The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SCR 362
INTRODUCER:	Senator Margolis and others
SUBJECT:	Equal Rights for Men and Women
DATE:	March 31, 2008 REVISED: 04/02/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	**Favorable**
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This senate concurrent resolution proposes state ratification of the proposed Equal Rights Amendment to the *United States Constitution*.

II. Present Situation:

In 1972, Congress passed the proposed Equal Rights Amendment (ERA) to the *United States Constitution*. The proposed ERA provides:

> *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.*

A proposed constitutional amendment requires ratification by three-fourths of the states (i.e., 38 states). The ERA failed ratification initially in 1979. In response to public pressure and disputes over the ratification deadline, Congress extended the deadline to 1982. However, political interests and publicity regarding the potential legal and social ramifications of the ratification of the proposed amendment stymied full ratification. By 1982, only 35 states (of which Florida was not one) had adopted state ratification of the proposed ERA.

Since 1982, the proposed ERA amendment has been reintroduced annually in Congress in the form of House and Senate resolutions, but they did not pass. In 2007, resolutions have been filed

again. *See, e.g.*, H.R.J.Res. 40, S.J.Res. 10, and H.R.J. 757 (110th Congress, 1st Session). No limiting ratification period has ever been included in these resolutions. House of Representatives Joint Resolution 40 and Senate Joint Resolution 10 require two-thirds vote of each house of Congress and subsequent assent to ratification by the 38 states. House of Representatives Joint Resolution 757 requires the House of Representatives to take any legislative action necessary to verify the ratification of the Equal Rights Amendment when three additional state legislatures ratify the amendment.

An alternative approach to ratification developed recently based on the argument that the existing state ratifications to the ERA were still viable.[1] First, Congress had already established precedence for dispensing with a ratification deadline when it extended the original ratification deadline of the proposed ERA. Second, Congress established precedence when it ratified, many years after its ratification deadline, the "Madison Amendment" relating to Congressional pay raises. Therefore, the rationale is that only three more states need to actually ratify the proposed ERA. Congress would then have to take the necessary steps to finalize the ratification of the proposed ERA. This means Congress could choose to adjust or repeal the existing deadline on the ERA, determine whether existing state ratifications are still valid, and declare that the ERA is ratified.

In Florida, efforts for state ratification of the proposed United States ERA or adoption of similar state constitutional language has been ongoing since 1972. Between the years 1972 through 1982, proposed legislative resolutions to ratify the ERA were filed annually but did not pass. In 1978, a modified version of an ERA amendment proposed by the 1977-1978 Constitutional Revision Commission, which stated that "no person will be deprived of any right because of sex," failed on the ballot. However, in 1998, Florida voters approved a constitutional amendment to section 2, article I of the *Florida Constitution*, explicitly stating and reinforcing the recognition that "natural persons" mean men and women alike, and that they are equal before the law for which discrimination based on gender is constitutionally prohibited.[2]

As amended, section 2, article I of the *Florida Constitution* reads:

> Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights…. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Florida is one of more than 20 states to have adopted constitutional language relating to equal protection for men and women.

> The language of the individual state ERAs varies considerably with regard to whether their reach is limited to state action. Montana's ERA expressly extends to private actors. Rhode Island's extends to "persons doing business with the state." The Louisiana Constitution contains separate prohibitions on sex discrimination that apply to both governmental actors and all actors operating public

[1] Allison Held, Sheryl L. Herndon, and Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 William and Mary Jrnl of Women and the Law 113 (1997).
[2] See Revision 9, 1997 Constitution Revision Commission Proposal.

accommodations. On the other hand, five states – Virginia, Colorado, Illinois, Hawaii, and New Hampshire – expressly limit the scope of their ERAs to governmental actors. The remaining fourteen state ERAs contain more open-textured language, which could be interpreted as extending to private actors.[3]

Supporters of the proposed United States ERA have attempted to introduce equal rights legislation in the 15 outstanding states,[4] of which Florida is one, that have not yet ratified the ERA.

III. Effect of Proposed Changes:

This senate concurrent resolution includes a statement of the state's ratification of the proposed Equal Rights Amendment (ERA) to the *United States Constitution*. It provides a number of whereas clauses regarding the background of the ERA first proposed in 1972. It provides the text of the proposed federal amendment. This resolution is offered on the premise that states may still ratify the proposed ERA under the authority of the Article V of the United States Constitution.

The resolution requires that certified copies of the resolution under the seal of the Secretary of the State of Florida be forwarded to the President of the United States, U.S. Secretary of State, U.S. Senate President, U.S. Speaker of the House of Representatives, and U.S. Administrator of General Services.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Final ratification of the proposed United States Equal Rights Amendment could subject gender-based laws to strict scrutiny in lieu of intermediate scrutiny. In the 2006 Journal of Legal Studies, the authors, using a four-step analysis on all identifiable constitutional sex discrimination cases resolved in state courts of last resort between 1960 and 1999, found that a court was more likely to apply a higher standard of law if the state had an

[3] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 Rutgers Law Journal 1201, 1229-1230 (2005).
[4] Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

Equal Rights Amendment in its state constitution.[5] Strict scrutiny requires a determination of whether enforcement of discriminatory laws serves a compelling state interest that cannot be protected in any other way. Laws based on "race, color, or previous condition of servitude" under Article XV of the *United States Constitution* and "race, religion, national origin, or physical disability" under section 2 of article I of the *Florida Constitution* are reviewed under strict scrutiny. Intermediate scrutiny requires a determination of whether the discriminatory law achieves a governmental objective and that the differential treatment or application is rationally related to that objective.[6]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Subject to final ratification by Congress of the proposed Equal Rights Amendment in the *United States Constitution*, men and women may benefit from increased equal protection against gender-based discrimination.

C. Government Sector Impact:

This resolution will affect state government only to the extent that final ratification by Congress of the proposed United States Equal Rights Amendment may invalidate any state program or act that promotes gender inequity or continues to discriminate against someone on the basis of gender. However, Florida law already prohibits such conduct under the Equal Protection Clause in section 2 of Article I of the *Florida Constitution* and under the Florida Civil Rights Act of 1992 in chapter 760, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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[5] Lisa Baldez, Lee Epstein, and Andrew D. Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. Legal Stud. 243, 243-254 (2006).

[6] Since 1998, two cases have been heard in the Florida appellate courts on gender discrimination. In 2001, the Fifth District Court of Appeal applied an intermediate level of scrutiny to the issues before it, providing, in part, that the scrutiny mandated by the United States Supreme Court when deciding similar issues was the appropriate level of scrutiny. In 2004, the Third District Court of Appeal agreed with the Fifth District Court of Appeal's reasoning in applying an intermediate level of scrutiny to gender discrimination issues. However, it found it unnecessary to apply this level of scrutiny to the issues before it since the issue dealt with a federal regulation that was previously held by the United States Supreme Court to be rationally related to a legitimate governmental interest. See *Frandsen v. County of Brevard*, 800 So. 2d 757 (Fla. 5th DCA 2001), and *A Choice for Women, Inc., v. Florida Agency for Health Care Administration*, 872 So. 2d 970 (Fla. 3d DCA 2004).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.