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EQUAL RIGHTS AMENDMENT (PROPOSED)

ISSUE BRIEF NUMBER IB74122

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THE LIBRARY OF CONGRESS

CONGRESSIONAL RESEARCH SERVICE

MAJOR ISSUES SYSTEM

DATE ORIGINATED 10/18/74
DATE UPDATED 10/23/78

FOR ADDITIONAL INFORMATION CALL 426-5700

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ISSUE DEFINITION

The proposed Equal Rights Amendment to the U.S. Constitution was first introduced in 1923, and was passed by the Congress in 1972. In 1978, Congress extended the original deadline for ratification of the ERA. Thus, if it receives approval in the form of ratification by 38 States before June 30, 1982, the measure will become the 27th Amendment to the Constitution, and will require equal treatment under Federal and State laws and practices for all persons, regardless of sex. While some Americans would welcome a constitutional guarantee of equal rights and responsibilities for persons of both sexes, others view the proposed amendment as a potential threat to family life and to the traditional roles of men and women.

BACKGROUND AND POLICY ANALYSIS

The proposed Equal Rights Amendment (ERA) to the U.S. Constitution was first introduced 3 years after the 19th Amendment (to provide women's suffrage) was ratified. After being introduced in various forms in nearly every Congress since 1923, the ERA was approved by the 92d Congress in 1972. The proposed amendment provides that:

> 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.

The Judiciary Committees of both Houses of Congress had held hearings on the measure and had reported the amendment to the full House and Senate prior to its passage by the 92d Congress. The Senate previously had passed the amendment twice: in the 81st Congress on Jan. 25, 1950, and in the 83d Congress on July 16, 1953. On both occasions, the measure included what was known as the "Hayden rider," which provided that "the provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex." Proponents of the measure consistently resisted attempts to amend the ERA.

The House of Representatives passed the Equal Rights Amendment in the 91st Congress on Aug. 10, 1970, after the discharge procedure was used to free the proposal from the Judiciary Committee. There had been no committee action on the ERA for 22 years prior to this action.

When the Senate considered the measure in October 1970, it adopted two amendments: to exempt women from the draft and to permit recitation of nondenominational prayers in public schools and other public buildings. Supporters of the ERA were again unhappy with an amended version, and on Nov. 19, 1970, by unanimous consent, the Senate laid aside the proposed ERA, and

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took no further action in the 91st Congress.

The House passed the ERA (H.J.Res. 208) in the 92d Congress on Oct. 12, 1971, rejecting two committee amendments which would have: (1) added the words "of any person" to Section 1, and (2) added a section allowing the exemption of women from the draft and holding that the ERA would not impair the validity of any law which "reasonably promotes the health and safety of the people." After rejecting 10 amendments proposed by Sen. Sam Ervin, the Senate approved H.J.Res. 208 on Mar. 22, 1972, clearing it for ratification by the States.

Three-fourths (38) of the States must now ratify the ERA before June 30, 1982; it would take effect 2 years after full ratification.

The first State to ratify, Hawaii, did so within hours of final congressional approval. To date, 35 States have ratified the measure, including Nebraska, Tennessee, Idaho, and Kentucky (where the Lt. Governor, acting with the power of the Governor, who was out of town, vetoed the rescission), which later voted to rescind ratification (see Chronology for dates of State ratification and rescission).

Although controversy exists over whether or not a State may rescind its ratification of a proposed amendment to the Constitution, there is a consensus (based primarily on the Supreme Court declaring in Coleman v. Miller, 307 U.S. 433 (1939), that rescission is a "political question") that Congress has full discretion, free from judicial review, to determine the validity of withdrawal of ratification. In the instances of the Fourteenth and Fifteenth Amendments, Congress determined that withdrawal of a prior ratification was invalid, thereby establishing precedent for congressional non-recognition of rescission. However, because the action of one Congress is not binding on another Congress, the question remains open and is subject to discussion in the ratification of ERA. Legislation has been introduced in the 95th Congress to provide that any State legislature which rescinds its ratification of a proposed amendment to the Constitution shall be considered to have not ratified the amendment. Amendments to H.J.Res. 638 to allow rescissions were defeated by the House and Senate.

CONTROVERSY OVER PROPOSED AMENDMENT

Controversy over the proposed amendment relates to: (1) interpretations of its probable effects in some areas, (2) whether there should be room in the law for "reasonable" distinctions in the treatment of men and women, and (3) whether a constitutional amendment is the proper vehicle for improving the legal status of women in our Nation.

There is little disagreement about the general intent of the proposed Equal Rights Amendment. Legislative intent in this regard is clearly seen in the Senate debate on the measure in March 1972, the House and Senate Judiciary Committee reports on the measure, and congressional hearings held in 1970-1971 (see Reports and Hearings). As stated in the Senate Judiciary Committee report on the measure, "The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or women.... The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected."

The Equal Rights Amendment would require that governments treat each

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person, male or female, as a citizen and individual under the law. It is directed at eliminating gender-based classifications in the law which specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus every Federal or State law which makes a discriminatory distinction between men and women would be invalid under the Equal Rights Amendment. Both proponents and opponents of the amendment agree that proper interpretation of the ERA would result in the elimination of the use of sex as the sole factor in determining, for example, who would be subject to the military draft, if one were reinstated; who in a divorce action would be awarded custody of a child; who would have responsibility for family support; or who would be subject to jury duty. Public schools could not require higher admissions standards for persons of one sex than for the other; courts could not impose longer jail sentences on convicted criminals of one sex. Thus certain responsibilities and protections which have been or are now extended to members of one sex, but not to members of the other sex, would have to be either extended to everyone or eliminated entirely.

Although there is general agreement on the intent of the amendment, one issue of interpretation on which opinions still are divided is whether the existence of separate restrooms, prisons, and dormitories for males and females would be permissible under provisions of the proposed Equal Rights Amendment. One point of view is that the constitutional right of privacy established by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), would permit a separation of the sexes with respect to such places as public restrooms and sleeping quarters. The opposing view is that the most recent constitutional amendment takes precedence over all other sections of the constitution with which it is inconsistent, and to allow separate facilities would be to revive the "separate but equal" doctrine. Opponents of the amendment also express concern that the Court has not yet clearly defined the rights of privacy and that therefore it is impossible to ascertain how this principle would be applied under the Equal Rights Amendment. Proponents have argued that the existence of separate restrooms in no way discriminates on the basis of sex and does not violate the equality-of-rights principle which underlies the Equal Rights Amendment.

A second disagreement concerns whether it is in the interest of the Nation, or of the women of the Nation, to establish absolute, unequivocal equality of treatment for men and women under the law. There are some who believe that because of unique characteristics or traditional societal roles, women should receive different legal treatment than men. The opposing view is that all citizens should share equally the rights and responsibilities of citizenship under the law.

This basic conflict leads to the third major area of disagreement: whether the process of constitutional amendment is the best means to improve the legal status of women in the United States. One point of view is that a constitutional amendment is unnecessary because the equal protection clause of the 14th Amendment, if properly interpreted, would nullify every law lacking a rational basis which makes distinctions based on sex. This idea is closely allied with the view that men and women should not always receive absolutely equal legal treatment. The approach of relying on the 14th Amendment appears to offer more flexibility of interpretation than does the proposed Equal Rights Amendment, which forbids any sex-based classification. Those who hold this view also point to the Supreme Court decision in Reed v. Reed, 404 U.S. 71 (1971), as a strong indication that the Court would find sex-based discrimination to be in violation of the equal protection clause of the Fourteenth Amendment. In the Reed case, the Supreme Court ruled as

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unconstitutional an Idaho statute requiring preference of male relatives over female relatives as administrators of estates. The Reed decision represented the first time the Supreme Court had struck down a law which discriminated against women.

Since Reed, several other cases have struck down gender classifications: Frontiero v. Richardson, 411 U.S. 677 (1973), concerning military benefits in which four Justices argued that sex should be ruled a "suspect classification," three argued that the Court should not make such a determination, one rejected the idea outright, and the ninth took no position on the matter; Taylor v. Louisiana, 419 U.S. 522 (1975), concerning jury selection; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), concerning Social Security benefits for widowed fathers; Stanton v. Stanton, 421 U.S. 7 (1975), concerning the age of majority; Craig et al. v. Boren, Governor of Oklahoma, et al., 429 U.S. 190 (1976), concerning the age of majority in the sale of 3.2% beer, and Califano v. Goldfarb, _ _ U.S. _ , 45 U.S.L.W. 4237 (Mar. 2, 1977), concerning social security benefits for widowers.

On the other hand, several recent Supreme Court decisions have upheld gender classifications which discriminated against men and in favor of women, on the ground that they are intended to overcome historic discrimination against women. For example: Kahn v. Shevin, 416 U.S. 351 (1974), regarding tax exemptions benefitting widows; and Schlesinger v. Ballard, 419 U.S. 498 (1975), which involved promotion systems in the Navy.

Because gender classifications have not been struck down with consistency in recent Supreme Court decisions, supporters of a constitutional amendment argue that there is a need for the establishment of a clear rule that gender classifications are suspect and that they must be justified by showing a compelling interest in order to be sustained. To date, the Court has not held that sex discrimination is "suspect" under the equal protection clause of the Fourteenth Amendment, thus leaving the burden of proof on a complaining woman that a sex-based classification is "unreasonable."

CONTROVERSY OVER EXTENSION OF THE RATIFICATION DEADLINE

Three basic questions arise when considering the ratification deadline for the proposed Equal Rights Amendment: (1) does Congress have the power to extend the deadline; (2) if Congress has such authority, should it extend the ratification deadline; and (3) if Congress chooses to extend the deadline, by what legislative method would the extension have to be enacted.

The first question regarding congressional authority to extend the deadline for ratification has never been addressed specifically by earlier Congresses or the courts. Article V of the Constitution sets forth the method of amending the Constitution; however, it does not mention any time limits for ratification of a proposed amendment. The Supreme Court in Dillon v. Gloss, 256 U.S. 368 (1921), held that under Article V of the Constitution, Congress, in proposing an amendment, may fix a reasonable time for ratification. Beginning with the 18th Amendment and continuing until the 23rd, except for the 19th Amendment (the Woman's Suffrage Amendment) for which no time limit was set, 7-year limits were included in the substantive provisions of amendments. Then, beginning with the 23rd Amendment, time limits were included as a part of the resolving clause of the underlying resolution proposing a constitutional amendment, as is the case of the proposed Equal Rights Amendment. Therefore, there is no disagreement that the Congress has the power to set a reasonable time limit for ratification of

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a proposed amendment.

With respect to the actual time limit set for ratification of a proposed amendment, the Supreme Court has held that seven years is reasonable (Dillon v. Gloss) and the Congress can make the final determination, with respect to an amendment which originally had no time limit, on the reasonableness of the time within which a sufficient number of States must act (Coleman v. Miller, 307 U.S. 433 (1939)). For example, since 1900 only one amendment, the proposed child-labor amendment submitted in June 1924, has not been ratified by the requisite number of States. Since this proposed amendment had no time limit, it is still pending before the States. If this proposed amendment were ratified by the requisite number of States, it would then be up to the Congress to decide if its ratification were completed within a reasonable amount of time.

The question in relation to the proposed ERA is whether Congress, once it has set a time limit, can extend that time period. The Coleman decision is used by both opponents and proponents of the extension. Opponents say that a succeeding Congress can determine the validity of the time period only when no time limit has been set by the proposing Congress. Proponents say that since the Court held that a subsequent Congress can determine the reasonableness of the time within which a sufficient number of States must act when no time limit for ratification has been set, a subsequent Congress can also determine the validity of the reasonableness of a time limit set by the proposing Congress.

Opponents of the extension also argue that the only role for the Congress in the amendment process is that of proposing amendments and, then, perhaps deciding on ratification if no time limit is set. Congress, therefore, has no authority to interfere with the ratification process once begun. Another argument is that the States when ratifying relied on the 7-year deadline and it would be unfair to these States to change the time limit.

Proponents of the extension argue, that according to the Dillon and Coleman decisions, the Congress has the authority to establish a reasonable time for ratification and therefore may extend the period if the extension is for a reasonable time. They further argue that the time period was in the resolving clause and not the amendment submitted to the States, therefore, it is a matter of detail, not substance, and is under the exclusive purview of the Congress.

Has a reasonable period of time been given to ratification of the proposed Equal Rights Amendment or should the Congress extend the deadline?

Opponents of the extension state that a reasonable time has been given for ratification. They argue that the purpose of the reasonable time rule articulated by the Supreme Court in Dillon was that there be a contemporaneous consensus; that is, all the ratifications of the several States should have occurred sufficiently close together to reflect a consensus of three-fourths of the several States at a given point in time. Opponents point out that 30 States ratified the ERA during the first year. Three additional States ratified the amendment in 1974, one in 1975 and one in January 1977. They argue that now the trend is against ratification as four States have rescinded their prior ratifications. They point out that every State legislature has considered ERA and worked its will according to its constitutional processes. In the 15 unratified States, 24 committee votes and 59 floor votes have taken place since the proposed amendment was submitted to the States for ratification. Opponents argue that in this day

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of mass communications seven years is a more than reasonable period of time. Further they argue that it is unfair "to change the rules in the middle of the game."

Proponents of the extension state that the 92nd Congress set the 7-year time limit because that had been the traditional time period set on amendments proposed since 1917, with the 18th Amendment (except for the woman's suffrage amendment, which set no time limit). Regarding the contemporaneous consensus, proponents argue that there is no contemporaneous consensus on the issues raised by the 14th Amendment because the debate is still going on. Likewise, there is no contemporaneous consensus on the issues raised by the ERA nor is there likely to be. They further argue that it took nearly 50 years to get the ERA passed by Congress and will probably take at least another 50 years for the Amendment's full impact to be felt. Proponents argue that public opinion polls continue to reflect the belief of a majority of Americans that the ERA should be ratified. They further argue that ERA has not been fully heard in some States. For example, in one State ERA has never come to the floor of either house. In four States, only one house has voted on ERA. In others ERA has been held up in committee. At least seven States have enacted rules requiring more than a simple majority for the ratification of a constitutional amendment. [Alabama -- three-fifths in the House; Arkansas, Colorado, Georgia, Idaho and Kansas — two-thirds in both Houses; and Illinois -- three-fifths in both Houses.] Proponents argue that a time limit can not be set on human equality.

Should the ERA not be ratified by Mar. 22, 1979, some observers feel that several options remain open for the passage and ratification of an Equal Rights Amendment. If an extension is not passed by the Congress, one alternative is to seek the enactment of a new amendment. Some opponents of the extension have urged the Congress to defeat the extension and, after the time limit expires, pass a revised version of the ERA that would be more acceptable to the States.

Another issue being discussed in relation to extension is whether States should be statutorily allowed by such legislation to rescind their prior ratification of a proposed amendment. The Supreme Court has said that rescission is a political matter for the Congress to decide. (Coleman v. Miller) One question is when should the Congress decide that issue with respect to the proposed Equal Rights Amendment. Some argue that since rescission is a separate issue, the time to make the decision on whether a State can rescind its ratification is when the requisite number of States have ratified. The Congress has made such determinations with respect to the 14th and 15th Amendments. Others argue that it would be unfair to extend the time for ratification without allowing States to rescind their prior ratifications. In other words, a State legislature's vote to ratify would be considered irreversable within the ratification time period, but a comparable vote against ratification or the rescission of an earlier ratification could be reversed by subsequent action. Amendments to H.J.Res. 638 to allow recission were defeated in both the House and Senate.

If Congress chooses to extend the deadline, by what legislative method would the extension have to be enacted?

Several possible methods are available to the Congress for extending the ratification deadline. Those who support the concurrent resolution, requiring only a majority vote, argue that the Constitution identifies issues as requiring a two-thirds vote. With respect to the constitutional amendment process, only the substance of proposed amendments to the Constitution

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require a two-thirds vote, as opposed to other parts of the amending process requiring a simple majority vote. For example, Congress, when deciding whether the necessary three-fourths of the States had ratified the 14th Amendment, used the concurrent resolution to express the congressional view. An argument raised against a concurrent resolution is that it does not have the force of law and therefore is not binding on a subsequent Congress.

Others argue that a joint resolution requiring a two-thirds vote is necessary since the ERA was originally proposed and passed by a joint resolution. They argue that many Members of Congress may have voted for the Amendment because of the time limit and it would be unfair to change that time limit by a simple majority. Another argument for a joint resolution is that it would have the force of law. An argument against the necessity for a two-thirds vote is that extending the deadline is a matter of detail and not substance; therefore, requiring only a majority vote.

A third proposal is to pass a joint resolution by a majority vote requiring the President's signature. This method, like the two-thirds vote on a joint resolution, would have the effect of law. An argument for this approach is that if the Congress wanted to change the time limit when the ERA was being considered by the 92nd Congress, such a change would have required only a majority vote and, therefore, it should only require a majority vote now. Those who argue against this method say that it is a dangerous precedent to involve the executive branch in the process of amending the Constitution of the United States.

H.J.Res. 638 passed both the House and Senate by majority votes. H.J.Res. 638 was signed by the President on Oct. 20, 1978, although there is still a question as to whether his signature is necessary.

LEGISLATION

H.J.Res. 208, 92d Congress (Griffiths)

Constitutional Amendment. 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. Passed the House of Representatives by a vote of 354-24 on Oct. 12, 1971, and passed the Senate on Mar. 22, 1972, by a vote of 84-8. The amendment must be ratified by three-fourths (38) of the States within 7 years from the date of final approval by the Congress.

95th Congress

H.R. 7008 (Hyde)
A bill to provide procedures for calling conventions for proposing amendments to the Constitution. Also contains a section providing for rescission of ratifications. Introduced on May 9, 1977, and referred to the Committee on the Judiciary. [Similar to identical bills: H.R. 10836 (Hyde), H.R. 11600 (Hyde), and S. 1880 (Helms)].

H.R. 9703 (Holtzman et al.)
A bill to extend the deadline for the ratification of the Equal Rights Amendment for 7 years, making the deadline 1986. Introduced on Oct. 10, 1977, and referred to the Committee on the Judiciary. [Similar or identical bill: H.R. 12041 (Stark)]