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THE PROPOSED EQUAL RIGHTS AMENDMENT

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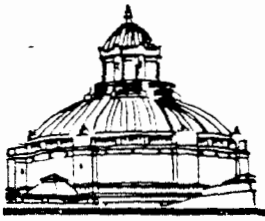

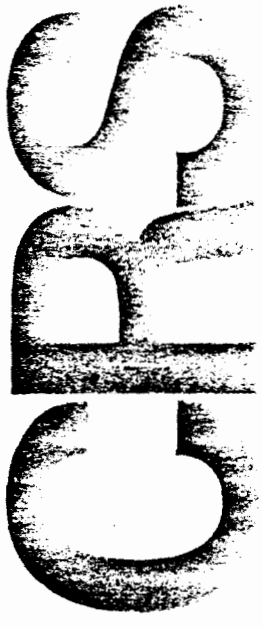

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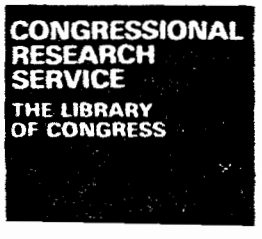

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ABSTRACT

This CRS Report provides a brief legislative history of the proposed Equal Rights Amendment and a description of its current status. The report also contains pro and con analyses of the possible effects of ERA, were it to be ratified, and a discussion of questions raised by the action of Congress in extending the deadline for ratification and by the action of States that have voted to rescind their approval of the measure.

This report is based in part on an earlier CRS report by Morrigene Holcomb and Karen Keesling.

CONTENTS

THE PROPOSED EQUAL RIGHTS AMENDMENT

CURRENT STATUS OF THE PROPOSED AMENDMENT

The proposed Equal Rights Amendment to the United States Constitution, which passed Congress on March 22, 1972, is pending before the State legislatures. As of February 1982, thirty-five States had ratified the amendment, although five had rescinded their approval. 1/ If ratified by 38 States before June 30, 1982, 2/ the measure would become the 27th amendment to the Constitution and would take effect two years after ratification.

The first State to ratify the ERA was Hawaii, which voted within hours after final passage by the Senate. During the first year after passage by the Congress, 30 States had ratified the Amendment. Then ratification slowed as opposition to the Amendment increased. At the end of seven years, only five more States had ratified it, the last in 1977.

Some States which have ratified the proposal Equal Rights Amendment have subsequently voted to rescind ratification, raising again the question of whether a State has the power, once it votes to ratify, to withdraw its ratification. Article V of the Constitution, which provides for the amending of the

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1/ A State by State history of ratification of ERA is in U.S. Library of Congress. Congressional Research Service. The Equal Rights Amendment (Proposed). CRS Issue Brief No. IB 74122, by Leslie Gladstone. Continuously updated. In addition, a list of States that have ratified the proposed amendment as of March 15, 1982, is given in the Appendix on p. 37 of this report.

2/ On Oct. 20, 1978, President Carter approved a bill extending the deadline for ratification from March 1979 to June 30, 1982.

Constitution, does not address this question. The Supreme Court considered this issue in Coleman v. Miller, 307 U.S. 433 (1939), declaring that rescission is a political question for Congress to decide.

More recently, however, substantial questions about the right of States to rescind prior to ratification by three-fourths of all the States were raised in a ruling by the U.S. District Court of Idaho on December 23, 1981. 3/ In this decision which appears to contradict the 1939 Supreme Court decision, Judge Marion J. Callister ruled that individual States were not bound by their original votes to ratify the amendment, but might rescind at any point before three-fourths of the States vote to ratify. Five State legislatures—in Nebraska, Tennessee, Idaho, Kentucky, and South Dakota--have reversed their approval of the amendment. "Rescission," said Judge Callister, is "clearly a proper exercise of a State's power. . . . Congress has no power to determine the validity or invalidity of a properly certified ratification or rescission." 4/

The district court also said that Congress violated the Constitution when it extended the deadline for the proposed amendment to June 30, 1982. In his decision, Judge Callister wrote that "[a]s part of the mode of ratification Congress may, by a two-thirds vote of both Houses, set a reasonable time limit for the States to act in order for the ratification to be effective. When [such a limit] is set, it is binding on Congress and the States and it cannot be changed by Congress thereafter." 5/ In addition, the district court said that even if Congress had the power to extend the time limit, it could not do so by a simple

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3/ Idaho v. Freeman, Civil No. 79-1079 [D. Idaho, Dec. 23, 1981]

4/ Idaho v. Freeman , Slip Opinion, p. 62, 71.

5/ Ibid., p. 71.

majority vote, as it did in 1978, since extension would require the same two-thirds majority in both Houses as required by Article V of the Constitution for proposal of an amendment.

On January 25, 1982, however the U.S. Supreme Court stayed the Idaho court decision in its entirety, pending a hearing by the Court at a later date. The effect of the stay was to allow the amendment process to continue until the June 30, 1982, deadline. Had the Court not stayed the Idaho decision with respect to extension, the proposed amendment would have been considered dead as of March 22, 1979--the original deadline. By issuing a stay, the Court also preserved its venue over the questions raised in the Idaho decision, including the question of rescission, which it may take up at a later date.

(CRS-4)

BRIEF LEGISLATIVE HISTORY

The proposed Equal Rights Amendment, has been introduced in Congress in various forms. The first Equal Rights Amendment, which was introduced in 1923 by Senator Charles Curtis and Representative Daniel R. Anthony, Jr., provided that—

> Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.
>
> Congress shall have power to enforce this article by appropriate legislation. 6/

In 1943 the Senate Judiciary Committee reported out a proposed amendment whose language was used in later proposals until 1971. The 1943 proposal provided 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.
>
> Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation. 7/

Hearings were held by both the House of Representatives and the Senate Judiciary Committee beginning in 1929. Both reported the Amendment. Before 1972, the Senate twice passed the Amendment, in the 81st Congress on January 25, 1950, and in the 83d Congress, on July 16, 1953. On both occasions, the measure

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6/ S.J. Res. 21, Dec. 10, 1923; and H.J. Res. 75, Dec. 13, 1923.

7/ S.J. Res. 25 (Gillette), Jan. 21, 1943.

was amended on the floor to include 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. 8/

In 1964, the Senate Judiciary Committee reported that this rider "is not acceptable to women who want equal rights under the law. It is under the guise of so-called 'rights' or 'benefits' that women have been treated unequally and denied opportunities which are available to men." 9/

The House of Representatives passed the Equal Rights Amendment in the 91st Congress on August 10, 1970, after the discharge procedure was used to free the proposal from Committee. There had been no Committee action on an equal rights amendment for 22 years, and it was a major goal of proponents of the Amendment, in the 91st Congress led by Representative Martha Griffiths, to bring the bill to the floor of the House.

Earlier, in May 1970, the Senate Subcommittee on Constitutional Amendments chaired by Senator Birch Bayh, held three days of hearings and favorably reported the Amendment to the full Senate Committee on the Judiciary. On September 9, 10, 11, and 15, the full Committee held hearings, chaired by Senator Sam J. Ervin, Jr. 10/

8/ S.J. Res. 25, as amended, 81st Cong., Congressional Record, vol. 95, Jan. 25, 1950. p. 903; and S.J. Res. 49, as amended, 83d Cong., Congressional Record, vol. 99, Jul. 16, 1953. p. 9223.

9/ U.S. Congress. Senate. Committee on the Judiciary. Equal Rights for Men and Women. S. Rept. No. 1558, 88th Cong., 2d Sess. Washington, U.S. Govt. Print. Off., 1964.

10/ Senator Ervin chaired the hearings at the request of Senator James O. Eastland, Chairman of the Committee.

During Senate consideration of H.J. Res. 264, the Senate adopted two amendments:

1) to guarantee that nothing in the women's rights amendment would require the drafting of women into the armed forces if Congress chose not to draft them; and

2) to permit recitation of "non-denominational" prayers in public schools and all other public buildings.

On October 14, 1970, following the adoption of these two amendments, Senator Bayh introduced a substitute amendment which read:

> Neither the United States nor any State shall on account of sex, deny to any person within its jurisdiction the equal protection of the laws.

Women's organizations supporting the Equal Rights Amendment opposed the two amendments added by the Senate and Senator Bayh's substitute resolution because they believed that this would still allow protective labor laws which were possible under the 14th amendment. The Senate laid aside the proposed Equal Rights Amendment, and no further action was taken by the 91st Congress.

Subsequently, the wording of the second section of the proposed Equal Rights Amendment was changed by the proponents to meet the objections raised by several constitutional lawyers, including Senator Ervin. The Equal Rights Amendment (H.J. Res. 208) as introduced in the 92d Congress read as follows:

H.J. Res. 208

> Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), 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.
>
> ARTICLE
>
> "Sec. 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."

Hearings were held in the 92d Congress by Subcommittee No. 4 of the House Judiciary Committee on the Equal Rights Amendment (H.J. Res. 208) and the Women's Equality Act (H.R. 916) on March 24, 25 and 31 and April 1, 2, and 5, 1971. On April 29, 1971, the Subcommittee reported H.J. Res. 208 to the full Committee which approved it on June 23, 1971, with two amendments. The first amendment reworded the measure by adding the words "of any person" as follows:

> Equality of rights <u>of any person</u> under the law shall not be denied or abridged by the United States or by any State on account of sex. [emphasis added]

The second amendment, known as the "Wiggins Amendment," added the following section to the bill:

> This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or any State which reasonably promotes the health and safety of the people.

When the House of Representatives considered the Equal Rights Amendment on October 12, 1971, however, it rejected the Committee amendments and approved the measure by a roll call vote of 354-24 <u>11/</u> in the form in which it was introduced:

<u>11/</u> Congressional Record, v. 117, Oct. 12, 1971. p. 35815.

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Although it held no hearings on the proposed amendment, the Senate Committee on the Judiciary favorably reported out the Equal Rights Amendment in its original form on February 29, 1972. The Senate began debate on the measure (S.J. Res. 8, S.J. Res. 9, H.J. Res. 208) on March 17, 1972. During the two days before the final vote of the Senate, Senator Sam Ervin introduced a total of ten amendments to the ERA in an effort to modify its application. The amendments were the following:

No. 1044 - to offer two alternative versions of the ERA, with the provision that the version ratified by the requisite number of States would be adopted (defeated, 82-9, Mar. 22, 1978)

No. 1058 - to exempt any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex (withdrawn, March 21, 1972)

No. 1065 - to exempt women from compulsory military service (defeated, 73-18, March 21, 1972)

No. 1066 - to exempt women from service in combat units (defeated, 71-18, March 21, 1972)

No. 1067 - to exempt from coverage laws extending protections or exemptions to women (defeated, 75-11, March 21, 1972)

No. 1068 - to exempt from coverage laws extending protections or exemptions to women (defeated, 77-14, March 22, 1972)

No. 1069 - to exempt from coverage laws maintaining fathers' responsibility (defeated, 72-17, March 22, 1972)

No. 1070 - to exempt from coverage laws securing privacy (defeated, 79-11, March 22, 1972)

No. 1071 - to exempt from coverage laws pertaining to sexual offenses (defeated, 71-17, March 22, 1972)

No. 1072 - to exempt from coverage laws based on physiological or functional differences between the sexes (defeated, 78-12, March 22, 1972)

Excerpts from the debate on the proposed amendments to the ERA provide a basis for determining the intent of Congress in passing the Amendment. For example, one will find the intent of Congress with respect to women and the draft in the pro and con debate on proposed amendment No. 1065, to exempt women from compulsory military service. This debate also summarizes most of the concerns about the Equal Rights Amendment.

On March 22, 1972, after rejection of the Ervin amendments, the Senate passed the House version of the Equal Rights Amendment by a vote of 84-8.

In late 1977, with approximately 18 months left until the March 1979 deadline for ratification of the ERA, and with 35 of the necessary 38 States having ratified it, a movement began to extend the deadline for ratification. Legislation was introduced in the 95th Congress to extend the deadline seven years until March 22, 1986. Hearings on H.J. Res. 638 were held on November 1, 4, and 8, 1977, and May 17, 18 and 19, 1978, by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. On July 18, 1978, the House Committee on Judiciary approved H.J. Res. 638 with an amendment to extend the deadline to June 30, 1982. 12/

The House considered H.J. Res. 638 on August 15, 1978. During the consideration, a motion to recommit the resolution to the Committee on the Judiciary was defeated. The House also rejected an amendment that would allow States that had already ratified the proposed Equal Rights Amendment during the first seven-year period to rescind that action during the extension period,

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12/ The Senate Committee on the Judiciary, Subcommittee on the Constitution, held hearings on a similar bill, S.J. Res. 134, on August 2-4, 1978.

as well as to require the General Services Administration (GSA) to submit notices of all resolutions of ratification or rescission to the Congress for final determination of whether the Amendment had in fact been properly ratified. A motion to provide an affirmative vote of two-thirds of the Members present and voting on the final passage of H.J. Res. 638 was tabled. H.J. Res. 638 passed the House on August 15, 1978, by a vote of 233 to 189.

The Senate considered H.J. Res. 638 on October 3, 4, and 6, 1978. On October 3, 1978, an amendment to permit a State legislature to rescind ratification of the Equal Rights Amendment, and an amendment to require that the joint resolutions be passed by two-thirds of both Houses of the Congress in order to become effective, were both defeated. 13/ On October 4, 1978, the Senate rejected five amendments:

> 1) to allow a State to rescind its ratification of the proposed Amendment any time after this joint resolution becomes effective;
>
> 2) to provide that the Congress express no opinion with respect to the effect of the action of any State legislature in rescinding its ratification of the Amendment;
>
> 3) to permit a State legislature to rescind its ratification of the Amendment after March 22, 1979;
>
> 4) to propose a new amendment to the Constitution to provide that equality of rights not be denied on account of sex; and
>
> 5) to establish January 1, 1980, as the deadline for ratification of the Amendment.

The Senate passed H.J. Res. 638 on October 6, 1978 by a vote 60-36.

H.J. Res. 638, which extended the deadline for ratification until June 30, 1982, was signed by the President on October 20, 1978.

13/ See discussion on p. 1-3.

(CES-12)

THE EQUAL RIGHTS AMENDMENT: PRO AND CON

Controversy over the proposed Amendment centers on four major areas:

(1) interpretations of its probable effects in areas such as right of privacy, military service, marriage and the family, protective labor laws, and criminal laws relating to sexual offenses;

(2) whether there should be room in the law for "reasonable" distinctions in the treatment of men and women;

(3) whether a constitutional amendment is the proper vehicle for improving the legal status of women in our Nation; and

(4) whether the proposed Amendment infringes on the rights of the States.

There is little disagreement about the general intent of the proposed Equal Rights Amendment. Legislative intent in this regard is found in the Senate debate on the measure in March 1972, the pertinent House and Senate Judiciary Committee reports, and congressional hearings held in 1970-71. As stated in the Senate Judiciary Committee report--

> "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 relationships of men and women are unaffected." [emphasis added] 14/

14/ U.S. Congress. Senate. Committee on Judiciary. Equal Rights for Men and Women; Report Together with Individual Views to Accompany S.J. Res. 9 and H.J. Res. 208. S. Rept. No. 92-689, 92d Cong. 2d Sess. Washington, U.S. Govt. Print. Off., 1972. p. 2.

The Equal Rights Amendment would require that governments treat males and females equally as citizens and individuals under the law. It is directed at eliminating from the law sex-based classifications that specifically deny equality of rights or violate the principle of nondiscrimination with regard to sex. Thus, Federal or State law or official practice that 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 it 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. Moreover, public schools could not require higher admissions standards for persons of one sex than the other, and courts could not impose longer jail sentences on convicted criminals of one sex. Thus, certain responsiblities and protections which once were or are now extended only to members of one sex would have to be either extended to everyone or eliminated.

EFFECTS OF THE ERA

The first area of identifiable controversy is the probable effect of the Equal Rights Amendment in the areas of privacy, military service, marriage and the family, protective labor laws, and criminal laws relating to sexual offenses.

Right of Privacy

One area still subject to interpretation where opinion is 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. The legislative history of the proposed Amendment reveals that Congress recognized the right of privacy doctrine as it was developed by the U.S. Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). In this case, the Court recognized that the right of privacy derived from specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments. The Senate Judiciary report on the effect of the ERA states that the "constitutional right of privacy established by the Supreme Court in Griswold v. Connecticut . . . would . . . permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions." 15/

The Court's opinions in Griswold and other cases have sustained the right of privacy in areas relating to "marriage, procreation, contraception, family relationships, and childbearing and education." The lack of precise definition and uncertainty over court interpretation under the ERA concerns opponents of the ERA. They argue that the privacy aspect of the relationship between men and women would be changed in the following areas:

(1) such police practices as searches involving the removal of clothing could be performed by members of either sex without regard to the sex of the one to be searched;

(2) segregation by sex in sleeping quarters of prisons or similar public institutions would be outlawed;

(3) segregation by sex of living conditions in the armed forces would be outlawed; and

(4) segregation by sex in hospitals would be outlawed.

15/ U.S. Congress. Senate. Committee on the Judiciary. Equal Rights for Men and Women. S. Rept. No. 92-689, 92d Cong., 2d Sess. Washington, U.S. Govt. Print. Off., 1972. p. 12.

Proponents argue that previous Supreme Court decisions, in which the Court has recognized an individual's right to control his or her bodily functions without interference by a State, would not be in conflict with the ERA. They point out that an individual's right to perform personal bodily functions, such as sleeping, showering, and disrobing, without intrusion by members of the opposite sex, also would be protected.

Opponents further state that the most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, they argue that if the ERA were construed strictly, there could be no segregation of public facilities for men and women on the basis of the right of privacy. Proponents argue that the legislative history is clear on this issue and 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 Amendments. 16/

Military Service

It is generally accepted today that the Equal Rights Amendment would require Congress to treat men and women equally with respect to the draft, if a draft were reinstated. This would mean that both men and women who meet physical and other requirements, and who are not exempt or deferred by law, would be subject to conscription according to the Senate Judiciary Committee report on the effects of the Equal Rights Amendment. 17/

16/ For more detailed discussion see U.S. Library of Congress. Congressional Research Service. The Proposed Equal Rights Amendment and the Right of Privacy. CRS Memorandum, Dated May 10, 1976, by Karen Lewis. Washington, 1976.

17/ Senate Judiciary Committee, Equal Rights for Men and Woman, p. 13.

Senator Ervin attempted to guarantee that passage of the ERA would not affect the right of Congress to exclude women from combat and the draft. His proposals, however, were defeated.

Still uncertain, were the ERA ratified, however, is whether women would be compelled to serve in combat units. Proponents believe that the ERA would mandate equal opportunity for women in the military and that training programs would have to be the same for both sexes unless individuals showed certain physical differences or incapacities requiring different treatment. If women were assigned to combat units with men, proponents believe, the Secretaries of the Services would have the authority to assign men and women according to their individual capabilities, taking into consideration various questions of privacy. As Representative Martha Griffiths stated: "The draft is equal. That is the thing which is equal. But once you are in the Army, you are put where the Army tells you where you are going." 18/

Opponents of the ERA express concern that women will have to be assigned direct combat roles in the field in the same manner and in the same numbers as men. They charge that this would adversely affect the efficiency and discipline of our forces. Opponents also point out that if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.

Traditionally, the doctrine of military necessity has been cited as reason enough for judicial reluctance to interfere with military decision-making. The

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18/ Ibid.

judiciary has assumed that congressional and military decisions to exclude women from combat have been rational and sensible. Recognizing that national defense is a concern of constitutional dimension and that Congress is empowered "to provide for the common defense," the courts have refrained from interfering with this area of legislative perogative." 19/ The Supreme Court's recent decision in Rostker v. Goldberg (49 USLW4798, June 23, 1981), a draft registration case involving sexual discrimination, can be seen as a continuation of the Court's historic deference to Congress in this area.

There appear to be two compelling, perhaps competing, national interests—one to eliminate discrimination based on sex and another to provide for national defense. A district court dismissed the defendant's argument that the draft law was "invidiously discriminatory" because it exempted females, stating that "such classifications as age and sex are not arbitrary or unreasonable, and the classifications are justified by the compelling government interest which is to provide for the common defense in a manner . . . which would both maximize the efficiency and minimize the expense of raising an army." 20/

Currently, women are excluded by policy from serving in the infantry, in field artillery, or to operate tanks in the Army. By statute women are excluded from service on combat ships in the Navy or combat aircraft in the Navy and Air Force. On July 27, 1978, the U.S. District Court for the District of Columbia 21/ declared that the provision contained in 10 U.S.C. 6015, barring the Secretary of the Navy from exercising his discretion to qualify and assign

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19/ See Korematsu v. United States, 323 U.S. 214 (1944).

20/ United States v. Dorris, 319 F. Supp. 1306, 1308 (1970).

21/ Owens v. Brown (Civil Action No. 76-2086).

any Navy women to any duty on any Navy ship, other than hospital ships or transports, violates the equal protection of the law as guaranteed by the Fifth Amendment. In light of that decision, it would appear that if the ERA were ratified, any remaining statutes requiring different treatment on the basis of sex would have to be changed.

Marriage and the Family

One of the most important areas of concern to opponents of the Equal Rights Amendment is the possible effect of the Amendment on the family as a social unit. The concerns are specifically with the roles of the husband and wife in an ongoing marriage, on the effects on the marital partners and the children when there is a break-up of the marriage, and on the possibility that marriage laws would be changed to allow persons of the same sex to marry. Opponents of the Amendment say that it will destroy the family. They further argue that it will take away privileges that women now enjoy.

One concern is whether the ERA would invalidate State laws which require a husband to support his wife. Opponents argue that were the ERA to invalidate these laws, to do so would take away a wife's "legal right" to be a full-time wife and mother supported by her husband and would force her into the job market in order to fulfill the equalized duty of support. Opponents interpret the equalization of the duty of support to mean one-half the financial support. Proponents of the Amendment argue, however, that "the support obligation of each spouse would be defined in functional terms based, for example on each spouse's earning power, current resources, and nonmonetary contributions to

the family welfare." 22/ They believe that if this were the case the legal status of the homemaker would be strengthened. Further, proponents point out that in none of the States which have incorporated equal rights provisions into their State Constitutions and which have equalized the duty of support, are wives obligated to work for compensation outside the home in order to equalize their contribution.

Opponents argue that upon divorce, women would lose their right to alimony and child support. Proponents agree that divorce laws would have to be sex-neutral and that factors other than one's sex would have to be used in determining the payment of alimony and the custody of children. These factors could include needs of a dependent spouse and ability of the wage-earning spouse to pay, which the proponents point out are now included in the Uniform Marriage and Divorce Act adopted by the National Conference of Commissions on Uniform State Laws.

Opponents argue further that under ERA a woman, upon the death of her husband, would lose her right to dower, an outright interest in the real estate of her deceased husband, which she has by law in some States. Proponents of the Amendment argue that dower rights could be extended to men.

Another concern raised by opponents of the Amendment is that it would permit persons of the same sex to marry. The rationale is that no law would be allowed which makes a distinction on the basis of sex. In the congressional debate on this issue, Senator Bayh stated--

> The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited to women partners.

22/ Senate Judiciary Committee, Equal Rights for Men and Women, p. 17.

> All it says is that if a State legislature makes a judgement that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman. 23/

Protective Labor Laws

Unions for several years opposed the Equal Rights Amendment on the grounds that it would invalidate such protective labor laws as weight-lifting laws applicable only to women, and laws limiting the hours women may work. Proponents of the ERA argue, however, that Title VII of the Civil Rights Act of 1964, which already prohibits sex discrimination in employment, has not had that effect. To enforce this Act, the Equal Employment Opportunity Commission has issued sex discrimination guidelines which interpret the "bona fide occupational qualification" narrowly. The EEOC guidelines declare that State laws which prohibit or limit employment of women in certain occupations 24/ discriminate on the basis of sex, because they do not take into account individual capacities and preferences. Accordingly, they conflict with and are superseded by Title VII. A series of court cases has upheld this guideline. According to a Women's Bureau report, "the conflict between State and Federal laws on this point was for the most part resolved in the early 1970's." 25/

23/ Congressional Record, v. 118, March 21, 1972. p. 9331.

24/ Such as in jobs requiring the lifting or carrying of more than specified weights, for more than a specified number of hours, and during certain hours of the night.

25/ U.S. Department of labor. Employment Standards Administration. Women's Bureau. State Labor Laws in Transition: From Protection to Equal Status for Women. Washington, 1976. p. 18.

Criminal Laws Relating to Sexual Offenses

Because of health considerations, prevailing moral standards, and physical differences between the sexes, legislatures have adopted some criminal laws which apply to only one sex. These include laws regarding seduction, statutory rape, sodomy, and prostitution. Opponents of the Amendment say that the ERA will forbid all existing and future criminal laws which make a legal distinction between men and women.

Under the ERA, it may be that those laws which are limited to one sex would have to be extended to both, or such laws would become invalid. For example, many prostitution laws make only the acts of women criminal and not those of men. These laws could be extended to cover all those involved in prostitution transactions.

Proponents of the Amendment argue that the legislative history makes it clear that laws such as these concerning statutory rape would be justified under the "unique characteristics qualification." Some States, however, have already changed their laws regarding rape and sodomy, placing them under a sexual assault code applied equally to both sexes, thereby eliminating any problem which might arise as a result of the ERA.

SHOULD THERE BE ABSOLUTE EQUALITY?

A second area of 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. Some opponents of ERA argue that because of unique physical characteristics and traditional societal roles, women should receive more or different legal protection than men.

Supporters of ERA argue that all citizens without regard to sex should share equally the rights and responsibilities of citizenship under the law.

SHOULD THERE BE A CONSTITUTIONAL AMENDMENT?

There is a third major area of disagreement--whether a constitutional amendment is the most appropriate means for improving the legal status of women in the United States. One view is that a constitutional amendment is unneccessary because the equal protection clause of the 14th amendment, if properly interpreted, would nullify every law that makes distinctions based on sex and which is not rationally based. This idea is closely allied with the view that men and women should not always receive absolutely equal legal treatment. Opponents of ERA argue that the 14th amendment offers more flexibility of interpretation than does the proposed Equal Rights Amendment, which they contend 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 14th amendment. In the Reed case, the Supreme court ruled 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 because it discriminated against women.

Since Reed, several other decisions have struck down sex-based classifications: Frontiero v. Richardson, 411 U.S. 677 (1973), concerning military benefits; 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. (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, 430 U.S. 199 (1977), concerning social security benefits for widowers.

On the other hand, other recent Supreme Court decisions have upheld sex classifications which discriminated against men and favored 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 benefiting widows; and Schlesinger v. Ballard, 419 U.S. 498 (1975), which involved promotion systems in the Navy.

Because sex classifications have not been struck down with consistency by the Supreme Court, supporters of the ERA argue for a constitutional amendment which makes clear that sex 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 14th amendment, thus leaving the burden of proof on the complainant that a sex-based classification does not bear a "fair and substantial relationship" to a legitimate governmental purpose.

Those who support passage of the Amendment also argue that an amendment to the Constitution is necessary to establish a national policy and to set a standard for the elimination of discrimination based on sex. Without this constitutional standard, they say, current laws could be amended and weakened. This constitutional standard would also prohibit the passage of future laws which discriminate on the basis of sex.

Opponents of the Amendment argue that with the passage of recent laws such as the Equal Pay Act of 1963, Title IX of the Education Amendments of 1972, the

Equal Credit Opportunity Act of 1976, and the Pregnancy Discrimination Act of 1978, discrimination on the basis of sex in employment, education, and credit is now illegal. Other areas of discrimination they argue, could be individually rectified by enacting separate laws pretatining to the particular subject, i.e., on a law-by-law basis.

THE ENFORCEMENT CLAUSE

A fourth area of controversy is the enforcement clause of the proposed Equal Rights Amendment. When the ERA was first introduced in 1923, the section stated: "Congress shall have power to enforce this article by appropriate legislation." The wording of the Amendment was changed to conform with the enforcement provision of the Prohibition (18th) Amendment, which read: "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."

In late 1970 the wording was changed by the proponents to read: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The proponents decided upon this change of language after Senator Ervin's hearings, during which he asked several constitutional lawyers to analyze the meaning and intent of the second clause. Since these constitutional lawyers agreed that the language should be changed, the proponents agreed to change the wording to conform to that of most of the other constitutional amendments.

Some opponents of the ERA have argued that the enforcement section of the proposed Equal Rights Amendment, in its current form, would augment Federal power at the expense of the States. Proponents of the Amendment point out, however, that this wording conforms to that of the 13th, 14th, 15th, 19th, 23d, 24th,

and 26th amendments, and that the 18th amendment, which was the only constitutional amendment to provide for enforcement by Congress and the States, was repealed. They also argue that because of the 10th amendment to the Constitution, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," it is necessary for the ERA to delegate enforcement authority only to the Congress--the States already have this authority.

Section 3 of the Amendment states that the Equal Rights Amendment would take effect two years after the date of ratification. The purpose of this section is to give the States and the Federal Government time to bring their laws into conformity with the ERA.

EXTENSION OF THE DEADLINE FOR RATIFICATION: PRO AND CON

Four basic questions arose during the consideration of extension of the deadline for ratification of the proposed Equal Rights Amendment in 1978:

(1) Does Congress have the power to extend the deadline?

(2) If Congress has such authority, should it extend the deadline?

(3) If Congress extends the deadline, should it allow States to rescind prior ratifications?

(4) If Congress chooses to extend the deadline, by what legislative method would the extension have to be enacted? 26/

DOES CONGRESS HAVE THE AUTHORITY TO EXTEND THE DEADLINE?

The question regarding congressional authority to extend the deadline for ratification had never been addressed specifically by earlier Congresses or the courts. Article V of the Constitution sets forth the method of amending the Constitution; it does not mention, however, 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,

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26/ The questions of extention of the deadline and rescission of State approval later became subjects of court action in Idaho v. Freeman. See p. 2 and 32 of this report for further discussion.

the Woman's Suffrage Amendment, for which no time limit was set--seven-year limits were included in the substantive provisions of amendments. Then, beginning with 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 over whether the Congress has the power to set a reasonable time limit for ratification of 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 ratifed 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 had been completed within a reasonable amount of time.

The question in relation to the proposed ERA was whether Congress, once it had set a time limit, could extend that time period. The Coleman decision was used by both opponents and proponents of the extension. Opponents said 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 said that since the Court held that subsequent Congresses 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 argued that the only role for the Congress in the amendment process is that of proposing amendments and, perhaps, confirming ratification if no time limit is set. Congress, therefore, has no authority to interfere with the ratification process once begun. Another argument was that the States, when ratifying, relied on the seven-year deadline, and it would be unfair to these States to change the time limit.

Proponents of the extension argued 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 argued that the time period was set forth in the resolving clause and not in the amendment submitted to the States; being a "matter of detail," not of substance, therefore, it is under the exclusive purview of the Congress.

WAS A REASONABLE PERIOD OF TIME INITIALLY GIVEN TO RATIFICATION? SHOULD CONGRESS HAVE EXTENDED THE DEADLINE?

Opponents of the extension stated that a reasonable time had been given for ratification. They argued 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 within a given period of time. Opponents pointed 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 argued that

the trend was against ratification in as much as four States had rescinded their prior ratifications by 1978. They pointed out that every State legislature had considered the 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 argued that in this day of mass communications seven years is a more than reasonable period of time. Further, they argued that it is unfair "to change the rules in the middle of the game."

Proponents of the extension stated that the 92d Congress set the seven-year time limit because that had been the traditional time period set on amendments proposed since 1917 (except for the Woman's Suffrage Amendment, which set no time limit).

Proponents also argued that public opinion polls continued to reflect the belief of a majority of Americans that the ERA should be ratified. They further argued that the ERA had not been fully heard in some States. For example, in one State--Mississippi--the ERA had never come to the floor of either house. In four States--Alabama, Arkansas, Utah, and Virginia--only one house had voted on the ERA. In others the ERA had been held up in committee. At least seven States had enacted rules requiring more than a simple majority for the ratification of a constitutional amendment. 27/ Proponents also argued that a time limit can not be set on human equality.

27/ Alabama had enacted a rule requiring a three-fifths majority in the House; Arkansas, Colorado, Georgia, Idaho, and Kansas, a two-thirds in both Houses; and Illinois, a three-fifths in both Houses. Colorado, Idaho, and Kansas are among the States that have ratified the proposed Amendment, although Idaho voted to rescind on February 8, 1977.

WHAT LEGISLATIVE METHODS FOR EXTENSION WERE AVAILABLE?

Several possible methods were available to the Congress for extending the ratification deadline. These included: concurrent resolution requiring majority vote, joint resolution requiring two-thirds vote; or joint resolution requiring majority vote and Presidential signature.

Those who supported the concurrent resolution, requiring only a majority vote, argued that the Constitution specifically identifies those areas that require a two-thirds vote. With respect to the constitutional amendment process, only the substance of proposed amendments to the Constitution requires 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 was that it does not have the force of law and therefore is not binding on a subsequent Congress.

Others argued that a joint resolution requiring a two-thirds vote was necessary since the ERA was originally proposed and passed by a joint resolution. They argued 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 was that it would have the force of law. An argument against the necessity for a two-thirds vote was that extending the deadline is a "matter of detail"--not entirely new constitutional amendment--and that it therefore required only a majority vote.

A third proposal was 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 was

that if the Congress wanted to change the time limit when the ERA was being considered by the 92d Congress, such a change would have required only a majority vote and, therefore, it should only require a majority vote subsequently. Those who argued against this method said that it would set 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.

MUST CONGRESS RECOGNIZE RESCISSION OF PRIOR RATIFICATION?

The Supreme Court in Coleman v. Miller (307 U.S. 433 [1939]) ruled that rescission is a political matter for Congress to decide. However, this opinion has been challenged by Idaho v. Freeman, which held that States have a right to rescind their approval of a proposed amendment until it is actually ratified by three-fourths of all the States, and that Congress must recognize that action.

The district court said--

> The clear purpose of article V of the United States Constitution is to provide that an amendment properly proposed by Congress should become effective when three-fourths of the states, at the same time and within a contemporaneous period, approve the amendment by ratification through their state legislatures.
>
> To allow an amendment to become effective at any time without the contemporaneous approval of three-fourths of the states would be a clear violation of article V of the Constitution. It follows, therefore, that a rescission of a prior ratification must be recognized if it occurs prior to unrescinded ratification by three-fourths of the states. Congress has no power to determine the validity or invalidity of a properly certified ratification or rescission. 28/

28/ Idaho v. Freeman, slip Opinion, p. 71.

The Supreme Court has agreed to hear this question, although no date has been set.

APPENDIX 1: STATES WHICH HAVE RATIFIED THE EQUAL RIGHTS AMENDMENT 29/

01/24/77--Indiana
03/19/75--North Dakota
02/07/74--Ohio
01/25/74--Montana
01/18/74--Maine
03/22/73--Washington
03/15/73--Connecticut
03/01/73--Vermont
02/28/73--New Mexico
02/08/73--Minnesota
02/08/73--Oregon
02/05/73--South Dakota (voted to rescind 03/01/79)
01/26/73--Wyoming
11/13/72--California
09/27/72--Pennsylvania
06/26/72--Kentucky (voted to rescind 03/16/78)
06/21/72--Massachusetts
05/26/72--Maryland
05/22/72--Michigan
05/18/72--New York
04/26/72--Wisconsin
04/22/72--West Virginia
04/21/72--Colorado
04/17/72--New Jersey
04/14/72--Rhode Island
04/05/72--Alaska
04/04/72--Tennessee (voted to rescind 04/23/74)
03/30/72--Texas
03/29/72--Nebraska (voted to rescind 03/15/73)
03/28/72--Kansas
03/24/72--Idaho (voted to rescind 02/08/77)
03/24/72--Iowa
03/23/72--Delaware
03/23/72--New Hampshire

29/ Includes the five States which later voted to rescind ratification. Source: General Services Administration. Office of the Federal Register. Special Projects Unit. For a discussion of the role of the General Services Administration in certifying and recording copies of ratification resolutions, see U.S. Library of Congress. Congressional Research Service. Amending the Federal Constitution--Procedures of the General Services Administration and of the State Legislatures. CRS Report No. 80-89A, by Michael V. Seitzieger. Washington, 1980. p. 10.

APPENDIX 2: ADDITIONAL SOURCES

U.S. Commission on Civil Rights. The Equal Rights Amendment: guaranteeing equal rights for women under the Constitution. Washington, U.S. Govt. Print. Off., June 1981. 29 p.

U.S. Congress. House. Committee on the Judiciary. Equal rights for men and women; report together with individual views to accompany H.J. Res. 208. Washington, Govt. Print. Off., 1971. 16 p. (92d Congress, 1st session. House. Report no. 92-359)

----- Proposed equal rights amendment extension; report to accompany H.J. Res. 638. Washington, U.S. Govt. Print. Off., 1978. 64 p. (95th Congress, 2d session. House Report no. 95-1405)

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil and Constitutional Rights. Equal Rights Amendment extension. Hearings, 95th Congress, 1st and 2d sessions, on H.J. Res. 638. Washington, U.S. Govt. Print. Off., 1978. 378 p.
Hearings held Nov. 1, 4, and 8, 1977; and May 17-19, 1978.

U.S. Congress. House. Committee on the Judiciary. Subcommittee No. 4. Equal rights for men and women, 1971. Hearings, 92d Congress, 1st session, on H.J. Res. 35, 208, and related bills; and H.R. 916 and related bills. Mar. 24, 25, and 31; Apr. 1, 2, and 5, 1971. Washington, U.S. Govt. print. Off., 1971. 724 p.

U.S. Congress. Senate. Committee on the Judiciary. Equal rights for men and women; report together with individual views to accompany S.J. Res. 9, and H.J. Res. 208. Washington, U.S. Govt. Print. Off., 1972. 52 p. (92d Congress, 2d session. Senate. Report no. 92-689).

----- Equal rights, 1970. Hearings, 91st Congress, 2d session, on S.J. Res. 61 and S.J. Res. 231. Sept. 9, 10, 11, and 15, 1970. Washington, U.S. Govt. Print. Off., 1970. 433 p.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Amendments. The "equal rights" amendment. Hearings, 91st Congress, 2d session, on S.J. Res. 61. May 5, 6, and 7, 1970. Washington, U.S. Govt. Print. Off., 1970. 793 p.

U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitution. Equal Rights Amendment extension. Hearings 95th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1978. 764 p.
Hearings held Aug. 2-4, 1978.

U.S. Library of Congress. Congressional Research Service. Equal Rights Amendment (proposed) [by] Leslie Gladstone [Washington] Continuously updated. 16 p.
Issue Brief no. IB 74122.

----- Equal Rights Amendment: selected floor debate and votes [by] Morrigene Holcomb. [Washington] December 21, 1974. 43 p.
Multilith 74-234 G.

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