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AFTER 38 STATES RATIFY THE EQUAL RIGHTS AMENDMENT, WHAT NEXT?

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THE EQUAL RIGHTS AMENDMENT

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.

The proposed Equal Rights Amendment (ERA) to the U.S. Constitution, written by woman suffrage leader Alice Paul, was first introduced in Congress in 1923. Nearly 50 years later, the ERA was passed by the Senate and the House of Representatives by well over the required two-thirds majority and was sent to the states on March 22, 1972 for approval. At present, the ERA has been ratified by 37 state legislatures, only one fewer than the 38 required to add it to the Constitution.

According to the process described in Article V of the U.S. Constitution, approval by at least three-fourths of the states (38 out of 50) completes an amendment's ratification. As each state approves a proposed amendment, it submits its ratifying documents to the National Archives and Records Administration (NARA). Under federal statute 1 U.S.C. 106b, when NARA receives notice of at least 38 state approvals, the U.S. Archivist publishes the amendment, along with a certification of the ratifications and a list of the ratifying states. The Archivist's certification of the ratifying documents is final and conclusive, and the amendment becomes part of the Constitution as of the date of the 38th state approval, with no further action by Congress.

Some circumstances of the ERA's ratification history vary from the process described in Article V, and several elements are unprecedented in constitutional amendment history. The following analysis considers possible implications of these circumstances for what could happen after the 38th state ratifies the ERA.

TIME LIMITS ON THE RATIFICATION PROCESS

When it was passed by Congress in 1972, the Equal Rights Amendment contained a seven-year ratification deadline in its proposing clause. In 1978 Congress passed by a simple majority a bill to extend that deadline from March 22, 1979 to June 30, 1982. Although the Constitution does not give the President any role in the amendment process, President Jimmy Carter signed the extension bill as a symbolic show of support for the ERA.

Setting time limits

The Article V description of the ratification process does not mention time limits. The first amendment with a Congressionally imposed ratification deadline was the 18th Amendment (Prohibition), proposed in 1917 with an arbitrarily chosen time limit of seven years. The 19th (Woman Suffrage) Amendment was sent to the states with no deadline, but subsequent proposed amendments that were eventually ratified contained a seven-year time limit either in the text of the amendment or (beginning with the 23rd Amendment in 1960, and including the ERA) in the proposing clause, not in the text ratified by the states.

The Supreme Court in its 1921 *Dillon v. Gloss* decision discussed Congress's right to set a ratification deadline in a passage that is commonly considered by legal scholars to be "dictum" (a non-binding statement in a decision that does not establish precedent). The Court later said in *Coleman v. Miller* (1939) that "Congress in proposing an amendment may fix a reasonable time for ratification" (likewise widely considered to be dictum) and that the timeliness of an amendment's ratification period is a political question for Congress to resolve if and when the amendment is approved by three-fourths of the states.

Two issues related to time limits that have arisen for the first time with the ERA's ratification process are (1) the validity of extending or removing an existing deadline by a vote in Congress, either before or after the deadline has passed, and (2) the validity of a state ratification of an amendment after the deadline has passed. Some legal scholars also question whether, if the Supreme Court's language about time limits in *Dillon* and *Coleman* is in fact dictum rather than precedent, Congress's application of a time limit on a constitutional amendment's ratification period might in fact violate Article V.

Extending or removing time limits

In the early 1990s, the national advocacy organization ERA Summit developed a "three-state strategy" for ERA ratification, positing that the existing 35 ratifications were still valid and that states could ratify the amendment even though the deadline had passed. Beginning in 1995, states that had not ratified the ERA by the 1982 deadline began to introduce ratification bills in their legislatures.

Development of the three-state strategy was prompted by ratification of the Constitution's 27th (Madison) Amendment in 1992, nearly 203 years after its 1789 passage by Congress. Although the amendment, which pertained to Congressional pay, contained no time limit, it arguably exceeded the "sufficiently contemporaneous" ratification period mentioned by the Supreme Court in *Dillon*.

After the 38th state approved the amendment, Speaker of the House Tom Foley (D-WA) considered challenging the validity of the unusual ratification process, but he changed his mind when members of Congress realized how popular the amendment was. The Archivist certified its ratification, and a day later Congress passed a bill declaring the ratification legal, thereby affirming its political acceptance of the process. Congress has made such a legislative endorsement of a ratification only one other time, when it passed a joint resolution in 1868 declaring that the 14th Amendment was duly ratified.

This positive conclusion to the 27th Amendment's two-century-long ratification process led some legal analysts to propose that Congress had the power to maintain the viability of the ERA's existing 35 state ratifications, since the 1978 extension of the original deadline in the ERA's proposing clause demonstrated that the time limit was open to change. This premise was analyzed by Allison Held *et al.* in "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States" (*William & Mary Journal of Women and the Law*, Spring 1997).

In 1996, 2014, and 2017 reports by the Library of Congress's Congressional Research Service, analysts concluded that acceptance of the Madison Amendment does have implications for the three-state strategy, and that resolution of the procedural issues is more a political question for Congress than a constitutional one for the courts.

The Legal Task Force of the national ERA Coalition states in a 2019 memorandum ("The Equal Rights Amendment: Advocacy, Litigation, and the 38th State"):

One of the guiding principles of our legislative branch is that one Congress cannot bind or limit the power of later Congresses. ... Congress has already changed the ERA's deadline once, extending it by more than three years. In doing so, Congress relied in part on the deadline's location in the preamble, rather than in the body of the amendment. No legal barrier prevents Congress from eliminating the deadline altogether—and doing so retroactively. No Supreme Court case has ever cast doubt on Congress's power with respect to the timing of ratification or suggested that Congress lacks the power to extend or remove a ratification deadline after the fact.

Legislation based on that premise has been introduced in one or both houses of Congress since 1994. In the current 116th Congress, bipartisan bills *S.J.Res. 6* (lead sponsors Senators Ben Cardin, D-MD, and Lisa Murkowski, R-AK) and *H.J.Res. 79* (lead sponsor Representative Jackie Speier, D-CA) state that notwithstanding any previous deadline, the ERA will be ratified when three-fourths of the states approve. The House Judiciary Committee has released *H.J.Res. 79*, and an affirmative vote by the full House is expected shortly. Prospects for passage of the Senate bill are not as optimistic.

While it is possible to infer a positive outcome to the ERA's ratification process from the above information, there can be no foregone conclusion about the resolution of questions regarding Congress's power with respect to time limits or the validity of state ratifications after a deadline has passed.

RESCISSION OR WITHDRAWAL OF A PREVIOUS RATIFICATION

Five states (Idaho, Kentucky, Nebraska, Tennessee, and South Dakota) first ratified the Equal Rights Amendment but later voted to rescind or otherwise withdraw their approval by the 1979 deadline.

In addition to its silence on the question of time limits, Article V also does not discuss whether a state that has ratified an amendment has the power to rescind or otherwise revoke its approval before the amendment becomes part of the Constitution. However, precedent shows that a state rescission or withdrawal of ratification of a constitutional amendment has never been accepted as valid.

During the ratification process for the 14th Amendment (1868), New Jersey and Ohio voted yes and then rescinded their ratifications, but both states were included in the published list of states approving the amendment. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19th Amendment guaranteeing women's right to vote, approved the amendment by one vote on August 18, 1920. The Tennessee House then "non-concurred" on August 31, but the Secretary of State had already certified the amendment's inclusion in the Constitution on August 26 (celebrated as Women's Equality Day).

Further evidence for the invalidity of rescissions is found in *The Story of the Constitution* (1937), an official publication of the United States Constitution Sesquicentennial Commission: "... an amendment [is] in effect on the day when the legislature of the last necessary State ratified. ... The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments."

Archivist of the United States David Ferriero wrote on October 25, 2012 to Representative Carolyn Maloney (D-NY), lead sponsor of the "start-over" ERA bills in the House of Representatives, in response to her query about the validity of rescissions:

NARA's website page "The Constitutional Amendment Process" ... states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid.

The ERA Coalition's Legal Task Force succinctly concurs in its 2019 memorandum: "The only question under Article V is whether a state's legislature voted to ratify at some point in time. It does not matter if a subsequent legislature disagreed."

VACATED COURT DECISION ON EXTENSION AND RESCISSION

ERA opponents have for many years cited a 1981 *Idaho v. Freeman* court ruling that deadline extensions are invalid and rescissions are valid, without noting (perhaps without knowing) that the decision was vacated in 1982 and has no legal standing.

In reality, the story behind *Idaho v. Freeman* (as reported in “ERA Dies Three States Short of Ratification,” *CQ [Congressional Quarterly] Almanac*, 1982, 377-378) illustrates the political and other non-judicial factors influencing the disposition of that case.

After Idaho in 1978 voted to rescind its 1973 ratification of the ERA, a group of anti-ERA state legislators and other officials sued the General Services Administration (GSA), which maintained the official list of ratifying states, seeking to force removal of Idaho from the list.

Pro-ERA forces and the Justice Department sought unsuccessfully to remove Judge Marion Callister, of the federal district court in Idaho, from hearing the case because he was a Mormon, and his church opposed the ERA.

However, on Dec. 23, 1981, Callister ruled that Congress exceeded its power when it extended the ERA ratification period in 1978, and that states could rescind their approval of the amendment if they acted within the period available for ratification.

After Callister’s adverse ruling, both the National Organization for Women (NOW) and the Justice Department appealed directly to the Supreme Court. NOW asked for expedited consideration of the appeal, but the Justice Department – which was under fire from conservative political groups opposed to the ERA – said such speed would be “inadvisable.”

On Jan. 25, 1982, the Supreme Court agreed to hear the cases of *NOW v. Idaho* and *Carmen v. Idaho*, but denied NOW’s request for expedited action. The court did not hear arguments in the case during its 1981-82 term, and on Oct. 4, 1982, the first day of its 1982-83 term, the court dismissed the ERA cases as moot.

Not only did the justices dismiss the cases as moot, they also vacated the lower court decision, wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it.

WHAT HAPPENS NEXT?

The Equal Rights Amendment is the only proposed constitutional amendment to fall short of the necessary state ratifications at a deadline, but then to receive additional state approvals based on the premise that its existing ratifications remain valid. Nevada ratified the ERA in 2017, and Illinois ratified it in 2018.

The 13 states that have not yet ratified the ERA are Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

Legislatures in all but one of these states (Alabama) have already introduced ERA ratification bills in one or more previous sessions, and most of them will almost certainly do so again in 2020.

The Virginia General Assembly, with both the Senate and the House of Delegates under Democratic control as a result of the November 2019 election, is expected to pass an ERA ratification bill very soon after its new legislative session begins in January 2020.

The next step, in accordance with Article V of the Constitution, federal statute 1 U.S.C. 106b, and precedent with the 27th Amendment, will be for the U.S. Archivist to publish the amendment, along with certification of the legal sufficiency of state ratification documents and a list of the ratifying states, as official notification that the ERA is in the Constitution as of the date of the 38th state ratification. It is not within the authority of the Archivist to make a determination regarding time limit or rescission questions, and it is not within the power of another governmental entity to alter the prescribed role of the Archivist in this particular amendment process.

Further political and legal actions in Congress and the courts are possible, but not required or inevitable, and challenges would take the process onto untrodden constitutional ground. Is legislation in Congress to remove the deadline necessary for ratification, or does it merely indicate Congress's political acceptance of the three-state strategy? Will the ability of Congress to impose time limits on the amendment process be questioned?

The fact that the ERA will not take effect until two years after the date of ratification may help minimize any confusion or disruption associated with a challenge to its ratification.

States that have not ratified a constitutional amendment by the time it is added to the Constitution continue to have the opportunity to ratify. For example, the 19th Amendment was added to the Constitution in 1920, but the nine coastal southern states from Maryland to Louisiana ratified it years later, between 1941 and 1984. Seven of those states (Maryland and Delaware excepted) are among the 13 that have not yet ratified the ERA.

Even after the Equal Rights Amendment is in the U.S. Constitution, states still working toward ratification will be able to join the list of ratified states in affirming 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."