Columbia Law School
ERA PROJECT

Memorandum

To: Interested Parties

From: ERA Project, Columbia Law School

Date: February 23, 2023

Re: Possible Avenues for Action Related to the Equal Rights Amendment

Resolutions have been introduced into both the House and the Senate declaring the Equal Rights Amendment (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.

1. **Congress Could Assert Singular Authority Over Article V Procedures and Disputes**

   Article V of the Constitution sets the procedures for amending the Constitution and specifically anticipates no role for courts in this process, or the Executive branch for that matter. Authority to propose and ratify amendments lies fully in the political process, in Congress, state legislatures, and/or constitutional conventions.

   For this reason, 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 of a proposed amendment), 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.

2. **Congress Should Clarify That Article V Permits Congressional Action Related to Constitutional Amendments If Undertaken by Both Houses in One or Consecutive Sessions**

   Under Article V, the amendment process begins either by Congress proposing an amendment via passage of a resolution by two thirds of both houses of Congress, or on the application of the legislatures of two thirds of the states. Article V is otherwise silent as to the additional procedures for proposing amendments and/or their ratification, leaving those procedures to

the Congress. Among the questions left to Congress to determine, as a matter of its plenary authority to undertake the constitutional amendment process, and its plenary power to set the rules of its "own proceedings," Art. I sec. 5, is 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 has shown different approaches to different proposed amendments. In particular, congressional ratification by two thirds of both houses on the proposed Thirteenth amendment took place in consecutive congressional sessions. The Senate passed the resolution abolishing slavery (Thirteenth) in April 1864 (38-6). Two months later, in June, the House failed to pass the amendment (93-65). The following year, the House narrowly passed the amendment.

3. **The Senate Majority Should Treat Article V Matters as Not Subject to the Filibuster**

The project of constitutional amendment is among the most quintessentially democratic exercises of self-government, and as such, the process should be left to the most representative bodies. The filibuster is widely understood to be the most anti-democratic tool in Congress, one that weaponizes minority rule. Its use is all the more problematic when deployed to defeat a constitutional amendment that has already satisfied all of the requirements proscribed by Article V. Amending the Constitution is not normal legislating. The Article V amendment process is "the people's process".

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, 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.