*L*egal Basis of the "Three State Strategy"

Library of Congress Analyzes Three-State Strategy

Why the ERA Remains Legally Viable and Properly Before the States

(by A.Held, S.Herndon, D. Stager published in the Spring 1997 issue of William and Mary Journal of Women and the Law)

The Equal Rights Amendment, passed by Congress in 1972, would have become the 27th Amendment to the Constitution if three-fourths of the states had ratified it by June 30, 1982. However, that date passed with only 35 of the necessary 38 state ratifications. Instead, the 27th Amendment is the "Madison Amendment," concerning Congressional pay raises, which went to the states for ratification in 1789 and reached the three-fourths goal in 1992.

The fact that a 203-year ratification period was accepted as valid has led ERA supporters to propose that Congress has the power to maintain the legal viability of the ERA and the existing 35 state ratifications. If so, only three more state ratifications would be needed to make the ERA part of the Constitution. Legal analysis supporting this strategy was developed in 1995 by Allison Held, Sheryl Herndon and Danielle Stager, then third-year law students at the T. C. Williams School of Law in Richmond, VA. Their article was published in the Spring 1997 issue of William & Mary Journal of Women and the Law.

LEGAL RATIONALE
Article V of the U.S. Constitution gives Congress the power to propose an amendment and to determine the mode of ratification, but it is silent as to the power of Congress to impose time limits or its role after ratification by three-fourths of the states.

Time Limits
A 1921 Supreme Court decision (Dillon v. Gloss) recognized that Congress has the power to fix a definite time limit for ratification; it also pointed out that an amendment becomes part of the Constitution once ratified by the final state constituting a three-fourths majority of the states. The Dillon Court said that an amendment should be ratified within a "reasonable" and "sufficiently contemporaneous" time frame "to reflect the will of the people in all sections at relatively the same period," because the amendment process is presumably triggered by a perception of "necessity" with respect to the subject of the amendment.

A 1939 Supreme Court decision (Coleman v. Miller) reaffirmed the power of Congress to fix a reasonable time period for ratification but also determined that Congress has the power to promulgate an amendment after the final state constituting a three-fourths majority ratifies. In Coleman, the Court held that Congress, upon receiving notification of ratification by three-fourths of the states, may determine whether the amendment is valid because it has been ratified in a reasonable period of time, or whether "the amendment has lost its vitality through lapse of time." The Court called the timeliness decision a "political question" and said that Congress is uniquely equipped to make that decision because of its "full knowledge . . . of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

It is important to note that Congressional promulgation is not a necessary feature of Article V. In the history of the amendment process Congress has promulgated only two

amendments, the 14th and the 27th, following the final state ratification. In addition, the requirement for ratification within a "sufficiently contemporaneous" time frame and the chronological definition of "contemporaneous" are now open to question in light of the Madison Amendment experience.

The first time limit ever imposed on the ratification period of a constitutional amendment was in the text of the 18th Amendment (Prohibition) in 1917; the seven-year limit was chosen by Congress without extensive discussion about the particular length of time. The 19th Amendment (Woman Suffrage) was sent to the states in 1919 with no time limit, as was a proposed Child Labor Amendment in 1924. Seven-year time limits were placed in the text of the 20th, 21st, and 22nd Amendments, but Congress shifted the seven-year limit out of the text and into the proposing clause of the 23rd, 24th, 25th, and 26th Amendments. The 27th Amendment had no time limit.

Despite arguments by proponents that the Equal Rights Amendment should go to the states without a time limit in the tradition of the 19th Amendment, the ERA passed Congress in 1972 with a seven-year time limit in its proposing clause. If the time limit had been placed in the text of the amendment itself, that restriction would not be subject to alteration by Congress after any state legislature had ratified. However, the ERA language ratified by 35 states between 1972 and 1982 (see above) did not contain a time limit for ratification.

By transferring time limits from the text of an amendment to the proposing clause, Congress retained for itself the authority to review the limit and to amend its own previous legislative action regarding that time limit. In 1978, Congress clearly demonstrated its belief that it may alter a time limit in the proposing clause when it passed an extension of the original seven-year limit for ERA ratification and moved the deadline from March 22, 1979, to June 30, 1982. A challenge to the constitutionality of the extension was dismissed by the Supreme Court as moot after the deadline expired, and no lower-court precedent stands regarding that point.

The Coleman decision asserted that Congress may determine whether the states have ratified in a "reasonable" time or whether the amendment is "no longer responsive to the conception which inspired it." Congress therefore could determine that the time period since the ERA went to the states for ratification in 1972 is "reasonable" and "contemporaneous" (particularly in light of the fact that it deemed the Madison Amendment's 203 years to be so), and it could decide that the ERA remains "responsive to the conception which inspired it" (indisputably so, since the fact that women's equal rights are not constitutionally affirmed will remain unchanged until the Constitution is amended or interpreted to establish unequivocally that women and men have equal rights).

Therefore, under the principles of Dillon and Coleman, and based on the fact that Congress voted to extend the ERA time limit and to accept the 203-year-long ratification period of the Madison Amendment as sufficiently "contemporaneous," it is likely that Congress has the power to legislatively adjust or remove the time limit constraint on the ERA if it chooses, to determine whether or not state ratifications which occur after the expiration of a time limit in a proposing clause are valid, and to promulgate the ERA after the 38th state ratifies.

Rescission
Article V of the Constitution speaks only to the positive terms of the ratification process, thus giving the states the power to ratify but not the power to rescind a ratification. All precedents concerning state rescissions of ratifications indicate that such actions are not valid and that the constitutional amendment process as described in Article V allows only

for ratification. For example, the official tally of ratifying states for the 14th Amendment in 1868 by both the Secretary of State and Congress included New Jersey and Ohio, states which had passed resolutions to rescind their ratifications. Also included in the tally were North Carolina and South Carolina, states which had originally rejected and later ratified the amendment. In the course of promulgating the 14th Amendment, therefore, Congress determined that both attempted withdrawals of ratifications and previous rejections prior to ratification were invalid.

In over 200 years of experience with Article V, covering the ratification of 27 constitutional amendments, no authorized decisionmaker has given conclusive validity to a purported rescission. Therefore, it is most likely that the acts of the five states which have attempted to rescind their ratification of the ERA since 1972 are a legal nullity. (The Kentucky legislature's rescission bill was vetoed by Lieutenant Governor Thelma Stovall, Acting Governor at the time.)

CONCLUSION
While women enjoy more rights today than they did when the ERA was first introduced in 1923 or when it passed out of Congress in 1972, hard-won laws against sex discrimination do not rest on any unequivocal constitutional foundation; they can be inconsistently enforced or even repealed. Elements of sex discrimination remain in statutory and case law, and courts have had difficulty applying a consistent standard to gender-based classifications, which are not inherently suspect or comparable to racial or ethnic classifications under equal-protection analysis.

The need for a federal Equal Rights Amendment remains as compelling as it was in 1978, when now Supreme Court Justice Ruth Bader Ginsburg wrote in the Harvard Women's Law Journal: "With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and all women are created equal."

Summary by
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Why the ERA Remains Legally Viable and Properly Before the States

Congressional Research Service
Library of Congress Analyzes Three-State Strategy

On March 18, 1996, the Congressional Research Service at the Library of Congress released a memorandum on ERA ratification, including analysis of the "three-state strategy" for preserving the existing 35 state ratifications.

While noting that there is no precedent for accepting state ratifications after a deadline, the report stated that inclusion of the 27th (Madison) Amendment in the Constitution has implications for the premise that ratification of the ERA by three more states could allow Congress to declare ratification accomplished.

Despite Supreme Court rulings requiring a "sufficiently contemporaneous" time period, the CRS analysis concludes that "Congress' acceptance of the ratification of the 27th Amendment...appears to have disproved the assumption that, absent a deadline, an amendment ceases to be eligible to be ratified merely because of the passage of time."

The three-state strategy expands on this concept to propose that amendments whose time limit is not in the text, such as the ERA, likewise remain valid for ratification indefinitely.

While ERA opponents might argue that 21st century ratifications could not be counted as contemporaneous with those from 1972 - 1982, the CRS report notes that "the acceptance of the Congressional Pay Amendment makes this argument much more difficult."

Congress has already shown that it claims authority to alter time limits in resolving clauses by extending the original ERA deadline from 1979 to 1982.

In light of that action, the CRS memorandum poses a key question: "Does this mean this (or another) Congress has the authority to recognize state ratifications of the ERA that may be received in the future, even though the deadlines have passed?"

The report, while taking no position, discusses three possible alternatives for a three-state strategy.

(1) ERA proponents could ask Congress to pass a new ratification deadline, thereby reviving the process that has already produced 35 of the necessary 38 state ratifications.

(2) Through the approach of H.Res. 39 [now H.Res. 98 in the 107th Congress], Congress could be requested to "take any legislative action necessary to verify the ratification of the Equal Rights Amendment as part of the Constitution" if three additional states vote to ratify.

(3) Proponents could pursue the argument of the legal analysis in "Why the ERA Remains Legally Viable and Properly Before the States" (A. Held, S. Herndon, D. Stager, published in the Spring 1997 issue of William & Mary Journal of Women and the Law), which claims that because future Congresses can extend ratification deadlines in resolving clauses, those deadlines constitute no absolute closure on the process, and the ERA remains open to ratification by the states.

The proposition that one Congress cannot bind a future Congress by means of a rule or law offers both possibilities and difficulties for the three-state strategy.

While a deadline might be able to be extended or eliminated by a future Congress, the commitment of H.Res. 98 to affirm ratification after three more states could also be ignored by a future Congress.

The CRS report sketches a possible scenario if three more states ratify the ERA. The U.S. Archivist, who maintains records regarding amendment ratifications, would likely file the new state ratification documents with the prior ones rather than rejecting them, but would probably not certify the amendment by a proclamation after the 38th state approval as long as existing instructions from Congress indicate that the ratification deadline has expired.

Further action would likely be required from Congress prior to or at that time in order to validate the ERA as part of the Constitution.

This CRS analysis does not in general challenge the following arguments for the three-state strategy:

(1) The ratification process of the Equal Rights Amendment, which began in 1972, might remain open because the time limit is in the resolving clause rather than in the text of the amendment.

(2) Ratification of the ERA over three or more decades can be considered sufficiently contemporaneous, since the 203-year time period for the 27th Amendment was considered so.

(3) The existing 35 state ratifications remain potentially viable if three more states ratify the ERA.

(4) Congress retains authority to declare the ERA ratification process valid after the 38th state ratifies.

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