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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

2024 ANNUAL MEETING
CHICAGO, ILLINOIS
AUGUST 5-6, 2024

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association supports the principle that any time limit for ratification of an amendment to the United States Constitution ("Constitution") is not consistent with Article V of the Constitution;

FURTHER RESOLVED, That the American Bar Association supports the principle that Article V does not permit a state to rescind its ratification of an amendment to the Constitution;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to support implementation of the Equal Rights Amendment ("ERA") to the Constitution, in accordance with Article V; and

FURTHER RESOLVED, That the American Bar Association urges all bar associations and the legal community as a whole to support implementation of the ERA.

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REPORT

The American Bar Association has a record of longstanding and steadfast support for the Equal Rights Amendment ("ERA"), as reflected in policy resolutions adopted in 1972, 1974, and 2016.[1] However, by their terms, the existing ABA resolutions broadly urge ratification of the ERA, and pre-date the ratifications by Nevada, Illinois, and Virginia – respectively, the 36th, 37th, and 38th of the 50 states to ratify. Before Virginia submitted its ratification, in 2019 the ABA encouraged other states to join Nevada and Illinois, although it did not expressly take a position on the legal effect of those ratifications. This resolution would establish the ABA's support of the principles that could allow implementation of the ERA as the 28th Amendment to the U.S. Constitution, and would allow the ABA to engage in the debate around the two legal principles in contention.

I. The Importance of the ERA

The ERA has always been important.

It is true that many existing statutes prohibit discrimination on the basis of sex, provide for gender equality, and protect women's rights, including Title VII barring sex discrimination in employment, the Pregnancy Discrimination Act, educational safeguards in Title IX, the Violence Against Women Act, and more. However, the existing federal and state laws prohibiting sex discrimination are – at best – a patchwork.

Further, Congress can easily amend or even repeal anti-discrimination statutes. The Executive Branch can fail to enforce statutes or refuse to aggressively enforce them. And courts, including the U.S. Supreme Court, can interpret statutes narrowly or based on social or political bias, stripping them of much of their force and effectiveness. The same is true of state laws and state branches of government. Statutory provisions thus lack the permanence and authority that constitutional protection of the equality of the sexes would afford.

The ERA also will heighten the level of judicial scrutiny applicable to claims of sex discrimination. At present, such claims are subject only to intermediate scrutiny. Under the ERA, sex would be considered a suspect classification (just as race, ethnicity, and national origin are now), and claims of sex discrimination would be subject to strict judicial scrutiny. To be upheld as constitutional, action discriminating based on sex would have to satisfy the most stringent level of review – a "necessary" relation to a "compelling state interest."[2]

[1] ABA Res. 72M56 (adopted Feb. 1972); ABA Res. 74M1 (adopted Aug. 16, 1974); ABA Res. 16M10B (adopted Feb. 8, 2016), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2016/2016-midyear- 10b.pdf. The 2016 Resolution committed the ABA to "support and take up the pursuit of ratification."

[2] E. Chemerinsky, Constitutional Law Principles and Policies 602-06 (7th ed. 2023).

For these reasons and others, the ERA has *always* been important. As outlined below, however, the ERA is now *more important* – and *more urgent* – than ever. [3]

Specifically, the greatest legal protection afforded to women today rests on the Equal Protection Clause of the 14th Amendment. However, the 14th Amendment was intended as a guarantee of equal citizenship to formerly enslaved persons after the Civil War, and later extended to include people of all races. Historically, it did *not* guarantee equality on the basis of sex. By judicial interpretation, the 14th Amendment was read to cover sex discrimination for the first time in the 1970s.[4] Courts have continued to look to the 14th Amendment in sex-based cases for the past half century. But now all that is in jeopardy.

Originalists on the Supreme Court and elsewhere argue that because the framers did not intend for the 14th Amendment to cover sex, it should not be so interpreted now. The late Supreme Court Justice Antonin Scalia famously stated: "Certainly the Constitution does not *require* discrimination on the basis of sex. The only issue is whether it *prohibits* it. It doesn't. Nobody ever thought that that's what [the 14th Amendment] meant."[5] To the extent that the Supreme Court's recent decisions in Dobbs and elsewhere evince a Supreme Court majority's embrace of originalism, longstanding interpretations of the 14th Amendment are in grave peril.[6]

II. The Constitutional Amendment Process

Amending the Constitution is a two-step process: [1] the proposal of an amendment, and [2] ratification of the amendment. The process is set forth in Article V of the Constitution:

> [1] 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, [2] 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 . . . . [7]

The first step – proposal of a constitutional amendment – can be made by a vote of two-thirds of each house of Congress. Alternatively, an amendment may be proposed via a

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[3] Ratifying the Equal Rights Amendment would help all kinds of Americans (Los Angeles Times, Nov. 27, 2019), https://www.latimes.com/opinion/story/2019-11-27/column-ratifying-the-equal-rights-amendment-would-help-all-kinds-of-americans-including-men.

[4] *See, e.g.,* Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.SV. 190 (1976).

[5] Legally Speaking: The Originalist at 33 (Cal. Lawyer, Jan. 2011); Antonin Scalia – Legally Speaking (Sept. 2010 interview of Scalia, sponsored by California Lawyer), https://www.youtube.com/watch?v=T9PIf1rkrmo.

[6] *See Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).*

[7] The numbers [1] and [2] are added to denote the proposal and ratification steps, respectively.

national constitutional convention initiated by the states. To date, all amendments have been proposed by Congress.[8]

The second step – ratification of an amendment – is by the states, either by their legislatures or by state constitutional conventions. The latter mode was used for only one amendment, the 21st, which repealed the 18th Amendment (Prohibition).[9]

III. The History of the ERA

A proposed Equal Rights Amendment, drafted by Alice Paul among others, was first introduced in the U.S. Congress on December 10, 1923.[10] Thereafter, it was proposed in every session of Congress through 1971, but it failed to advance to a vote. Finally, in 1970, Congresswoman Martha Griffiths filed a discharge petition to force the legislation out of committee, and it passed in the House. Although the Senate failed to approve it that legislative session, Griffiths reintroduced the ERA the following year as House Joint Resolution 208 (H.J. Res. 208).[11]

House Joint Resolution 208 – the vehicle for Congress's vote on the ERA – consists of two distinct parts: the "proposing clause" or "resolving clause" (*i.e.*, the clause beginning with "Resolved") and the text of the actual amendment itself (*i.e.*, the three sections under the heading "ARTICLE"):

JOINT RESOLUTION
Proposing an amendment to the Constitution of the United States relative to
[H. J. Res. 208] equal rights for men and women.

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[8] *See* Constitution Annotated: Overview of Article V, Amending the Constitution (Library of Congress) ("Constitution Annotated: Overview of Article V"), https://constitution.congress.gov/browse/essay/artV-1/ALDE_00000507/.

[9] *See* Constitution Annotated: Overview of Article V.

[10] For discussions of ERA history, *see, e.g.,* R. DeWolf, Gendered Citizenship: The Original Conflict Over the Equal Rights Amendment, 1920-1963 (U. Neb. Pr. 2021); M. Spruill, Divided We Stand: The Battle Over Women's Rights and Family Values That Polarized American Politics (Bloomsbury 2017); J. Neuwirth, Equal Means Equal (The New Press 2015); J. Suk, We The Women: The Unstoppable Mothers of the Equal Rights Amendment (Skyhorse 2020); K. Kelly & N. LaRue, Ordinary Equality (Gibbs Smith 2022); *see also* M. Honora Thorne, A New Era for the ERA? Our 28th Amendment to the U.S. Constitution, 36 CBA Rec. 31 (May-June 2022), https://user-35215390377.cld.bz/CBA-Record-May-June-2022/31; A Centennial Season's Greetings from the ERA (Library of Congress, Dec. 14, 2023), https://blogs.loc.gov/manuscripts/2023/12/a-centennial-seasons-greetings-from-the-era/; Equal Rights Amendment was introduced 100 years ago — and still waits (Wash. Post, Dec. 12, 2023), https://www.washingtonpost.com/history/2023/12/14/equal-rights-amendment-100-years/; L. Thuli, Why the Equal Rights Amendment Is Still Not Part of the Constitution (Smithsonian Mag., Nov. 13, 2019), https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/; *cf.* D. Machalow, The Equal Rights Amendment in the Age of #MeToo, 13 DePaul J. for Soc. Just. (2020) (a wide-ranging, extensively-sourced, albeit not flawless, account), https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1201&context=jsj.

[11] H.J. Res. 208, 92d Cong. (1972), https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf.

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 —

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SECTION 3. This amendment shall take effect two years after the date of ratification.

Notably, House Joint Resolution 208 included two separate references to periods of time, which, significantly, appear in the two separate parts of the legislation. The first reference, which appears in the resolving clause, provides that the amendment "shall be valid . . . when ratified . . . within seven years from the date of its submission [to the states] by the Congress." In contrast, the second reference to timing appears in the text of the amendment itself, as Section 3. That provision provides for a two-year delay in the effective date of the amendment following the amendment's ratification by three-fourths of the states.

As of March 22, 1972, House Joint Resolution 208 was approved by overwhelming bipartisan majorities in both houses of Congress – 354-24 (94%) in the House of Representatives and 84-8 (91%) in the Senate, far in excess of the two-thirds majority required by Article V of the Constitution.[12] Thus, pursuant to Article V, as of March 22, 1972, the ERA (*i.e.*, Sections 1 through 3 of the Joint Resolution) was submitted to the states for ratification.

Within 48 hours of Congress' action sending the amendment to the states, six states had ratified the ERA; and within nine months, 22 had ratified. Another eight states ratified in 1973, but the early momentum had begun to stall.[13] Only three states ratified in 1974,

[12] *See* 117 Cong. Rec. 35815 (1971) (House vote on Oct. 12, 1971); 118 Cong. Rec. 9598 (1972) (Senate vote on March 22, 1972).

[13] The ERA was the victim of a concerted campaign by conservative activists allied with the emerging religious right. Conservative lawyer and anti-ERA activist Phyllis Schlafly's fear-mongering cautioned crowds about what "women's libbers" might do to U.S. culture. Similarly, media mogul, religious broadcaster, political commentator, and one-time presidential candidate Reverend Pat Robertson warned that the ERA would lead women "to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians." *See*, *e.g.*, Virginia Just Became the 38th State to Pass the Equal Rights Amendment. Here's What to Know About the History of the ERA (Time, Jan. 15, 2020), https://time.com/5657997/equal-rights-amendment-history/; Time to Reconsider ERA (Christian Science Monitor, Aug. 17, 1993), https://www.csmonitor.com/1993/0817/17191.html.

followed by one each in 1975 and 1977, totaling 35 – three short of the 38 (three-fourths of 50) required by Article V.[14]

In fall of 1978, with the resolving clause's seven-year period soon to expire and still three states short of the necessary 38, Congress voted by simple majority to extend the period from March 21, 1979 to June 30, 1982. Although Article V does not give the President any role in the amendment process, President Jimmy Carter signed the extension legislation as a symbolic show of support for the ERA.[15]

June 30, 1982 came and went, however, and no more states ratified. In the meantime, between 1973 and 1979, five states – Nebraska, Tennessee, Idaho, Kentucky, and South Dakota – voted to rescind their ratifications. In 2021, North Dakota did the same.[16]

From the early 1980s into the early 1990s, women's rights continued to evolve through a combination of statutes and case law, at both the state and federal levels, in areas such as employment, personal finance, the family, and reproduction. In parallel, a group of ERA advocates devised a new legal strategy drawing on the facts surrounding the 27th Amendment (known as the "Congressional Pay Amendment" or the "Madison Amendment"[17]). By the time the Madison Amendment was fully ratified and added to the Constitution in 1992, it had been pending before the states for more than two centuries – nearly 203 years, to be exact. The ERA's several decades of dormancy were a mere blink of an eye compared to the pendency of the Madison Amendment.

In effect, the Madison Amendment served as a wake-up call for ERA advocates. Based on the Madison Amendment, ERA advocates reasoned that the ERA's first 35 state ratifications remained "live," notwithstanding the passage of time. Pursuant to their newly-conceived "three-state strategy," ERA advocates turned their attention to campaigning for ratification by three more states, to bring the total to 38.[18]

In January of 2017, a robust resurgence of women's rights advocacy began, with Women's Marches worldwide (founded by Tamika Mallory, Carmen Perez, and Linda

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[14] *See* Equal Rights Amendment – Proposed March 22, 1972: List of State Ratification Actions (National Archives, March 24, 2020) (providing a list of ratifying states, with dates of ratification) ("Archives List"), https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf.

[15] *See* H.J. Res. 638, 95th Cong. (1978), https://www.congress.gov/bill/95th-congress/house-joint-resolution/638; President Jimmy Carter, Remarks on Signing H.J. Res. 638 - The Equal Rights Amendment (Oct. 20, 1978) (Univ. of Cal., Santa Barbara: The American Presidency Project), https://www.presidency.ucsb.edu/documents/remarks-signing-hj-res-638-the-equal-rights-amendment.

[16] *See* Archives List (identifying five purported rescissions); House rescinds ratification of Equal Rights Amendment (Associated Press, March 20, 2021), https://apnews.com/general-news-2aee248b867d09f0758776a25b3ac620.

[17] The nickname for the 27th Amendment — the "Madison Amendment" — reflects the fact that founding father James Madison authored the amendment. For a general history, *see* Across Two Centuries, a Founder Updates the Constitution (Wash. Post, May 14, 1992), https://www.washingtonpost.com/wp-srv/politics/special/pay/stories/co051492.htm.

[18] *See* A. Held, *et al.*, The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 Wm. & Mary J. Women & L. 113 (1997), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1271&context=wmjowl.

Sarsour) and the #MeToo movement (founded by Tarana Burke) casting a spotlight on sexual harassment and assault.[19] On March 22, 2017, after years of advocacy and activism on behalf of the ERA, and with a high proportion of women in its legislature, Nevada became the 36th state to ratify the ERA. Next, on May 30, 2018, with strong bipartisan support, Illinois became the 37th state to ratify the amendment. Then, in fall of 2019, the ERA was effectively on the ballot for the Virginia General Assembly, in its 400th year of existence. With its first woman speaker of the House and with diverse legislative leadership in support of the amendment, on January 27, 2020, Virginia became the 38th and final state needed to ratify the ERA.[20]

Like the 35 states that acted before they did, Nevada, Illinois, and Virginia provided the National Archivist with official notice of their ratifications.[21] Nevertheless, the ERA has not yet been published and certified pursuant to the statutory mandate of 1 U.S.C. § 106b.

IV. Current Legal Issues in Contention

There are two legal issues relating to the status of the ERA. The first issue concerns the timing of the ERA's ratification by the 38 states. The second issue concerns the purported rescissions of ratification by six of those states. In light of these two issues, the National Archivist has not yet undertaken publication and certification of the ERA pursuant to 1 U.S.C. § 106b.

A. The Timing of Ratifications

Three of the requisite three-fourths of the states (38 states) – Nevada (2017), Illinois (2018), and Virginia (2020) – ratified the Amendment well after the time specified in the ERA's "resolving clause" (as extended), with full ratification of the Amendment spanning 48 years, from 1972 to 2020. Focusing principally on the "resolving clause" and the legislative language in that clause concerning the timing of ratification, ERA opponents contend that the three most recent and any future ratifications by states are too late to "count" towards the 38 states required by Article V. But, in fact, there are no timing issues that preclude recognition of the ERA as the 28th Amendment to the Constitution.

1. The Constitution Does Not Limit the Time for State Ratifications

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[19] Scholars refer to these events as a part of an intersectional "fourth wave" of feminism. *See, e.g.,* K. Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, Stanford L. Rev. 1241 (Jul. 1991), https://www.jstor.org/stable/1229039; *see also* J. Baumgardner & A. Richards, Manifesta: Young Women, Feminism, and the Future (Farrar, Straus, & Giroux 2000). *Cf.* M. Jones, Vanguard: How Black Women Broke Barriers, Won the Vote, and Insisted on Equality for All (Basic Books 2020).

[20] *See generally* J. Suk, Save the Equal Rights Amendment (Boston Review, Oct. 8, 2020), https://www.bostonreview[.]net/articles/save-equal-rights-amendment/; *see also* C. Daniels, A new wave of Black women are leading the fight for the ERA (The Hill, Mar. 31, 2023), https://thehill.com/policy/3926296-a-new-wave-of-black-women-are-leading-the-fight-for-the-era/.

[21] *See* Archives List.

Although there are many Constitutional provisions that address timing, the Constitution includes no provision that limits the time for ratification of Constitutional amendments by the states.[22] In a 1992 opinion on the subject of the 27th (Madison) Amendment (which was ratified only after a record 200+ years), the U.S. Department of Justice's Office of Legal Counsel ("OLC") underscored this fundamental point, noting that "the plain language of Article V contains no time limit on the ratification process."[23]

ERA opponents concede that the text of the Constitution includes no limit on the time for state ratification of a Constitutional amendment. Instead, they point to the "resolving clause" in Congress's 1972 Joint Resolution, which included legislative language providing that the proposed amendment "shall be valid as to all intents and purposes when ratified . . . *within seven years*" (emphasis added) – *i.e.*, by March 21, 1979, later extended to June 30, 1982. Significantly, however, Congress has no power to *unilaterally* add a ratification time limit to Article V. Congress cannot impose a ratification time limit on

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[22] For example, the Constitution provides for the age, length of citizenship, and terms for national officeholders (Art. I, §§ 2 & 3; Art. II, § 1); the conduct of a census every 10 years (Art. I, §§ 2 & 9); the allowance of 10 days for Presidential consideration of legislation (Art. I, § 7, Cl. 2); the time for choosing electors and receiving their votes (Art. II, § 1); and 1808 as the year when amendments could first be proposed to prohibit the slave trade (Art. V). *See* Testimony of Kathleen M. Sullivan, U.S. Senate Committee on the Judiciary Hearing on Congress's Role in Ratifying the Equal Rights Amendment (Feb. 28, 2023) (observing that "[o]f course, the Framers knew how to impose deadlines or otherwise allow for time limits when they wished to") ("K. Sullivan 2023 Senate Judiciary Committee Testimony"), https://www.judiciary.senate.gov/imo/media/doc/2023-02-28%20-%20Testimony%20-%20Sullivan.pdf; Brief of Constitutional Law Scholars Catherine McKinnon, Paul Brest, Rebecca Brown, Kimberle Crenshaw, Martha Field, Lawrence Lessig, Deborah Jones Merritt, Martha Minow, Jessica Neuwirth, Margaret Jane Radin, Dorothy Roberts, Diane Rosenfeld, Jane S. Schacter, Geoffrey R. Stone, Gerald Torres, and Laurence Tribe as amici curiae in support of Plaintiffs-Appellants and Reversal, at 13, filed in Virginia v. Ferriero (D.C. Cir.), Court No. 21-5096 (Jan. 10, 2022) ("Constitutional Scholars Brief"), https://voteequality.us/wp-content/uploads/2022/01/Amicus-Brief_Constitutional-Law-Professors_MacKinnon-et-al.pdf.

[23] *See* Congressional Pay Amendment, 16 Op. O.L.C. 85, 88 (May 13, 1992) (explaining: "That the ratification of the Congressional Pay Amendment has stretched across more than 200 years is not relevant under the straightforward language of Article V. Article V contains no time limits for ratification. It provides simply that amendments 'shall be valid to all Intents and Purposes . . . when ratified.' Thus, the plain language of Article V contains no time limit on the ratification process.") ("1992 OLC Opinion"), https://www.justice.gov/olc/opinion/congressional-pay-amendment; *see also*, *e.g.*, Report No. 116-378, re: H.J. Res. 79, Removing the Deadline for the Ratification of the Equal Rights Amendment (Jan. 16, 2020) (quoting Constitutional scholar Kathleen M. Sullivan: "Article V places no time limits on the States' ratification process.") ("2020 House Report"), https://www.govinfo.gov/content/pkg/CRPT-116hrpt378/html/CRPT-116hrpt378.htm; *see generally* The Equal Rights Amendment: Achieving Constitutional Equality for All, Hearing before U.S. House of Representatives Committee on Oversight & Reform, 117th Congress (Oct. 21, 2021), at 19—20, 50 (testimony of Victoria Nourse, emphasizing that Constitution imposes no limit on the time for ratification of an amendment and that Congress has the power to extend the time for ratification, "if necessary") ("2021 House Oversight Committee Hearing"), https://docs.house.gov/meetings/GO/GO00/20211021/114152/HHRG-117-GO00-Transcript-20211021.pdf; Written Testimony of John M. Harmon, Asst. Att'y Gen., Office of Legal Counsel, reprinted in Senate proceedings re: introduction of joint resolution "Extending the Deadline for Ratifying the ERA," 124 Cong. Rec., Part 11, 14065-74, 14065 (May 17, 1978) (concluding that "Congress does have the power to extend the ratification period for the ERA") ("Harmon Written Testimony"), *available at* https://www.congress.gov/bound-congressional-record/1978/05/17/senate-section.

the states except by amendment to the Constitution.[24] And the legislative language in the "resolving clause" on which the ERA opponents rely did not amend the Constitution.

Article V establishes that amending the Constitution requires ratification by three-quarters of the states. But the legislative language on timing at issue here *was not part of the text that Congress submitted to the states for a vote*, because that language was included only in the Joint Resolution's "resolving clause" – not in the language of the Amendment itself.[25] And ratification did not require the states to vote on the "resolving clause." Ratification required only that states vote on the text of the actual Amendment – *i.e.*, the three numbered sections set forth in the second part of the Joint Resolution, including the section numbered 1 (the operative section), which states 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."[26]

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[24] For a summary history of provisions concerning the timing of state ratification of Constitutional amendments, *see*, *e.g.*, Ratification of Amendments to the U.S. Constitution (Congressional Research Service ("CRS"), Sept. 30, 1997), https://www.everycrsreport.com/files/19970930_97-922GOV_ebded0a0c9f961ffabb21b4364d260b76a0b8d11.pdf; 2020 House Report, at n.51; Constitutional Scholars Brief, at 16-17.

[25] The legislative language concerning the timing of ratification, which appears in the ERA's "resolving clause," is to be contrasted with numbered Section 3 which also concerns timing but appears in the text of the Amendment itself. Unlike the legislative language concerning the timing of ratification, which was never presented to or considered by the states, numbered Section 3 ("This amendment [the ERA] shall take effect two years after the date of ratification.") was a part of the Amendment that was submitted to the states for their consideration. Because the timing provision in Section 3 was ratified by 38 of them, that provision (like numbered Sections 1 and 2) is a part of the Constitution, in accordance with Article V.

[26] *See*, *e.g.*, Letter to Chair of the House Committee on Oversight and Reform from Hon. Russell Feingold, President of the American Constitution Society (March 21, 2022) ("[The resolving clause with the purported deadline] is not what the states ratified. If we look at the amendment itself, there is prefatory language, and then it says 'Article,' and there is Section 1, 2, and 3. That is what the states ratified, not the deadline. When taking up a proposed amendment, states 'have the opportunity to vote on any deadline in the text of an amendment [… and] thus bind themselves to the deadline constraint upon their ratification vote.' But states are afforded no such opportunity when the deadline appears in prefatory text on which the states cannot vote and therefore should not be bound by deadlines therein."), https://feminist.org/wp-content/uploads/2022/03/ERA-50th-Anniversary-Russ-Feingold-Letter.pdf; 2021 House Oversight Committee Hearing, at 19--20, 50 (testimony of Victoria Nourse, emphasizing that Constitution imposes no limit on the time for ratification of an amendment and that Congress has the power to extend the time for ratification, "if necessary").

Scholars and others highlight the fact that Congress had the option of placing the legislative language concerning the timing of ratification either in the "resolving clause" or in the text of the Amendment itself and chose the former. *See*, *e.g.,* 2020 House Report. The legislative language on the timing of ratification therefore has no binding force. As one group of Constitutional scholars recently explained, "Congress is free to specify a *desired* time period for ratification and to extend or lift that date, so long as the time period is not incorporated in the text of the amendment that is sent to the States. But such non-textual dates are best understood as advisory or hortatory rather than binding on the States or judicially enforceable. If the requisite number of States ratify within such time period, the amendment is valid. But if they do not, it does not follow that the amendment is dead." *See* Constitutional Scholars Brief, at 23. *Cf*. Harmon Written Testimony, at 14065 (proffering possible rationale for including time period for ratification in "proposing clause" of ERA: "By placing the time period in the proposing resolution rather than in the text of the amendment, the 92d Congress effectively decided that the proposal should remain viable for at least 7 years without barring a subsequent Congress from making a more informed judgment at a later time as to the reasonableness of the time period for ratification of the ERA.")

Because the legislative language concerning the timing of ratification was not incorporated into the Constitution as an amendment by the vote of three-fourths of the states, the timing of the ERA ratifications by Nevada, Illinois, and Virginia is of no moment. All three states validly ratified the ERA in accordance with Article V of the Constitution and must be counted towards the 38-state threshold.[27]

Although scholars emphasize that Constitutional amendments are effective immediately upon ratification by 38 states without any action by Congress or the Executive Branch, some members of Congress have – in the interests of clarification and expedience – proposed legislation declaring that the ERA is valid "having been ratified by the legislatures of three-fourths of the several States," without regard to any timing issues.[28] However, some ERA opponents contend that any Congressional action to extend or eliminate the legislative language on the timing of ratification would have had to occur no later than June 30, 1982.

In essence, the ERA opponents argue that today's Congress can take no action that affects the language in the resolving clause concerning the timing of ratification. But there is nothing in Article V that can be cited to support that view. Moreover, as the U.S. Department of Justice's Office of Legal Counsel ("OLC") has pointed out, one Congress

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[27] Based on an isolated, hundred-year-old case, Dillon v. Gloss, 56 U.S. 368 (1921), ERA opponents argue that Congress has the unilateral authority to impose a ratification time limit on the states – inside or outside the text of an amendment. Dillon does not stand for that proposition; it concerned the validity of the 18th Amendment (Prohibition), which was the first amendment to include a time limit. That time limit, however, appears in the text of the 18th Amendment. In the case of the ERA, the legislative language concerning the timing of ratification was only in the "resolving clause" of the 1972 Joint Resolution.
The question in Dillon was not congressional power. Congress there put its material change to the Constitution – a state ratification time limit – in the text of the 18th Amendment. Congress exercised a power it already has under Article V, which is the power to propose amendments. Rather, the question in Dillon was whether the Article V amending process could itself be amended, by adding a ratification time limit within the text of the 18th Amendment; and, if unconstitutional, whether that time limit nullified the entire 18th Amendment. The Supreme Court upheld the constitutionality of that amendment, including its *textual* time limit. This has no application to the ERA, where the legislative language concerning the timing of ratification appeared in the "resolving clause."

[28] *See*, *e.g.*, S.J. Res. 4 (Sen. Ben Cardin) (introduced Jan. 24, 2023) & H.J. Res. 25 (Rep. Pressley) (introduced Jan. 31, 2023) ("[N]otwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States."), https://www.congress.gov/bill/118th-congress/house-joint-resolution/25/text; S.J. Res. 39 (Sen. Kirsten Gillibrand) & H.J. Res. 82 (Reps. Cori Bush & Ayanna Pressley) (introduced July 27, 2023) ("A joint resolution expressing the sense of Congress that the article of amendment commonly known as the 'Equal Rights Amendment' has been validly ratified and is enforceable as the 28th Amendment to the Constitution of the United States, and the Archivist of the United States must certify and publish the Equal Rights Amendment as the 28th Amendment without delay.") ("S.J. Res. 39 (Sen. Gillibrand) & H.J. Res. 82 (Reps. Bush & Pressley)"), https://www.congress.gov/bill/118th-congress/senate-joint-resolution/39/text.

As leading Constitutional scholars point out, legislation like the pending joint resolutions "provide an alternative path to removing any doubt that the ERA is valid for all intents and purposes and part of the Constitution." *See* Constitutional Scholars Brief, at 4. Nothing in this Report should be construed to question Congress's ability to follow this alternative path to recognizing the ERA as a valid part of the Constitution.

(*e.g.*, the 1972 Congress or the 1979 Congress) has no constitutional authority to bind a subsequent Congress.[29]

Some opponents of the ERA also argue that any legislation to extend or eliminate the June 30, 1982 date must be passed by two-thirds of each house of Congress (rather than a simple majority), because that date is an extension of the March 21, 1979 date established by Congress' original 1972 Joint Resolution, which similarly required a two-thirds majority, per Article V of the U.S. Constitution.

Crucially, however, the legislative language at issue was not in the text of the proposed amendment itself. And it is the text of the proposed amendment itself that required a two-thirds majority vote of Congress. The legislative language at issue was in the "resolving clause," which, like most Congressional action, requires only a simple majority. Significantly, when Congress adopted H.J. Res. 638 in 1979 to substitute June 30, 1982 for the ERA's original legislative language on the timing of ratification, Congress did so by a simple majority.[30]

2. The Constitution Includes No Requirement of "Contemporaneity"

Quite apart from the specific language in the ERA concerning the timing of ratification, some ERA opponents contend more generally that the ratifications by Nevada, Illinois, and Virginia are ineffective because they were not sufficiently "contemporaneous" with Congress' adoption of the ERA and the ratifications by the first 35 states. According to this theory, in the time that has elapsed since Congress's adoption of the Joint Resolution and the 35 states' ratifications, the ERA has grown "stale" and can no longer be assumed to reflect the will of the people.

[29] *See*, *e.g.*, 2020 House Report (quoting testimony of Kathleen M. Sullivan before House Judiciary Committee's Subcommittee on the Constitution, stating that "Congress indisputably has the power to clear away any deadline" and "[t]he 1972 or 1979 Congress has no constitutional authority to bind later Congresses" to their views concerning the timing for states' ratification of the ERA, and explaining that "although the decision to change a ratification deadline set by a prior Congress should not be taken lightly, the present Congress must be free to make its own judgment about whether a proposed amendment has 'lost its vitality through lapse of time.").

[30] *See*, *e.g.*, 2020 House Report; K. Sullivan 2023 Senate Judiciary Committee Testimony; U.S. Department of Justice Office of Legal Counsel ("OLC") Memorandum for Hon. Robert J. Lipshutz, Counsel to the President, re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment (Oct. 31, 1977) (clarifying that passage of a congressional resolution requires only a simple majority: "The suggestion that two-thirds of both Houses must concur in order to decide whether a reasonable time has passed, we think, is incompatible with the Constitution's pattern of narrowly and carefully defined super-majority requirements."), reprinted in Senate proceedings re: introduction of joint resolution "Extending the Deadline for Ratifying the ERA," 124 Cong. Rec., Part 11, 14065-74, 14069 (May 17, 1978), https://www.congress.gov/bound-congressional-record/1978/05/17/senate-section; Harmon Written Testimony, at 14065 (concluding that, to extend the time period set forth in the ERA's "proposing clause," "a two-thirds vote is not required" and "a simple majority is constitutionally sufficient").

In fact, however, the ERA enjoys enormous popular support today.[31] Moreover, as a matter of law, there is no "contemporaneity" requirement in the Constitution.[32]

Historic precedent further lays to rest any suggestion that concerns of "contemporaneity" preclude recognition of the ERA.[33] In particular, the 27th (Madison) Amendment remained pending for ratification by the states for a period of nearly 203 years. Congress sent that amendment out to the states in 1789, but ratification by the 38th state – Michigan – did not come until May 7, 1992.[34] Notwithstanding the extraordinary timing, the National Archivist had no hesitation in promptly publishing and certifying the Madison Amendment as part of the Constitution.[35]

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[31] *See*, *e.g.*, AP-NORC, The Equal Rights Amendment and Discrimination against Women, Jan. 2020 (reporting that roughly 3 in 4 Americans support the ERA), https://apnorc.org/projects/the-equal-rights-amendment-and-discrimination-against-women/.

[32] *See*, e.*g.*, K. Sullivan 2023 Senate Judiciary Committee Testimony; Constitutional Scholars Brief, at 18-22; 2020 House Report (quoting testimony of Kathleen M. Sullivan before House Judiciary Committee's Subcommittee on the Constitution, stating that "[n]othing in Article V says that ratification must be . . . contemporaneous, or bounded within any particular time frame," and citing Coleman v. Miller, 307 U.S. 433 (1939), for the proposition that Congress "has the final determination whether by lapse of time . . . [a proposed amendment] ha[s] lost its vitality prior to the required ratifications").

[33] *See*, *e.g.*, M. Kalfus, Why Time Limits on the Ratification of Constitutional Amendments Violate Article V, 66 U. Chi. L. Rev. 437 (1999), https://chicagounbound.uchicago.edu/uclrev/vol66/iss2/3/.

[34] *See generally* R. Bernstein, The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 Fordham L. Rev. 497, 498 (1992) ("On May 7, 1992, the American people discovered that they had amended the Constitution almost in a fit of absent-mindedness.") ("The Sleeper Wakes"), https://ir.lawnet.fordham.edu/flr/vol61/iss3/1/.

[35] A 1992 OLC Opinion concluded that, "As the Amendment was proposed by the requisite majorities of both Houses of Congress, and has been ratified by the legislatures of three-fourths of the States, it has met all of the requirements for adoption set forth in Article V." *See* 1992 OLC Opinion, at 86. The National Archivist certified the ratification on May 18, 1992, and, the following day, an announcement that the amendment had become part of the U.S. Constitution was published in the Federal Register. *See* A Record-Setting Amendment (U.S. National Archives, Apr. 11, 2016), https://prologue.blogs.archives.gov/2016/04/11/a-record-setting-amendment/; D. Wilson & L. Sales, Stop Making Women's Equality a Political Question Mark (Ms. Mag., Dec. 20, 2022), https://msmagazine.com/2022/12/20/equal-rights-amendment/. After the fact, on May 20, 1992, Congress declared that there was a new 27th Amendment. *See* S. Con. Res. 120, 102d Cong. (1992), https://www.congress.gov/bill/102nd-congress/senate-concurrent-resolution/120/text; H. Con. Res. 320, 102d Cong. (1992), https://www.congress.gov/bill/102nd-congress/house-concurrent-resolution/320/text. Article V does not require this third step – of Congressional action – prior to recognition and implementation of an amendment, but Congressional action can amplify the message that an amendment is done. *See*, *e.g.*, L. Coberly, Congress Can and Should Take Action on the ERA (American Constitution Society, Feb. 11, 2020), https://www.acslaw.org/expertforum/congress-can-and-should-take-action-on-the-era/; Constitutional Scholars Brief, at 12-13, 14.

The 27th (Madison) Amendment and its curious, protracted history are in certain respects closely intertwined with the ERA. The Madison Amendment was ratified by six states between 1789 and 1791, but then lay dormant for two full centuries. The campaign that eventually led to the Madison Amendment's inclusion as part of the Constitution in 1992 began as a 1982 college research paper on the ratification of the ERA. *See*, *e.g.*, Underestimated but Undeterred: The 27th Amendment and the Power of Tenacious Citizenship, PS: Political Science & Politics, Vol. 56, 158, 159-62 (Jan. 2023), https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/underestimated-but-undeterred-the-27th-amendment-and-the-power-of-tenacious-citizenship/1912F2DC90242C6A484D340B83437E4B; 100 Years on, the ERA Rises from the Ashes (ABA Commission on Women in the Profession/Perspectives, March 2020),

The ERA's pendency of 48 years pales by comparison to the nearly 203 years of the Madison Amendment and is no impediment to the recognition of the ERA as the 28th Amendment to the Constitution.

B. Purported Rescissions of Ratification

In addition to ERA opponents' arguments focusing on timing, some opponents also assert that the six states that purportedly rescinded their ratifications of the ERA – Nebraska, Tennessee, Idaho, Kentucky, South Dakota, and North Dakota – should not "count" towards the 38 states required under Article V of the Constitution.

As leading Constitutional scholars explain, however, because there is no provision for rescission of a ratification in the Constitution, the six purported rescissions of the ERA are legally null. Article V refers to ratification but says nothing about rescission, and there is no implied power to rescind.[36] The history of the Constitution bears out this result. James Madison dismissed the notion of "conditional" ratification, emphasizing that ratification is "*in toto*, and *for ever*."[37] Indeed, the very definition of "ratification" bars revocations.[38]

Uniform past practice stretching back more than 150 years similarly compels rejection of the purported rescissions. In three prior cases, states that had ratified an amendment subsequently voted to rescind. Specifically, after ratifying the 14th Amendment, Ohio and New Jersey voted to rescind. Similarly, after ratifying the 15th Amendment, New York voted to rescind. And, after ratifying the 19th Amendment, Tennessee voted to rescind. Consistently, in each instance, the rescissions were ignored, and the states were treated as having ratified the respective amendments.[39] So too the rescissions at issue here must

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https://www.americanbar.org/groups/diversity/women/publications/perspectives/2020/march/100-years-the-era-rises-the-ashes/?login; *see also, e.g.*, The Sleeper Wakes at 532, 536-42.

[36] *See generally*, *e.g.*, 2020 House Report (citing, *inter alia*, H. Rep. No. 95-1405 (1978)); Constitutional Scholars Brief, at 22; Harmon Written Testimony, at 14065 (concluding, *inter alia*, that "a State which has once ratified an amendment is powerless to rescind that ratification" and that "Congress cannot give to the States a right to rescind by any means short of amending the Constitution"); M. Kallen, *et al.*, "In Toto" and "For Ever": Why States Cannot Rescind Ratification of Constitutional Amendments, 38 Journal of Law & Politics 27 (Winter 2023) ("'In Toto' and 'For Ever'"), https://nmcdn.io/e186d21f8c7946a19faed23c3da2f0da/bec921723f6f43b1965ed273674fa252/files/Kallen--amp--Maloney_Original.pdf; D. Wright, Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifi*cations*, 12 U.C. Irvine L. Rev. 1019, 1072-77 (2022), https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1565&context=ucilr.

[37] *See* Letter to Alexander Hamilton from James Madison (July 20, 1788), https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0086; *see also*, *e.g.*, "In Toto" and "For Ever," at 30-31.

[38] *See, e.g.,* Bouvier Law Dictionary (6th ed. 1856, Vol II), at 421 (Ratification: "As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act."), https://www.constitution.org/1-Constitution/bouv/bouvier_r.htm.

[39] *See*, *e.g.*, Constitutional Scholars Brief, at 22-23; *see also* "In Toto" and "For Ever," at 33-37; D. Wright, "An Atrocious Way to Run a Constitution": The Destabilizing Effects of Constitutional Amendment Rescissions, 59 Duq. L. Rev. 12, 33-37 (2021), https://dsc.duq.edu/dlr/vol59/iss1/4.

be ignored and the six states – Nebraska, Tennessee, Idaho, Kentucky, South Dakota, and North Dakota – must be "counted" as having ratified the ERA.

C. Publication and Certification of the ERA

After a constitutional amendment has been ratified by three-fourths of the states, 1 U.S.C. § 106b instructs the National Archivist to publish and certify the amendment "as a part of the Constitution of the United States."[40] However, although 38 states have submitted "official notice" of their ratification of the ERA, the Archivist has not yet undertaken publication and certification pursuant to the statute.[41]

Raising arguments such as those outlined above concerning the timing of the states' ratifications and the purported rescissions of ratification by some, ERA opponents oppose publication and certification by the Archivist.[42] However, as Constitutional scholars point out, when 38 states have ratified an amendment, that amendment automatically becomes a part of the Constitution, whether or not the amendment is so published and certified. The Archivist has no authority to judge the validity of ratifications by the states.[43] The Archivist's role in the Constitutional amendment process is purely "ministerial."

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[40] As set forth in 1 U.S.C. § 106b: "Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." *Cf.* S.J. Res. 39 (Sen. Gillibrand) & H.J. Res. 82 (Reps. Bush & Pressley) (joint resolution "[e]xpressing the sense of Congress that . . . the Archivist of the United States must certify and publish the Equal Rights Amendment as the 28th Amendment without delay.").

[41] Some ERA opponents cite Illinois v. Ferreiro, but nothing in that case precludes the Archivist from publishing and certifying the ERA as the 28th Amendment. *See* Ferreiro, 60 F.4th 704 (D.C. Cir. 2023). In that *mandamus* action, two of the states that most recently ratified the ERA sought to compel the Archivist to fulfill his ministerial duty to publish and certify the Amendment. The D.C. Circuit ultimately decided the case on narrow procedural grounds. The court reached no conclusion on the substantive merits as to the Archivist's obligation, but – rather – found only that the duty was not so "clear and undisputable" as to warrant the "drastic" and "extraordinary" remedy of *mandamus* relief. *See generally* D. Pozen & T. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317 (2021) (discussing implications of Article V's "ambiguity" for judging the validity of contested amendments), https://scholarship.law.columbia.edu/faculty_scholarship/3161/.

[42] *See*, *e.g.*, 2020 OLC Opinion.

[43] *See*, *e.g.*, Constitutional Amendment Process (National Archives/Office of the Federal Register) (stating that "[a] proposed amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the States"; and, further, explaining that the Archivist merely "examines ratification documents for facial legal sufficiency and an authenticating signature" and "does not make any substantive determinations as to the validity of State ratification actions") ("Constitutional Amendment Process"), https://www.archives.gov/federal-register/constitution; *see also*, *e.g.*, Dillon v. Gloss, 56 U.S. 368 (1921) (explaining, *inter alia*, that an amendment is added to the Constitution as soon as it satisfies Article V, and that publication affects neither the date on which the amendment is considered added, nor when it becomes legally effective); Leser v. Garnett, 258 U.S. 130 (1922) (explaining that the duty to publish is automatic, ministerial); NARA Press Statement on the Equal Rights Amendment (National Archives & Records Administration ("NARA"), Jan. 8, 2020) (describing the Archivist's role as "ministerial"), https://www.archives.gov/press/press-releases-4; Letter to Rep. Carolyn Maloney from National Archivist (Oct. 25, 2012) (confirming automatic, ministerial nature of Archivist's role), https://voteequality.files.wordpress.com/2020/07/archivist-letter-to-maloney-2012.pdf: 2021 House

Because the act of publication and certification is purely ministerial, there may be little or no *legal* significance to the fact that the ERA has not yet been officially published and certified. However, the *practical* consequences of that are very real. Publication is legal evidence of the law;[44] and it serves notice to all branches of state and federal government for purposes of compliance, enforcement, adjudication, and further legislation. Publication carries great symbolic weight as official performance of public affirmation.[45] By establishing the ABA's support for the principle that time limits for ratification of Constitutional amendments are not consistent with Article V of the U.S. Constitution and the ABA's support for the principle that Article V does not permit a state to rescind its ratification, the resolution will support publication and certification of the ERA pursuant to 1 U.S.C. § 106b.

V. Conclusion

The Equal Rights Amendment was first introduced in Congress more than a century ago. A mere 24 words – "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," its recognition and implementation as law are long overdue.

Indeed, the United Nations recently highlighted the United States' failure to include in its Constitution "an explicit guarantee . . . against sex- and gender-based discrimination," and expressly called for the inclusion of the ERA in the U.S. Constitution.[46] Today, a full 85% of the 194 U.N. member states have provisions in their constitutions explicitly addressing gender equality, and 115 have provisions prohibiting discrimination on the basis of sex.[47]

The U.S. stands alone in the world, with "the only major written constitution . . . that lacks a provision declaring the equality of the sexes." The U.S. is a global outlier.[48]

Oversight Committee Hearing, at 20, 29-30 (testimony of Victoria Nourse, criticizing 2020 opinion of the Office of Legal Counsel ("OLC") on timing of ratification and Archivist's duty to publish and certify the ERA, and urging that the opinion be withdrawn).

[44] *See* 1 U.S.C. § 112; Constitutional Amendment Process (stating that the Archivist's certification "serves as official notice to the Congress and to the Nation that the amendment process has been completed").

[45] *See*, *e.g.*, Amicus Curiae Brief of the ERA Coalition *et al*. in Support of Reversal, at 32-34, filed in Virginia v. Ferriero (D.C. Cir), Court No. 21-5096 (Jan. 10, 2022), https://eracoalition.org/uploads/2023/11/Amicus-Brief-Filed.pdf.

[46] *See* CCPR/C/USA/CO/5: Concluding observations on the fifth periodic report of the United States of America, at paras.18-19 (U.N. Human Rights Committee, Dec. 7, 2023), https://www.ohchr.org/en/documents/concluding-observations/ccprcusaco5-concluding-observations-fifth-periodic-report-united; *see also* I Need the ERA Because . . . . (Equality Now, March 8, 2024 (arguing that, without constitutional sexual equality, the U.S. is in breach of international law), https://equalitynow.org/resource/i-need-the-era-because-international-law/

[47] J. Heymann, *et al*., Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide, at 254 (Univ. of Cal. Pr. 2020), https://www.jstor.org/stable/j.ctv1f8854w.

[48] Testimony of Kathleen M. Sullivan to the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties Hearing on the Equal Rights Amendment (April 30, 2019) (emphasizing that the absence of a Constitutional provision recognizing the equality of the

The ABA is already on record supporting the ERA, with resolutions adopted in 1972, 1974, and 2016. However, as evidenced by the U.S. Supreme Court's decision in Dobbs and other recent developments, the need for the ERA is greater now than ever before.

The American Bar Association prides itself as "the largest voluntary association of lawyers in the world" and "the national voice of the legal profession."[49] Particularly in this momentous Presidential election year, with women's rights on the ballot, the ABA must be prepared to speak on the procedural issues that continue to be raised as to recognition of the ERA as the 28th Amendment to the U.S. Constitution.

We need the ERA – *now*. Before it is too late.

Respectfully submitted,

Karol Corbin Walker, Chair
Commission on Women in the Profession

August 2024

sexes "is a national embarrassment to the world's leading democracy," characterizing the U.S. as "an outlier among all the major industrial democracies of the world in failing to have an express guarantee in its written constitution that men and women are equal under the law," and stating that "[g]iven the vital role the U.S. Constitution has played in inspiring and informing the written constitutions of other nations, it is a national embarrassment that the other democratic nations of the world are so far ahead of ours in providing for sex equality in their constitutions."), https://docs.house.gov/meetings/JU/JU10/20190430/109330/HHRG-116-JU10-Wstate-SullivanK-20190430.pdf; Constitutional Scholars Brief, at 5-6; 2021 House Oversight Committee Hearing, at 23 (testimony of Victoria Nourse, underscoring the United States' status as a global outlier vis-à-vis constitutional protection against gender-based discrimination); *see also* C. Russell, The American Woman Who Wrote Equal Rights Into Japan's Constitution (The Atlantic, Jan. 5, 2013), https://www.theatlantic.com/sexes/archive/2013/01/the-american-woman-who-wrote-equal-rights-into-japans-constitution/266856/.

[49] *See*, *e.g.*, Statement of ABA President Mary Smith RE: International Women's Day (Office of the ABA President, Mar. 8, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/03/aba-president-statement-re-intl-womens-day/?login.

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GENERAL INFORMATION FORM

Submitting Entity: Commission on Women in the Profession

Submitted By: Chair, Karol Corbin Walker

1. Summary of the Resolution(s).

   This Resolution urges federal, state, local, territorial, and tribal governments to implement the Equal Rights Amendment ("ERA") to the United States Constitution ("Constitution"), in light of the ERA's ratification by Nevada, Illinois, and Virginia, bringing the number of ratifying states to 38, in accordance with Article V of the Constitution; and, further, urges all bar associations and the legal community as a whole to implement the ERA.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1- Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   This Resolution will serve all four of the ABA's goals, but primarily it will allow the ABA to more substantively advocate for the ERA as a key basis to eliminate gender bias and advance the Rule of Law.

3. Approval by Submitting Entity.

   The Commission on Women in the Profession voted to sponsor at its April 8, 2024 meeting.

4. Has this or a similar resolution been submitted to the House or Board previously?

   Resolutions supporting the ERA were passed in 1972, 1974 and 2016; the latter committed the ABA to "support and take up the pursuit of ratification". This Resolution differs in that, having been fully ratified, the ERA now requires implementation as the 28th Amendment.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   See answers to #2 and #4.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

   Not applicable.

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7. Status of Legislation. (If applicable)

   S.J. Res. 4 (removing the deadline for ratification of the ERA, and affirming that — having been ratified by 3/4 of the states — the ERA is part of the U.S. Constitution)

   H.J. Res. 25 (same as S.J. Res. 4, above)

   S.J. Res. 31 (expressing sense of Congress that the ERA has been validly ratified and is enforceable as the 28th Amendment to the U.S. Constitution, and instructing National Archivist to certify and publish the ERA as the 28th Amendment to the U.S. Constitution)

   H.J. Res. 82 (same as S.J. Res. 31, above)

   S. Res. 107 (recognizing [purported] expiration of ERA proposed by Congress in March 1972, and asserting that Congress has no authority to modify a resolution proposing a constitutional amendment after the amendment has been submitted to the states or after the amendment has expired)

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   - Include recognition of the ERA as an ABA Legislative "Priority Issue" (e.g., for lobbying/advocacy efforts as part of ABA Day on Capitol Hill).
   - Issue ABA Presidential Statements (including references in, e.g., statements marking Women's History Month and International Women's Day), as well as statements on pending legislation, and public remarks (speeches, etc.).
   - Write letters to Congress and provide Congressional testimony.
   - Write letters to the Executive Branch—including the President and Vice President, Attorney General, and National Archivist (e.g., urging the Administration to publish, without delay, the ERA as the 28th Amendment).
   - File briefs with the U.S. Supreme Court and Courts of Appeals.
   - Advocate through appropriate UN entities.
   - Write op-eds and letters to the editor.
   - Sign joint petitions and joint statements.
   - Recommend federal and state audits of laws.
   - Provide Continuing Legal Education.
   - Educate the public.

9. Cost to the Association. (Both direct and indirect costs)

   The ABA would not incur any direct costs in adopting these resolutions, but the costs associated with advocacy would be prioritized according to the Board of Governors funding priorities and the GAO's budget.

10. Disclosure of Interest. (If applicable)

    Not applicable.

11. Referrals (List ABA entities and use proper names. For a list of all entities click here.)

Standing Committees
- Standing Committee on Armed Forces Law
- Standing Committee on Continuing Legal Education
- Standing Committee on Delivery of Legal Services
- Standing Committee on Election Law
- Standing Committee on Ethics and Professional Responsibility
- Standing Committee on Federal Judiciary
- Standing Committee on Gun Violence
- Standing Committee on Law and National Security
- Standing Committee on Lawyers' Professional Liability
- Standing Committee on Legal Aid and Indigent Defense
- Standing Committee on Legal Assistance for Military Personnel
- Standing Committee on Pro Bono and Public Service
- Standing Committee on Professional Regulation
- Standing Committee on Professionalism
- Standing Committee on Public Education

Special Committees and Commissions
- Commission on the American Jury
- Center for Professional Responsibility Coordinating Council
- Center on Children and the Law
- Commission on Cornerstones of Democracy
- Coordinating Council for the Center for Professional Responsibility
- Commission on Disability Rights
- Center for Diversity and Inclusion
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Commission on Law and Aging
- Commission on Lawyer Assistance Programs
- National Conference of Lawyers and Certified Public Accountants
- Racial and Ethnic Diversity in the Education Pipeline Council
- Commission on Racial and Ethnic Diversity in the Profession
- Coalition on Racial and Ethnic Justice
- Special Committee on Rule of Law Initiative

- Commission on Sexual Orientation and Gender Identity
- Commission on Youth at Risk

Sections, Division and Forums

- Section of Business Law
- Section of Criminal Justice
- Section of Dispute Resolution
- Section of Family Law
- Government and Public Sector Lawyers Division
- Section of Health Law
- Judicial Division
- Appellate Judges Conference
- Lawyers Conference
- National Conference of the Administrative Law Judiciary
- National Conference of Federal Trial Judges
- National Conference of Specialized Court Judges
- National Conference of State Trial Judges
- Labor and Employment Law
- Law Practice Division
- Law Student Division
- Section of Legal Education and Admissions to the Bar
- Section of Litigation
- Section of Science & Technology Law
- Senior Lawyers Division
- Solo, Small Firm and General Practice Division
- Section of State and Local Government Law
- Young Lawyers Division
- Forum on Affordable Housing and Community Development
- Forum on Communications Law
- Forum on Construction Law
- Forum on Entertainment and Sports Industries

Affiliated Organizations

- American Immigration Lawyers Association
- American Law Institute
- Association of American Law Schools
- Conference of Chief Justices
- Federal Bar Association
- Federal Circuit Bar Association
- Hispanic National Bar Association
- Judge Advocates Association
- NABE – The Association for Bar Professionals
- National Association of Women Judges
- National Association of Women Lawyers
- National Bar Association
- National District Attorneys Association

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- National Legal Aid and Defender Association
- National Native American Bar Association
- National Organization of Bar Counsel

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

    Deena Hurwitz 434-962-7170 drhurwitz22@gmail.com
    Judge Delissa Ridgway 646-251-3154 delissa.ridgway@gmail.com

13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

    Karol Corbin Walker
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

   This Resolution urges federal, state, local, territorial, and tribal governments to implement the Equal Rights Amendment to the United States Constitution, in light of the ERA's ratification by Nevada, Illinois, and Virginia, bringing the number of ratifying states to 38, in accordance with Article V of the Constitution; and, further, urges all bar associations and the legal community as a whole to implement the ERA.

2. Summary of the issue that the resolution addresses.

   The Equal Rights Amendment has met the requirements of Article V of the Constitution to be the 28th Amendment, yet it has not been officially published by the National Archives, despite a ministerial duty under 1 U.S.C. § 106b. Nor has it been implemented by the various branches of government.

3. Please explain how the proposed policy position will address the issue.

   Adoption of this resolution would mobilize the nation's largest legal organization and activate the state, county, and local bar associations nationwide, to pressure public officials to implement the ERA as the 28th Amendment. As expressed in the Executive Summary accompanying ABA Resolution 16M10B regarding the ERA: "Through a chorus of voices in the legal profession the mission of advancing equality under the law can be fulfilled."

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

   Some believe that Congress has unilateral constitutional authority to control the time for state ratifications, and/or that states can rescind their prior ratification of constitutional amendments.