Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

The Equal Rights Amendment: Recent Developments

April 25, 2022

In February 2022, the Commonwealth of Virginia filed a motion with the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) seeking to withdraw the state from a lawsuit challenging the Archivist of the United States' refusal to publish and certify the Equal Rights Amendment (ERA) as part of the U.S. Constitution. First presented to the states in 1972, the ERA would amend the Constitution and provide that "[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." This Legal Sidebar provides a brief background on the ERA and the ratification process for constitutional amendments. The Sidebar also reviews *Virginia v. Ferriero*, the case challenging the Archivist's refusal. In March 2021, the U.S. District Court for the District of Columbia dismissed the case, holding that Virginia, Nevada, and Illinois lacked standing to challenge the Archivist's decision. While all three states filed an appeal in May 2021, the case will now proceed without Virginia's involvement after the D.C. Circuit granted Virginia's request to withdraw from the case.

Background

The power to amend the Constitution is established in Article V. Article V empowers Congress to propose an amendment when two-thirds of both chambers deem it necessary or on the application of two-thirds of the state legislatures to call a convention for proposing an amendment. A proposed amendment becomes part of the Constitution when ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. Following ratification by three-fourths of the states, the Archivist of the United States, pursuant to 1 U.S.C. § 106b, is to identify the ratifying states, publish the amendment, and certify that the amendment has become part of the Constitution.

While Article V provides for the proposal and ratification of constitutional amendments, it is silent regarding other procedural matters, such as any time limitations for ratifying such amendments. The House and Senate passed H. J. Res. 208, which first proposed the ERA, in 1972 during the 92nd Congress. In its proposing clause, H. J. Res. 208 provided that, for the ERA to be adopted, three-fourths of the states would have to ratify the amendment within "seven years from the date of its submission by the Congress." In accordance with this provision, the ratification deadline became March 22, 1979, seven years after the Senate approved H. J. Res. 208.

Congressional Research Service
https://crsreports.congress.gov
LSB10731

By the fall of 1977, 35 states had ratified the ERA, three fewer than the 38 needed for adoption. H. J. Res. 638 was introduced in October 1977 to extend the ERA's ratification deadline until June 30, 1982. Representative Elizabeth Holtzman, the joint resolution's sponsor, indicated that the extension would provide an "insurance policy to assure that the deadline will not arbitrarily end all debate on the ERA." H. J. Res. 638 passed the House and Senate in 1978, but no additional states ratified the ERA before the June 30, 1982, deadline. Nevada ratified the ERA in 2017, and Illinois ratified the amendment in 2018. Virginia became the 38th state to ratify the ERA in 2020.

Virginia v. Ferriero

After Virginia ratified the ERA, supporters of the amendment moved for its inclusion in the Constitution, as it had been ratified arguably in accordance with Article V by three-fourths of the states. The Archivist declined to certify the ERA, however, relying on an opinion by the Department of Justice's Office of Legal Counsel, which concluded that the amendment's original ratification deadline had expired and that the amendment was not properly before the states when approved by Virginia, Nevada, and Illinois.

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

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

The court also provided "an alternative holding to streamline appellate review" with regard to the ERA's ratification deadline issue—that is, that the ERA's original ratification deadline was effective, and the Archivist has the authority to determine whether an amendment was properly ratified. The court rejected the Archivist's contention that the deadline was a nonjusticiable political question but determined that the Archivist could consider whether a state's ratification complied with a congressionally imposed deadline before publishing and certifying an amendment:

> The ministerial nature of the Archivist's obligations does not mean that he must rubberstamp any ratification he receives but rather that, once he has determined that a proposed amendment has met Article V's requirements, he must publish it…. A contrary result would be absurd.

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

Virginia, Illinois, and Nevada filed an appeal of *Ferriero* with the D.C. Circuit in May 2021. In February 2022, the court granted Virginia's motion to be dismissed as a party in the case. Currently, Illinois and Nevada are continuing with the appeal, and oral argument before the D.C. Circuit has yet to be scheduled.

Rescission of Ratifications and Extension of Ratification Deadline

Between 1973 and 1978, five states—Idaho, Kentucky, Nebraska, South Dakota, and Tennessee—passed legislation to rescind their prior ratifications of the ERA. In 1982, a federal district court in Idaho addressed the question of whether states could validly rescind prior ratifications and whether Congress's prior extension of the ERA's ratification deadline was permissible, concluding that a state's rescission of a prior ratification should be recognized and that Congress could not change the ratification deadline once it was established in 1972. Reviewing Article V, the court in *Idaho v. Freeman* emphasized that an amendment cannot become part of the Constitution until a state has determined that there is consensus among its people and three-fourths of the states ratify the amendment. Accordingly, the court contended that a subsequent rescission should be recognized because it promotes "the democratic ideal by giving a truer picture of the people's will[.]" The court indicated that a failure to recognize Idaho's rescission would allow the ERA to become part of the Constitution when the state's people were not unified in their consent. According to the court, a rescission of a prior ratification "is clearly a proper exercise of a state's power … especially when that act would give a truer picture of local sentiment regarding the proposed amendment."

The court in *Freeman* also viewed the ERA's original ratification deadline as part of the amendment and that it could not be changed once the ERA was sent to the states: "Once the proposal has been formulated and sent to the states, the time could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa." On appeal to the Supreme Court, *Freeman* was vacated and the district court was instructed to dismiss the case as moot because the ERA's extension deadline had passed. Nevertheless, others have indicated that Congress's extension of the ratification deadline was invalid. For example, in its 2020 ERA opinion, the Office of Legal Counsel contended that Congress could not extend a ratification deadline on an amendment pending before the states.

Although the district court in *Ferriero* declined to address the rescissions of Idaho, Kentucky, Nebraska, South Dakota, and Tennessee, it appears possible that the D.C. Circuit could consider their validity in its examination of the case. If those rescissions were deemed effective, it seems that approval by three-fourths of the states will not have been achieved.

Considerations for Congress

Legislation to revive consideration of the ERA has been introduced steadily since the 1982 deadline. These measures have generally assumed two approaches. One approach involves restarting the ratification process with a new joint resolution. H. J. Res. 28, for example, proposes a new constitutional amendment "relative to equal rights for men and women." If passed by the House and Senate, the amendment would be presented to the states for ratification.

A second approach contemplates the continued vitality of the 35 state ratifications completed before the ERA's original ratification deadline. H. J. Res. 17 provides that "notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States." A similar measure, S. J. Res. 1, has been introduced in the Senate. This approach has been described as the "three-state strategy" because 38 states would satisfy the Article V ratification requirement. The approach does not address, however, the five states that rescinded their ratifications between 1973 and 1978. The House passed H. J. Res. 17 on March 17, 2022. The measure has been received in the Senate and awaits further consideration.

Author Information

Jon O. Shimabukuro
Legislative Attorney

Disclaimer