

Date of Hearing: August 4, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SCR 92 (Leyva) – As Introduced March 30, 2022

SENATE VOTE: 29-1

SUBJECT: THE EQUAL RIGHTS AMENDMENT: CALIFORNIA LAW REVISION
COMMISSION: STUDY

KEY ISSUE: SHOULD THE CALIFORNIA LAW REVISION COMMISSION UNDERTAKE A STUDY TO DETERMINE WHAT CHANGES ARE NECESSARY IN CALIFORNIA LAW TO ENSURE THAT THE CODES ARE CONSISTENT WITH THE PROVISIONS OF THE FEDERAL EQUAL RIGHTS AMENDMENT?

SYNOPSIS

This resolution directs the California Law Revision Commission to study and report to the Legislature about any statutory changes necessary for the state to implement the federal Equal Rights Amendment. The Equal Rights Amendment was originally sent to the states for ratification in 1972 and, if ratified, would guarantee that the “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”

Although the Equal Rights Amendment finally reached the requisite number of states approving of its ratification in 2018, the Archivist of the United States has not yet certified the Amendment. Much of the confusion surrounding the status of the Equal Rights Amendment stems from congressionally created deadlines for its ratification and lingering issues regarding several states’ attempts to rescind their original support for the Equal Rights Amendment. The legal issues surrounding the potential certification of the Equal Rights Amendment aside, this resolution simply ensures that once these legal issues are resolved, California law will comply with the provisions of the Equal Rights Amendment. This resolution is co-sponsored by the California Women’s Law Center and the Feminist Majority who highlight California’s ongoing leadership on issues related to gender equality and the need to ensure that California’s laws are prepared when the validity of the Equal Rights Amendment is confirmed. This resolution has no known opposition.

SUMMARY: Directs the California Law Revision Commission to study, report on, and prepare recommended legislation to revise California law to reflect any changes necessary to implement the federal Equal Rights Amendment. Specifically, **this resolution:**

1) Declares the following:

- a) The United States House of Representatives passed the Equal Rights Amendment to the United States Constitution in 1971 by approval of at least two-thirds of that chamber;
- b) The United States Senate passed the Equal Rights Amendment in 1972 by approval of at least two-thirds of that chamber;

- c) California was among the earliest states to ratify the Equal Rights Amendment, doing so on November 13, 1972;
 - d) The Commonwealth of Virginia became the 38th state to ratify the Equal Rights Amendment on January 27, 2020;
 - e) Article 5 of the United States Constitution requires that any amendment thereto be approved by two-thirds of both chambers of the United States Congress and ratified by three-fourths of the states;
 - f) Upon Virginia's ratification, legislatures of three-fourths of the states duly ratified the Equal Rights Amendment;
 - g) Notwithstanding the United States archivist's failure to perform their ministerial duty to verify the duly made state ratifications, certify the Equal Rights Amendment, and publish notice thereof in the Federal Register and United States Statutes at Large, the Equal Rights Amendment has satisfied all requirements imposed by Article 5 of the United States Constitution;
 - h) The Equal Rights Amendment 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";
 - i) Section 3 of the Equal Rights Amendment states that the amendment will take effect two years after the date of its ratification;
 - j) House Resolution 891 in the 117th Congress, with 155 cosponsors, expresses the sense of that chamber that the Equal Rights Amendment is valid;
 - k) Senate Joint Resolution 1 in the 117th Congress to eliminate the ratification deadline stated solely in the preamble of the Equal Rights Amendment, which 50 additional Senators currently cosponsor;
 - l) House Joint Resolution 17 in the 117th Congress to eliminate the ratification deadline stated solely in the preamble of the Equal Rights Amendment, which the United States House of Representatives passed on March 17, 2021;
 - m) The Legislature deems it appropriate and necessary to undertake a comprehensive study of California law to identify any defects that prohibit compliance with the Equal Rights Amendment; and
 - n) The California Law Revision Commission is authorized to study topics set forth in the calendar contained in its report to the Governor and the Legislature that have been or are thereafter approved for study by concurrent resolution of the Legislature, and topics that have been referred to the Commission for study by concurrent resolution of the Legislature or by statute.
- 2) Resolves the following:
- a) The Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law, including common law, statutes of the state, and judicial decisions, to remedy defects related to

inclusion of discriminatory language on the basis of sex, and disparate impacts on the basis of sex upon enforcement thereof.

- b) In studying the matters specified in a), the Commission must request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations;
- c) The Commission's report must also include a list of further substantive issues that the Commission identifies in the course of its work as topics for future examination; and
- d) The Secretary of the Senate must transmit copies of this resolution to the author for appropriate distribution.

EXISTING LAW:

- 1) Provides that the United States Congress, whenever two-thirds of both houses deem it necessary, may propose amendments to the Constitution of the United States, which is to be valid to all intents and purposes, as part of the 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. (U.S. Const., Article V.)
- 2) Requires that whenever official notice is received at the United States 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 must forthwith cause the amendment to be published, with the Archivist's 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. (1 U.S.C. Section 106b.)
- 3) Provides that a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin. (Cal. Const. Article 1, Section 8.)
- 4) Establishes the California Law Revision Commission and tasks the Commission with doing the following:
 - a) Examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;
 - b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, or other learned bodies;
 - c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law; and
 - d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions. (Government Code Section 8289.)

FISCAL EFFECT: As currently in print this resolution is keyed fiscal.

COMMENTS: Originally proposed in 1972, the Equal Rights Amendment was finally ratified by the three-fourths of the states in the union in 2020, thus finally meeting the threshold necessary to become part of the United States Constitution. Although uncertainty surrounding timelines for ratification have resulted in the Archivist of the United States, thus far, refusing to certify the Equal Rights Amendment, the author argues that, in light of ongoing congressional efforts to remedy the timeline issue, California must act now to ensure that the laws of this state are consistent with the Equal Rights Amendment. Accordingly, this resolution directs the California Law Revision Commission to examine California law and recommend any changes necessary to ensure consistency with the Equal Rights Amendment. In support of this resolution the author states:

Section 3 of the Equal Rights Amendment states that the amendment will take effect two years after the date of its ratification. When—either through Congressional action or judicial decision—the validity of the Equal Rights Amendment is confirmed, it will immediately take effect according to the language of Section 3. States will be required to comply with the amendment’s prohibition on sex-based discrimination under the law.

Senate Concurrent Resolution 92 simply authorizes and requests that the California Law Revision Commission study, report on and prepare recommended legislation to revise California law to remedy any defects in its language or impact that discriminate on the basis of sex. While it is long overdue for the Equal Rights Amendment to be validated, we—as a Legislature—can and must take action now by preparing for it to be certified and make sure that California is ready to implement it as soon as possible.

Despite marginal gains in recent decades, women’s rights are under attack in the United States. Reflecting historic gender roles in Judeo-Christian societies, throughout American history women have generally been treated as second-class citizens in relation to their male counterparts. Notably, most women in the United States were ineligible to vote until just over 100 years ago, upon ratification of the Nineteenth Amendment to the United States Constitution in August of 1920. Even then, it was not until the Second World War that women began to have an even measurable presence in the American workforce.

Nonetheless, since the 1950s, women’s rights have made modest gains in the United States. In 1965, the United States Supreme Court upheld the right to access contraception without government interference. (*Griswold v. Connecticut* (1965) 381 U.S. 479.) However, the current radically conservative Supreme Court is now taking aim at these rights. In June 2022, the Supreme Court stripped American women of the right to obtain an abortion. (*Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. ___, 142 S. Ct 2228.) The *Dobbs* decision, and the Court’s focused on eliminating previously recognized civil rights, is particularly troublesome given that gender has never been a truly protected class under American law. Indeed, the United States Supreme Court has declined to consider gender a suspect class. Thus, sex discrimination claims have never been reviewed under the strict scrutiny test. Instead, the Supreme Court created an intermediate review level, called the heightened scrutiny test. Under this test, a statute will be upheld if it serves an important government objective and is closely related to the achievement of that objective. (*Craig v. Boren* (1976) 429 U.S. 190.) Notably, in the wake of the *Dobbs* decision, if gender-based discrimination were subject to strict scrutiny, the Supreme Court would likely be required to reevaluate the right to an abortion under a more stringent framework, thus potentially restoring some of the rights stripped away by *Dobbs*. (Alexandra Desantis, *Would the Equal Rights Amendment Enshrine Abortion Rights in the Constitution?* The National

Review (Feb. 17, 2020) *available at*, <https://www.nationalreview.com/2020/02/would-the-equal-rights-amendment-enshrine-abortion-rights-in-the-constitution/>.)

The Equal Rights Amendment was intended to provide women with equality under the law.

Shortly after securing the right for women to vote in 1920, women's rights advocates turned their attention to ensuring that women would be provided rights equal to those of men under the law. Accordingly, the Equal Rights Amendment was first introduced in 1923. After languishing in the halls of Congress for half a century, the Equal Rights Amendment was finally passed by Congress and sent to the states for ratification in 1972. The Equal Right Amendment simply 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. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." (H.R.J. Res. 208 (1972) 92d Cong., 2d Sess.)

As with all amendments to the United States Constitution, the Equal Rights Amendment required ratification by the legislatures of three-quarters of the states in the union. Initially many states easily enacted resolutions to approve the Equal Rights Amendment such that by 1977 the Amendment only needed an additional three states for approval of the Amendment in order for it to become law. However, as discussed below, a confluence of factors came together to bring the effort for ratification to a grinding halt. Not until recent efforts to revive the Equal Rights Amendment did it reach the requisite 38 states required for ratification.

The California Law Revision Commission serves to assist the Legislature in evaluating highly technical legal questions. The California Law Revision Commission was established in 1953. (AB 35 (Shaw), Chap. 1445, Stats. 1953; Gov. Code Section 8280.) The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature; and those that the Legislature assigns to the Commission directly, by statute or concurrent resolution. Once the Commission identifies a topic for study, the Legislature must authorize the Commission to commence the study via legislation or a resolution. Typically the Law Revision Commission produces reports on a half-dozen or more areas of the law for the Legislature to consider.

This resolution. Recognizing that the Equal Right Amendment may become federal law, this resolution directs the California Law Revision Commission to examine California law and recommend any changes necessary to ensure consistency with the Equal Rights Amendment. Such changes may include provisions of law that treat sexes differently or contain antiquated language regarding gendered pronouns. The resolution also makes various findings and declarations regarding the Equal Rights Amendments and federal efforts to ensure that the Amendment is ratified as the 29th Amendment to the United States Constitution.

Legal complications regarding the ratification of the Equal Rights Amendment. The Equal Rights Amendment was initially well received by a great many states and appeared on track to be ratified by the congressionally proposed deadline for ratification of 1979. For example, California and 21 other states ratified the Amendment shortly after Congress sent it to the states for consideration in 1972. However, a growing rightwing anti-women's liberation movement sought to prevent the Amendment's ratification. Indeed, conservative firebrand Phyllis Schlafly's "STOP-ERA" movement derailed efforts to ratify the Equal Rights Amendment and it missed the congressionally imposed deadline for ratification. However, the legality of the deadline is in

question, and efforts are presently underway in Congress to statutorily eliminate the deadline, thus enabling the Equal Rights Amendment to become law.

However, the deadline is not the only issue. Notably, just as the final three states to support the Equal Rights Amendment (Illinois, Virginia, and Nevada) have become more progressive since the 1970s, the conservative movement has grown stronger in several of the initial supporters of the Amendment. In fact, Idaho, Kentucky, Nebraska, Tennessee, and South Dakota have all voted to rescind their initial support of the Amendment. Yet again, the issue of whether approval of a constitutional amendment is permitted is a legal grey area. Historical precedent suggests that once a state approves of a constitutional amendment, it cannot subsequently undo that action and disapprove the amendment. Proponents of the Equal Rights Amendment highlight the fact that, during the ratification process for the Fourteenth Amendment to the U.S. Constitution, two states claimed to have rescinded their ratifications, but the amendment was nonetheless incorporated into the Constitution, and continues to serve as the bedrock for many of the freedoms Americans hold dear. However, as the only federal district court to confront the question concluded, in a decision later vacated by the Supreme Court who concluded that the case had become moot, “until the technical three-fourths has been reached, a rescission of a prior ratification is clearly a proper exercise of a state’s power granted by the article V phrase ‘when ratified’.” (*Idaho v. Freeman* (D. Idaho 1981) 529 F. Supp. 1107, 1150; vacated as moot by *NOW, Inc. v. Idaho* (1982) 459 U.S. 809.) Thus, even if Congress were to eliminate the deadline and demand that the Archivist of the United States certify the Equal Rights Amendment, legal challenges to the ratification determination are almost certain to continue.

ARGUMENTS IN SUPPORT: This bill is co-sponsored by the California Women’s Law Center and the Feminist Majority. In support of this resolution they jointly write:

Californians have advocated tirelessly for women’s equal rights under the law. Indeed, California was among the earliest states to ratify the Equal Rights Amendment to the United States Constitution (ERA), doing so in the same year that Congress approved it—1972. The ERA states simply: “Equality of rights under the law shall not be denied or abridged, by the United States or any state on account of sex.”

Nationally, the fight for women’s equality is ongoing. Upon Virginia’s ratification of the ERA on January 27, 2020, the ERA satisfied the two requirements imposed by Article V of the U.S. Constitution to become an amendment: i) approval of two-thirds of each chamber of Congress and ii) ratification by three-fourths of the states. However, the U.S. Archivist, an appointed official, declined to certify and formally publish the ERA, citing a Department of Justice memo that advised a ratification timeline in the ERA’s preamble was binding. The final three states to ratify the ERA filed suit to require that the Archivist perform his ministerial duties. That case is now pending in federal appellate court, where 16 distinguished constitutional law scholars have submitted an amicus brief that argues the timeline in the preamble does not render subsequent ratifications invalid. In addition, both chambers of the U.S. Congress introduced joint resolutions in January 2021 to eliminate the ratification deadline noted in the preamble of the ERA; the House resolution passed in March 2021.

This resolution seeks to ensure the principles of gender equality already enshrined in the California Constitution, and soon to be reflected in the U.S. Constitution, are not violated by the language or impact of California’s laws. At a moment when these principles remain

contested in national debate, this resolution clearly announces that the California legislature upholds the legal rights and equal dignity of its citizens regardless of sex.

REGISTERED SUPPORT / OPPOSITION:**Support**

California Women's Law Center (co-sponsor)

Feminist Majority (co-sponsor)

Opposition

None on file

Analysis Prepared by: Nicholas Liedtke / JUD. / (916) 319-2334