Policy Brief

A Critical Juncture: Outlining A Strategy for Final Ratification of the Equal Rights Amendment

Introduction

This policy brief provides a strategic vision for final ratification of the Equal Rights Amendment ("ERA")[1] as the 28th Amendment to the U.S. Constitution. The ERA has satisfied all requirements for constitutional amendment under Article V of the Constitution. However, finalization has stalled with debate focused on procedural questions, including the expiration of a congressionally imposed deadline for Congress to consider the ERA fully ratified, and attempts by states to rescind their prior ratifications. Meanwhile, the ERA is more popular today than ever before in its over 100-year history, as voters overwhelmingly prioritize gender equality and reproductive rights.[2] The project of amending the Constitution is a fundamentally democratic process, and Congress, as the most representative branch of federal government, possesses the sole authority to resolve the remaining issues impeding final recognition of the ERA as the 28th Amendment.

ERA advocates have advanced several views regarding the best strategy for moving the ERA to final ratification. Our considered opinion leads us to conclude that a congressional strategy, rather than one focused on the Archivist, is the best path to pursue both from a legal and a political standpoint.

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[1] *See* Proposed Amendment to the Constitution of the United States, 92d Cong., 2d Sess. (1972) ("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." "SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." "SEC. 3. This amendment shall take effect two years after the date of ratification.")

[2] According to a national poll conducted in 2023, seven out of ten voters support the Equal Rights Amendment. Roxanne Szal, *The 2024 Election Will Be a Referendum on Abortion and Women's Equality, According to New Ms. Poll, Ms. Magazine* (Oct. 9, 2023), https://msmagazine.com/2023/10/09/2024-election-women-voters-equal-rights-amendment-abortion/.

Background: Procedural Roadblocks Preventing Finalization of the ERA

The ERA has satisfied all *constitutional* requirements for ratification as the 28th Amendment in the U.S.[3] Nevertheless, there are widespread *political* concerns about whether the ERA has been fully ratified. Of primary interest is the lingering question over the meaning and impact of a congressionally imposed time limit for ratification by 38 states. When the time limit ultimately expired in 1982, three states were still needed to achieve ratification of the ERA to the U.S. Constitution; however, the remaining states ratified the ERA—in 2017, 2018, and 2020—after the time limit had expired.[4] This time limit, which Congress placed in the ERA's preamble and not the text of the amendment itself, has left unresolved questions about 1) the validity/legal effect of a time limit not required by the Constitution; 2) the significance of state ratifications after the expiration of the time limit; and 3) Congress's power to extend and/or remove the time limit retroactively. A second concern involves the five state legislatures that have voted to rescind their prior ratifications of the ERA.[5] Article V designates Congress as the only federal institution with a role to play in constitutional amendments. The history and tradition of other amendments supports that role..[6]

Throughout U.S. history, legally questionable amendments to the Constitution have been the norm, and the ERA's ratification process is no exception.[7] While the rules of Article V may seem clear, the text itself leaves unanswered a wide range of ambiguities, divergent procedures and

[3] The ERA was passed by a two-thirds majority of both houses of Congress in 1972. In 2020, Virginia became the 38th state to ratify the ERA, fulfilling all Article V constitutional requirements for amendment. The ERA is not yet recognized by many as part of the constitution due to legal questions about whether a deadline found in the preamble of the resolution proposing the amendment is binding and whether five states may rescind their ratifications.
[4] The ERA passed by Congress in 1972 included in the preamble a seven-year time limit for ratification by the states. House Joint Resolution 208 (1972). Congress subsequently extended the time limit for another three years, to June 30, 1982. House Joint Resolution 638, (1978).
[5] Between 1973 and 1979, five state legislatures that had previously voted to ratify the ERA subsequently voted to rescind that ratification. Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979).
[6] For further discussion on the procedural barriers to finalization of the ERA, *see Memorandum on Possible Avenues for Action Related to the Equal Rights Amendment*, ERA PROJECT (Feb. 23, 2023), https://gender-sexuality.law.columbia.edu/content/memo-era-action-2023; *see also* Katherine Franke et al, T*estimony to the Senate Judiciary Committee by the ERA Project at Columbia Law School and Constitutional Law Scholars on Joint Resolution S.J.Res. 4: Removing the Deadline for the Ratification of the Equal Rights Amendment* (Feb. 28, 2023), https://gender-sexuality.law.columbia.edu/sjres4-testimony-feb-2023
[7] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2348 n. 149 (2021).

irregularities.[8] Such debates were resolved by Congress as a political matter in every case.[9] This history and tradition of resolving disputes regarding final ratification of proposed constitutional amendments is assigned to Congress as the only federal branch of government with a designated role in the Article V constitutional amendment process.

Congress Has Exclusive Authority to Resolve Article V Issues

The process for amending the Constitution is governed by Article V which grants exclusive authority for proposing and ratifying amendments to Congress, state legislatures, and/or constitutional conventions.[10] Article V contemplates no role for either the Executive or Judicial branches of government in the constitutional amendment process. No President has ever asserted or been understood to have the power to approve or veto amendments proposed by Congress.[11] Indeed, resolutions proposing amendments to the Constitution do not take the form of *regular* legislation insofar as they do not go to the President for signature after passage by Congress. Instead, those resolutions become effective upon a 2/3 vote of both Houses of Congress. The Supreme Court has affirmed Congress's authority to "promulgate" or "proclaim" an amendment after its ratification.[12]

The ratification of the 27th Amendment illustrates Congress's authority to resolve questions incident to the ratification process. The "Congressional Pay Amendment" was passed by both houses of Congress in 1789 and was then fully ratified by the requisite 2/3 of the states over 200 years later. The Archivist published the measure as the 27th Amendment on May 19, 1992, but this action by the executive branch garnered a strong negative reaction from Congress. Senator Robert Byrd of West Virginia denounced the Archivist for certifying the amendment without congressional approval. Congressional leadership held the

[8] For example, Article V does not state whether an amendment must be passed by a two-thirds majority of the full body of Congress or simply a quorum, and as a result, the 12th Amendment was passed in the Senate by two-thirds of a quorum. David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2346-2347 (2021).
[9] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2339-2368 (2021).
[10] U.S. CONST., art. 5 ("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, which, in either Case, 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 .. .").
[11] Coleman v. Miller, 307 U.S. 433 at 450 (1939).
[12] Coleman, 307 U.S. 433 at 450.

view that Article V, as well as the history and tradition of the amendment process, instructed that Congress should pass a resolution resolving procedural questions with respect to the ratification of 27th Amendment and declare it fully ratified *before* the Archivist proceeded to publish the amendment. As such, Congress took action "to reassert [its] primacy in judging the validity of an amendment," and Congress in fact affirmed the 27th Amendment's ratification in 1992, over 200 years after it was first proposed.[13]

The primary role of Congress in the Article V process finds a strong parallel in the Supreme Court's recent decision on Colorado's power to exclude Republican presidential candidate Donald Trump from the state's 2024 presidential primary ballot. In *Trump v. Anderson*, a case that also addressed the interests of the entire nation as a whole, the Supreme Court interpreted Sections 3 and 5 of the 14th Amendment to grant Congress clear authority to enforce Section 3 against federal elected officials and candidates. The Court's deference to Congress in *Trump v. Anderson* presents a strong analogy for Article V, which can and should be interpreted to reserve for Congress exclusive authority to resolve issues related to the constitutional amendment process. This argument reinforces what the Department of Justice's Office of Legal Counsel and others have maintained: it is primarily, if not exclusively, within the authority of Congress to resolve disputes about the constitutional amendment process.[13]

Democratic Principles Require That Article V Issues Be Resolved By Congress, Not By the Judiciary or Executive Branch

While the text of Article V does not specify a dispute-resolution mechanism for issues arising in the ratification process, such as those involving time limits for state ratifications and state rescissions, structural considerations further support the idea that Congress, as the most democratic branch of federal government, is best suited to resolve questions related to the amendment process.[14]

Disagreements about proposed amendments must be governed by the underlying democratic structure and values of the amendment process itself. When two opposing resolutions over the ratification of a proposed amendment arise, the most democracy-enhancing answer should

[13] Slip. Op., Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment, Department of Justice Office of Legal Counsel (Jan. 26, 2022), https://www.justice.gov/d9/2022-11/2022-01-26-era.pdf.

[14] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 Colum. L. Rev. 2317, 2324 (2021).

be favored. For example, the attempts by five states to rescind their prior ratifications of the ERA should be treated as an essentially political question to be resolved by Congress. There is historical precedent for this position: New Jersey and Ohio voted to ratify the 14th Amendment and then voted a second time to rescind their prior ratifications. Nevertheless, Congress responded by passing a resolution declaring the 14th Amendment fully ratified and listed New Jersey and Ohio as two of the ratifying states.[15] This precedent supports the conclusion that Congress has the authority and is best positioned within the Constitution's structure to address state legislative rescissions of earlier ratifications of a proposed amendment as part of Congress's *legal* and *political* power under Article V.

The project of constitutional amendment is among the most quintessentially democratic exercises of self-government anticipated by the Constitution, and the Constitution delegates the amendment process to the most representative bodies—Congress, state legislatures, and constitutional conventions. It follows, then, that questions relating to the procedures for proposing and successfully ratifying amendments are essentially political questions properly left to the authority of political bodies to resolve.

Congress Has the Legal Authority to Resolve the Time Limit Issue in the ERA's Preamble

The Supreme Court has recognized Congress's power to determine the mode of ratification for constitutional amendments.[16] In *Dillon v. Gloss* (a case in which a criminal defendant challenged his conviction under laws relating to the prohibition of alcohol, passed pursuant to the 18th Amendment) the Supreme Court held that Congress's authority to impose a reasonable time limit for state ratification is implicit in Article V and "an incident of its power" to determine the mode of ratification under Article V.[17] In *Dillon,* the Court upheld Congress's specification of a seven-year time limit on the ratification of the 18th Amendment establishing alcohol prohibition. Congress's authority in resolving disputes arising from constitutional amendment processes was further affirmed by the Supreme Court in *Coleman v. Miller*, holding that "Congress, in controlling the

[15] *Id.* at 2348 n. 149 (2021).
[16] *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921).
[17] *Id.* at 375–76.("Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.").

promulgation of the adoption of a constitutional amendment, has the final determination of the question whether, by lapse of time, its proposal of the amendment had lost its vitality prior to the required ratifications."[18] If Congress has the power to set the time limit for ratification, then it would follow from the principle of anti-entrenchment that a subsequent Congress could amend, extend, or repeal a previously established time limit.[19]

It bears mentioning that the language of the ERA time limit is distinguishable from that of the 18th Amendment at issue in *Dillon* in significant ways. The ERA time limit is written in the preamble proposing the amendment, and as such carries the same status as any legislation. It is a direction for future Congresses about the time of ratification, which Congress may choose to repeal or amend as it can any legislation. By contrast, when a deadline is included in proposed constitutional text, it is mandatory on both the states and the Congress. The language of these limitations reflects this difference: the limiting language in the ERA speaks to the amendment "when ratified," leaving Congress a role in determining timing, while the 18th Amendment's language resolves any issue by declaring the amendment "inoperative."[20] In addition, the text of the preamble to the ERA, which states that the ERA is valid "*when ratified* …within seven years" by 38 states, is less conditional than the 18th Amendment's language that the amendment is "*inoperative unless*" ratified by the required state legislatures.[21] These distinctions suggest that the time limit included in the preamble of the ERA thus has a different audience, namely Congresses of the future. By contrast, when a deadline is inside the text of an amendment, that is binding because the amendment has a different legal status as "constitutional text." By putting the deadline in the text, Congress is tying itself to the mast on the date of ratification.[22]

As such, Congress has the power through resolution to extend or repeal the time limit set forth in the preamble of the original resolution proposing the state's ratification of the ERA.

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[18] 307 U.S. 433, 456 (1939).
[19] *See e.g. Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Significantly, Congress set the original seven-year time limit in the preamble to the ERA, a decision that stands in stark contrast to the 18th, 20th, and 22nd amendments which all contained a deadline for ratification in the text of the amendment. Generally, the preamble to legislation, or the Constitution itself, is not regarded as a source of law or enforceable.
[20] *See* H.R.J. Res. 208, 92nd Cong. (1972).
[21] *Id.* (emphasis added), U.S. CONST. amend. XVIII, § 3 (repealed 1933) (emphasis added).
[22] *See* Pozen & Schmidt, *supra* note 7, (manuscript at 42 & n.303).

Legislation Relating to Article V Matters Is Not Regular Legislation and Should Not Be Subject to a Filibuster

A Senate minority should not be able to block a constitutional amendment that is the expression of a super-majority of states and hundreds of millions of citizens. The filibuster is widely understood to be an anti-democratic tool that weaponizes minority rule and is, therefore, anathema to the quintessentially democratic project of constitutional amendment.[23] Its use is all the more problematic when deployed to defeat a constitutional amendment that has already satisfied the multiple supermajority requirements prescribed by Article V. In April 2023, a cloture motion to close debate and move forward with a resolution to remove the time limit from the ERA achieved a majority vote of 51-47. Rather than viewing the Senate majority vote as a win for the ERA, the vote was treated as a failure because the filibuster threshold of 60 votes was not met.[24] In other words, a minority of Senators is obstructing legislation regarding an amendment that was passed by supermajorities of both houses of Congress in 1972 and was ratified by 38 states. Resolutions pertaining to the amendment of the Constitution are not normal legislation but part of "the people's process" and should not be held hostage by a minority.

There is compelling precedent for the proposition that the Senate's filibuster rule should not apply to a vote on this kind of measure. In 1978, when the Senate was considering whether to extend the deadline for state ratification of the ERA to 1982, a motion made by Senator William Scott of Virginia would have required a super-majority vote—essentially a filibuster rule. After robust debate, it was handily rejected by a vote of 33-58, including 12 Republican Senators joining the Democrats.

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[23] The anti-democratic nature of the filibuster has led legal scholars to argue that it is also unconstitutional. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stanford L. Rev. 181-254 (1997), https://scholarship.law.duke.edu/faculty_scholarship/772.

[24] Katharine Jackson, US Equal Rights Amendment blocked again, a century after introduction, Reuters (Apr. 27, 2023), https://www.reuters.com/legal/government/us-equal-rights-amendment-blocked-again-century-after-introduction-2023-04-27/#:~:text=With%20a%2051%2D47%20vote,Amendment%20from%20going%20into%20effect; *see also* S. J. Res. 4, 118th Congress (2023-2024).

Actions by the National Archivist Have No Constitutional Effect and May Trigger Legal Challenges

If the Archivist of the U.S. certifies and publishes the ERA without prior congressional action resolving procedural disputes, this action would have no legal effect relative to the amendment's final ratification and will pose the risk of negative rulings in federal court declaring the ERA ratification process over in 1982.

Congress established the National Archives and Records Administration (NARA) in 1984 as an independent federal agency within the Executive Branch with the Archivist as its chief administrator.[25] Within this congressionally designated role, the Archivist is responsible for the process of certification and publication of amendments to the U.S. Constitution.[26] There is nothing in the Constitution that mentions a role for the Archivist, or the Executive branch for that matter, in the constitutional amendment process.

The legal meaning of Archivist publication of a new constitutional amendment is largely ministerial. By the terms of Article V of the Constitution itself, an amendment becomes valid upon ratification by 38 state legislatures.[27] As a technical legal matter, Archivist publication merely confirms the completion of the constitutionally mandated ratification process and is not necessary to render the amendment valid.

The ERA's Future Relies on Legislative Action

Resolutions have been introduced in the House of Representatives and the Senate, declaring the ERA to be fully ratified as the 28th Amendment to the U.S. Constitution. There are other legislative steps that—while short of declaring the ERA fully ratified—could be taken to advance the measure toward final ratification and to create political facts that would reinforce the position that the ERA is already the 28th Amendment.

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[25] 44 U.S.C.A. § 2102.
[26] 1 U.S.C.A. § 106b.
[27] U.S. CONST., art. 5 ("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, which, in either Case, 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 .. .").

Congress could pass a resolution declaring that Congress possesses the sole authority and power to set the terms and procedures under Article V. Such a resolution could clarify procedural questions unaddressed by Article V (such as the legality of a congressionally created deadline for ratification or the permissibility of state rescission of an earlier ratification), resolving disputes related to the process for ratification of a proposed amendment, and declaring an amendment fully ratified. The measure could also divest both lower federal courts and the U.S. Supreme Court of jurisdiction to adjudicate questions related to the validity of constitutional amendments.

Congress is also empowered under the Article V constitutional amendment process and under Art. I sec. 5 to set the rules of its "own proceedings" to resolve the question of whether congressional action must take place in both Houses in the same congressional session, consecutive sessions, or at any time. Past practice supports a diversity of approaches to proposed amendments. For example, congressional ratification by 2/3 of both Houses of the proposed 13th Amendment took place in consecutive congressional sessions. The Senate passed the resolution abolishing slavery in April 1864 (by a 38-6 vote). Two months later, in June, the House failed to pass the amendment (93-65). The following year, the House narrowly passed the amendment. Congress should clarify that Article V permits congressional action related to constitutional amendments if undertaken by both Houses in one or consecutive sessions.

Avenues of Action for the President to Fulfill His Commitment to Finalizing the ERA

President Biden has consistently affirmed his commitment to support the ERA,[28] and can demonstrate that commitment by making a strong statement in favor of congressional action. To ensure the viability of the ERA, President Biden should also use his influence to persuade the Senate Majority Leader to prioritize rule-making that excludes legislation relating to Article V from the filibuster. If the people of three-quarters of the states, a huge supermajority of citizens have declared their support, then no Senate minority should block a constitutional amendment. As outlined above, congressional action to lift the deadline for ratification of the ERA—exempt from the filibuster—is the most direct and effective path to finalization of the ERA and the accomplishment

[28] *See, e.g., National Strategy on Gender Equity and Equality*, The White House (2021), https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf.

of the administration's goal to prioritize "the full participation of women across economic, political, and social life, [and to] pursue reform to secure full gender equality under the law."[29]

Conclusion

In light of rapidly regressing constitutional sex equality rights in the U.S., the ERA's foundational promise of sex equality for all is more critical than ever. Although gender equality has advanced significantly since the ERA was first introduced in Congress in 1923, the promise of full substantive equality has evaded the legal system's current patchwork of sex equality protections. Congress, the branch charged under Article V with authority and responsibility for the ratification of constitutional amendments, can and should resolve the ERA's time limit issues—an effort well underway with appropriate pending legislation.

[29] *Id.*