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Why Can't We Make Women's Equality the Law of the Land?

Jan. 28, 2022

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Even if you are a political junkie, there's a good chance you didn't realize that the United States Constitution grew 58 words longer this week.

Those words, which begin, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," are the text of the Equal Rights Amendment. Section 3 of the amendment states that it takes effect two years after its ratification, which happened on Jan. 27, 2020, when Virginia became the 38th state to sign on. By its own terms, then, the 28th Amendment went into force on Thursday. American women are, at long last, equal to men in the eyes of the law. Hallelujah.

Or maybe not.

New printings of the Constitution will not include a 28th Amendment. The Supreme Court will not treat it as part of the nation's fundamental law. There will be no command from on high that women and men must be treated the same. And yet on Thursday, President Biden called on Congress "to act immediately to pass a resolution recognizing" that the E.R.A. has been properly ratified and is part of the Constitution. What's going on?

The argument that the E.R.A. is now the law of the land is straightforward and compelling. Under the explicit terms of Article V of the Constitution, an amendment "shall be valid to all intents and purposes" when two-thirds of both houses of Congress approve it, followed by three-quarters of the states. The E.R.A. easily passed Congress in the early 1970s, and it has been ratified by 38 states, or just over three-quarters of 50.

"The Constitution is clear: You need to do two things. We did it," Representative Carolyn Maloney of New York, a longtime E.R.A. proponent, told me. Indeed, no amendment that has cleared Article V's two high bars has ever been excluded from the Constitution — until now.

The technical reason for this is that the archivist of the United States, David Ferriero, has declined to certify the Equal Rights Amendment, despite a federal law requiring him to do so whenever an amendment has satisfied "the provisions of the Constitution."

His refusal is based on a 2020 memo by the Justice Department's Office of Legal Counsel, which provides legal advice to the executive branch. The memo contended that the E.R.A. is no longer valid because it failed to meet the seven-year deadline that Congress initially set and then, when the ratification effort fell three states short, extended until 1982. (The last three states — Nevada, Illinois and Virginia — all ratified after 2016, spurred by the election of Donald Trump.) The O.L.C. memo also noted that five states that approved the amendment later tried to back out by rescinding their ratifications. As a result of the missed deadline, the memo said, the E.R.A. "has expired and is no longer pending before the states." If its supporters want it ratified, they need to start over.

The supporters' retort: The Constitution says not a word about either deadlines or rescissions. It says two-thirds of Congress and three-quarters of the states, nothing more. In a 2012 letter to Ms. Maloney, Mr. Ferriero appeared to agree with this interpretation. As soon as at least 38 states have ratified an amendment, he wrote, the National Archives publishes the amendment along with his certification "and it becomes part of the Constitution without further action by the Congress." He also said he did not consider any of the rescissions to be valid.

But following the 2020 Justice Department memo, Mr. Ferriero balked, triggering our current constitutional conundrum. Complicating matters further, the O.L.C. on Wednesday issued a new memo that called into question the reasoning of the 2020 memo and stated that "whether the E.R.A. is part of the Constitution will be resolved not by an O.L.C. opinion but by the courts and Congress."

The E.R.A. has thus become the Schrödinger's Cat of amendments — simultaneously part of and not part of the Constitution. Its ultimate fate is bound up in profound legal and political questions that force us to consider how we decide what our national charter includes and what it doesn't.

Take the legal questions first. Does Congress have the power to set a time limit for ratification? Many of today's E.R.A. proponents, relying on the plain language of the Constitution, say no.

And yet Congress has been doing so since the 18th Amendment, which introduced Prohibition and was ratified in 1919. (It was later repealed by the 21st Amendment.) When a lawsuit challenged this practice, the Supreme Court sided with Congress. In a 1921 ruling, the court wrote that because "ratification is but the expression of the approbation of the people," any proposed amendment "must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period."

By the 1970s, time limits were a standard and widely accepted part of proposed amendments. Martha Griffiths, the Michigan congresswoman who steered the E.R.A. through the House of Representatives, agreed with them on the grounds that an amendment "should not be hanging over our head forever." When the E.R.A. failed to gain the necessary number of ratifications by the end of the extended deadline in 1982, its supporters admitted defeat.

Sounds reasonable, right? Wait; it gets messier. Ten years after that failure, a different amendment — barring Congress from raising its salary before the next federal election — became the 27th Amendment to the Constitution. Like the previous 26, it had passed Congress and been ratified by three-quarters of the states. The only problem: It was more than 200 years old. James Madison had drafted it in 1789 along with 11 other amendments, 10 of which were quickly adopted and are known as the Bill of Rights. The other two passed Congress but failed to win approval in enough states. Both were largely forgotten until the early 1980s, when a college student in Texas noticed that the congressional-pay amendment had not expired and began a campaign to push it across the finish line. As soon as the 38th state ratified it in 1992, the archivist certified the amendment despite substantial legal controversy — which included the Supreme Court's specific warning, from that 1921 case, that "it is quite untenable" to treat the congressional-pay amendment (or any other old one) as still valid.

This history reveals a deeper truth: Despite what appears to be the clear language of Article V, the process for changing the Constitution is filled with ambiguities. For starters, is there any limitation on the subject matter of an amendment? Must each house of Congress separately pass an amendment by a two-thirds majority vote, or can it be two-thirds of both houses combined? The list goes on.

Women's March for Equal Rights in 1970. Universal History Archive/Getty Images

"I started out thinking the E.R.A. was exceptional for raising difficult Article V questions," David Pozen, a professor at Columbia Law School and the co-author of a recent study on the history of amendments, told me. "On the contrary, almost every single amendment that we have has been only debatably in compliance with Article V." For example, Mr. Pozen pointed out, only one of the 27 recognized amendments — the 13th, which abolished slavery — received a president's signature before being sent to the states. And yet Article I of the Constitution states clearly that "every order, resolution, or vote" of Congress must be approved by the president before it can "take effect." Are amendments exempt from this requirement? If not, is every amendment but the 13th invalid?

Another unresolved question is whether states may take back an earlier yes vote before an amendment crosses the three-quarters threshold — a key part of the debate over the E.R.A. The Constitution says nothing either way. And yet to date, none of the attempted rescissions throughout American history have been counted.

The bottom line is that for all the high-minded talk about obedience to the Constitution, the key factor in an amendment's ratification is not to be found in the text of that document itself. Rather, Mr. Pozen said, it is whether the amendment is accepted by society at large, which "throughout U.S. history has not turned on punctilious adherence to a set of rules." "This isn't so unusual or scary or undemocratic," he added. "When enough Americans act as though an amendment is part of the Constitution, it becomes part of the Constitution."

The 27th Amendment offers a good example of how this plays out in practice: One day after the archivist issued his certification, Congress voted to express its near-unanimous approval of the amendment. That vote was legally irrelevant, but as an official performance of public affirmation, it was a crucial act. And it is hard to see how it could ever happen today.

This is infuriating for those of us who believe it's insane that two decades into the 21st century, the U.S. Constitution still does not formally recognize the full equality of more than half the country's population. Obviously the founding fathers included no mothers, and they did not see women as their equals — one of many views they held strongly that we reject today without a second thought. And yet more than 230 years after the Constitution was adopted, the U.S. is increasingly out of step. At least 168 countries, and at least 26 states, contain guarantees of sex equality in their Constitution.

What would the E.R.A. accomplish in concrete terms? Its proponents argue that it would address a raft of injustices, from wage gaps to parental leave laws to violence against women, although legal scholars debate how much of a difference the amendment would really make. More likely, Mr. Pozen said, is that its presence could "embolden legislators and judges in a cultural way" by, for example, encouraging the passage of more laws aimed at preventing sex-based discrimination.

But laws can be overturned, or fail to be enforced. Only a constitutional amendment is forever — and even then, as illustrated by the 14th and 15th Amendments, it can take generations for their guarantees to be reflected in everyday life.

"Why is this so difficult?" Representative Maloney asked of the long struggle to pass the E.R.A., the first version of which was introduced nearly 100 years ago. "What is so intimidating about treating women equally?"

The quick answer: abortion. Today's E.R.A. opponents see the measure, above all, as a stalking horse that would result in bans on state laws that restrict or prohibit a woman's right to terminate her pregnancy. Whether or not that prediction would be borne out, there is no question that the debate over the amendment has shifted in the decades since it was introduced. Back in the 1970s, the main opposition was driven by Phyllis Schlafly, the conservative activist who warned that sex equality would lead to a carnival of horrors, including same-sex marriage. That ship sailed even without the E.R.A., of course, but in 2022 the concept of "sex" itself is being contested in ways even Ms. Schlafly's darkest fantasies couldn't have foretold.

That is why widespread public support in the present day is key. "Until the world is clamoring for this, the world will do nothing," said Kati Hornung, a political organizer who led Virginia's effort to pass the E.R.A. and now runs a group focused on ensuring it becomes the 28th Amendment. The state strategy, she told me, "was to make it part of a daily discussion, where you as a politician couldn't go somewhere without being asked about it. We have to do nationwide what we did here in Virginia."

The advocates haven't given up entirely on the courts. A lawsuit by the attorneys general of the last three states to ratify the E.R.A. is in the U.S. Court of Appeals in Washington, D.C., calling on the archivist to certify the amendment as required under federal law. The attorneys general of five conservative-led states have joined the lawsuit to argue against ratification.

For Ms. Hornung, the ultimate goal is the same regardless of what path it takes to get there. "We just have to have sex treated the same way as race, religion, country of origin. That seems fair and decent and reasonable," she said. Right now, "it's still men making decisions for the majority of the country, who are women."

On the last night of March 1776, Abigail Adams sat down and drafted a letter to her husband, John, who was off serving in the Continental Congress, helping shape what would soon become the Declaration of Independence. "By the way," she wrote, "in the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember all men would be tyrants if they could." She went on, "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation."

John Adams and his colleagues didn't heed her warning, but we can. And that means treating the Constitution not as a sacred text from another era, but as an adaptable framework for an ever-growing and changing society. The founders expected this. They knew they were far from perfect, and they intended their creation to be updated on a regular basis, even if they failed to anticipate how polarized the country would become. That polarization may seem like an intractable fact of modern life, but remember: 40 percent of the Constitution we live under in 2022 consists of amendments. That is to say, the American people — those living today and those yet to come — are the authors of the Constitution no less than the founders are. It is not their document anymore, if it ever was. It is ours.

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