Id*. at 61.

[53] *Id*.

[54] Virginia v. Ferriero, No. 21-5096, 2022 WL 605733 (D.C. Cir. Feb. 24, 2022).

[55] Illinois v. Ferriero, 60 F.4th 704 (D.C. Cir. 2023).

[56] *Id*. at 719.

[57] *Id.* at 714.

duty to act, and that the plaintiff has no adequate alternate remedy.[58] The states advanced three arguments for mandamus relief. First, focusing on Article V of the Constitution and 1 U.S.C. § 106b, the states argued that the Archivist had a clear duty to certify and publish the ERA once he was told that three-fourths of the states had ratified it.[59] The states contended that the Archivist is not permitted to consider anything other than whether the requisite number of states have ratified an amendment and that the expiration of the ERA's ratification deadline should not have affected the certification and publication of the amendment.[60]

The D.C. Circuit explained, however, that 1 U.S.C. § 106b could be interpreted to allow the Archivist to consider the validity of a state's ratification.[61] By authorizing the Archivist to "specify" that an amendment "has become valid," the statute, according to the court, could be viewed as "giv[ing] the Archivist authority to decide whether the fact that some of the ratifications occurred after Congress's seven-year deadline affects their validity."[62]

Apart from 1 U.S.C. § 106b, the states contended that Article V prohibits the Archivist from considering the ratification dates because the constitutional provision permits Congress to select only an amendment's "mode of ratification."[63] The D.C. Circuit viewed the states' position as "essentially merg[ing] with its second argument," which focused on Congress's authority to establish the seven-year ratification deadline for the ERA.[64] The states maintained that Article V allows Congress to decide only whether an amendment will be ratified by legislative vote or constitutional convention and does not permit Congress to impose other limitations on the states, such as a ratification deadline.[65] If Congress could not establish a ratification deadline for the ERA, the states believed that the deadline should have "no legal relevance to the Archivist's certification and publication duties."[66]

The D.C. Circuit determined, however, that the Supreme Court's decisions in *Dillon v. Gloss*, a 1921 case involving the Eighteenth Amendment's ratification, and *Coleman v. Miller* supported the view that Congress has the power to set a ratification deadline when it proposes an amendment.[67] In *Dillon*, the Court concluded that the inclusion of a ratification deadline for the Eighteenth Amendment was consistent with Article V.[68] In *Coleman*, the Court held that "Congress had the power to fix a reasonable time for ratification."[69] The D.C. Circuit maintained that these two decisions "undermine[d] the contention that it is 'clear and indisputable' that Congress lacks the authority to set deadlines for ratification, including the seven-year deadline in the ERA."[70]

Finally, the states argued that even if Congress has the power to impose a ratification deadline, the ERA's deadline was invalid because it was included in the amendment's proposing or

[58] *Id.*

[59] *Id.* at 715–16.

[60] *Id.* at 716.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 717.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 716.

[67] *Id.* at 718.

[68] Dillon v. Gloss, 256 U.S. 368, 373 (1921).

[69] Coleman v. Miller, 307 U.S. 433, 452 (1939).

[70] *Ferriero*, 60 F.4th at 719.

resolving clause and not in the text of the amendment.[71] The states noted that the Eighteenth Amendment's ratification deadline was included in its text, and, thus, the *Dillon* Court's reasoning should apply only when a deadline is placed in that part of the amendment.[72] Citing Congress's consistent placement of the mode of ratification in the proposing clause of constitutional amendments, the D.C. Circuit disputed any notion of a restriction on Congress placing a ratification deadline in the proposing clause: "If one aspect of the mode of ratification can be placed in the proposing clause, then why not also the ratification deadline?"[73]

After considering all of the states' arguments, the D.C. Circuit concluded that they had not clearly and indisputably shown that the Archivist had a duty to certify and publish the ERA or that Congress lacked the authority to establish a ratification deadline in the amendment's proposing clause.[74] Because the states could not establish an entitlement to mandamus relief, the court affirmed the district court's dismissal of the states' complaint.

Considerations for Congress

Since 1982, legislation to revive consideration of the ERA has been frequently introduced.[75] Interest in the amendment has continued in the 118th Congress. On February 28, 2023, the Senate Committee on the Judiciary held a hearing on the amendment.[76] Legislation has also been introduced that contemplates the "removal" of the ERA's original ratification deadline and the continued vitality of the thirty-five state ratifications completed before that deadline. S.J. Res. 4 provides that "notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States."[77] Senator Ben Cardin, who cosponsored S.J. Res. 4 with Senator Lisa Murkowski, maintains that passage of the resolution and adoption of the ERA would "advanc[e] true legal equality on the basis of sex."[78] A similar measure, H.R.J. Res. 25, has been introduced in the House.[79]

Whether the Archivist would certify and publish the ERA following the adoption of S.J. Res. 4 or H.R.J. Res. 25 is not certain. Some have questioned Congress's ability to remove the ERA's original ratification deadline.[80] For example, in its 2020 opinion, the OLC maintained that Article

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See, e.g.*, H.J. Res. 1, 98th Cong. (1983) (proposing an amendment to the U.S. Constitution relative to equal rights for men and women); H. Res. 432, 103rd Cong. (1994) (requiring the House to take any legislative action necessary to verify the ERA's ratification when three additional state legislatures ratify the amendment); H.J. Res. 40, 107th Cong. (2001) (proposing an amendment to the U.S. Constitution relative to equal rights for men and women); H.J. Res. 43, 113th Cong. (2013) (removing the ERA's ratification deadline).

[76] *The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution, Hearing on H.R. Res. 28 Before the S. Comm. on the Judiciary*, 118th Cong. (2023).

[77] S.J. Res. 4, 118th Cong. (2023). A Senate vote to end debate on a motion to proceed to S.J. Res. 4 was held on April 27, 2023. Only 51 Senators voted to end debate, fewer than the 60 needed to proceed.

[78] Press Release, Lisa Murkowski, Senator, Cardin, Murkowski, Pressley and Colleagues Unveil Resolution Affirming Ratification of the Equal Rights Amendment (Jan. 31, 2023), https://www.murkowski.senate.gov/press/release/cardin-murkowski-pressley-and-colleagues-unveil-resolution-affirming-ratification-of-the-equal-rights-amendment.

[79] H.R.J. Res. 25, 118th Cong. (2023).

[80] *See, e.g.*, Idaho v. Freeman, 529 F. Supp. 1107, 1152-53 ("[I]f the Congress chooses to fix a time period by making it (continued...)

V does not empower Congress to "change the terms upon which the 1972 Congress proposed the ERA for the States' consideration."[81] Citing *Dillon*, the OLC acknowledged Congress's authority to set a "definite period for ratification."[82] The OLC observed, however, that a ratification period would not be "definite" if a later Congress could revise that decision.[83] The OLC contended that the ERA's ratification deadline became an integral part of its mode of ratification and that Congress's authority under Article V is a "prospective power" that does not allow it to modify a proposed amendment's terms once it has been sent to the states for consideration.[84] Others maintain, however, that Congress can modify or remove a ratification deadline because that authority is incident to the power to initially establish time limits for ratification.[85]

Another issue to consider is the five states that rescinded their ratifications of the ERA between 1972 and 1979.[86] S.J. Res. 4 and H.R.J. Res. 25 do not address the actions of these five states. In 1982, a federal district court in Idaho addressed the question of whether states could validly rescind their prior ratifications and whether Congress's prior extension of the ERA's ratification deadline was permissible. In *Idaho v. Freeman*, the federal district court concluded that a state's rescission of a prior ratification should be recognized and that Congress could not change the ratification deadline once it was established in 1972.[87] Reviewing Article V, the court emphasized that an amendment cannot become part of the Constitution until a state has determined that there is consensus among its people and three-fourths of the states ratify the amendment.[88] Accordingly, the court contended that a subsequent rescission should be recognized because it promotes "the democratic ideal by giving a truer picture of the people's will.... "[89] The court indicated that a failure to recognize Idaho's rescission would allow the ERA to become part of the Constitution when the state's people were not unified in their consent.[90] On appeal to the Supreme Court, *Freeman* was vacated, and the district court was instructed to dismiss the case as moot because the ERA's extension deadline had passed.[91]

In light of the constitutional uncertainty regarding the rescissions and extending the ERA ratification deadline, Congress could consider restarting the ratification process with a new joint resolution. Introduced in the 117th Congress, H.R.J. Res. 28 proposed a new constitutional amendment "relative to equal rights for men and women."[92] The amendment would have stated: "Women shall have equal rights in the United States and every place subject to its jurisdiction.

---

part of its proposal to the states, that determination of a time period becomes an integral part of the proposed mode of ratification. Once the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. Once the proposal is made, Congress is not at liberty to change it.").

[81] Ratification of the Equal Rights Amendment, *supra* note 39, at 25.

[82] *Id.* at 26.

[83] *Id.*

[84] *Id.* at 27.

[85] *See, e.g.*, Letter from Equal Rights Amend. Project, Columbia L. Sch., to Hon. Carolyn B. Maloney (Jan. 8, 2022), https://gender-sexuality.law.columbia.edu/sites/default/files/content/OLC%20Letter%20January%202022.pdf.

[86] *See* Ratification of the Equal Rights Amendment, *supra* note 39, at 7 (discussing rescissions by Kentucky, Nebraska, Tennessee, Idaho, and South Dakota).

[87] Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1982), *vacated by* Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982), and Carmen v. Idaho, 459 U.S. 809 (1982).

[88] *Freeman*, 529 F.Supp. at 1148.

[89] *Id.*

[90] *Id.* at 1148–49.

[91] Nat'l Org. for Women, Inc., 459 U.S. at 809.

[92] H.R.J. Res. 28, 117th Cong. (2021).

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[93] Although "fresh start" resolutions have been introduced in every Congress since the 104th Congress, a similar resolution has yet to be introduced in the 118th Congress.[94]

Author Information

Jon O. Shimabukuro
Legislative Attorney

Disclaimer

[93] *Id.*

[94] S.J. Res. 25, 104th Cong. (1995); H.R.J. Res. 66, 105th Cong. (1997); S.J. Res. 24, 105th Cong. (1997); H.R.J. Res. 41, 106th Cong. (1999); S.J. Res. 30, 106th Cong. (1999); H.R.J. Res. 40, 107th Cong. (2001); S.J. Res. 10, 107th Cong. (2001); H.R.J. Res. 37, 108th Cong. (2003); S.J. Res. 11, 108th Cong. (2003); H.R.J. Res. 37, 109th Cong. (2005); S.J. Res. 7, 109th Cong. (2005); H.R.J. Res. 40, 110th Cong. (2007); S.J. Res. 10, 110th Cong. (2007); H.R.J. Res. 61, 111th Cong. (2009); S.J. Res. 41, 111th Cong. (2010); H.R.J. Res. 69, 112th Cong. (2011); S.J. Res. 21, 112th Cong. (2011); H.R.J. Res. 56, 113th Cong. (2013); S.J. Res. 10, 113th Cong. (2013); H.R.J. Res. 52, 114th Cong. (2015); S.J. Res. 16, 114th Cong. (2015); H.R.J. Res. 33, 115th Cong. (2017); S.J. Res. 6, 115th Cong. (2017); H.R.J. Res. 35, 116th Cong. (2019); S.J. Res. 15, 116th Cong. (2019); H.R.J. Res. 28, 117th Cong. (2021); H.R.J. Res. 31, 117th Cong. (2021); S.J. Res. 28, 117th Cong. (2021).