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Testimony to the Senate Judiciary Committee by the ERA Project at Columbia Law School and Constitutional Law Scholars on Joint Resolution S.J.Res. 4: Removing the Deadline for the Ratification of the Equal Rights Amendment

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With respect to ratification of constitutional amendments "Congress is uniquely equipped to decide the timeliness question," because the constitution made Congress the "director of the Amendment process."
Ruth Bader Ginsburg

The Equal Rights Amendment Project at Columbia Law School (ERA Project)[1] and the undersigned constitutional law scholars provide the following analysis of S.J.Res. 4, resolving to remove the time limit for the ratification of the Equal Rights Amendment (ERA) and declaring the ERA fully ratified.

Introduction

In the analysis below, we make several points related to Congressional power to remove the time limit for the ratification of the ERA and declaring it fully ratified:

- Congress has the authority to amend, extend, or repeal the ratification time limit placed in the preamble to the ERA.
- Little weight should be given to a federal court ruling, the Congressional Research Service, and the Office of Legal Counsel that the time limit for state ratifications of the ERA expired in 1982.
- It matters that the time limit for state ratification of the ERA was placed in the *preamble* of the Congressional resolution proposing the amendment and not in the *text* of the amendment itself.
- The text of Article V specifically references state ratifications, and makes no mention of rescissions or withdrawals of earlier ratifications of proposed constitutional amendments. Not only are state legislative rescissions not accounted for in the Constitution, there is no historical precedent for recognizing state rescissions. Even if rescissions had a place in the constitutional amendment process, Congress is in the best position to recognize or reject state legislative rescissions or withdrawals of earlier ratifications of a proposed amendment

[1] The ERA Project at Columbia Law School's Center for Gender and Sexuality Law is a law and policy think tank established in January 2021 to develop academically rigorous research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment (ERA) to the U.S. Constitution, and on the role of the ERA in advancing the larger cause of gender-based justice.

Article V of the Constitution sets forth the procedures for amending the Constitution and specifically anticipates no role for courts or the Executive Branch in this process. Authority to propose and ratify amendments lies fully in the political process, in Congress, state legislatures, and/or constitutional conventions. As such, the project of constitutional amendment is among the most quintessentially democratic exercises of self-government anticipated by the Constitution, and the amendment process should be left to the most representative bodies—Congress, state legislatures, and constitutional conventions. So, too, questions relating to the procedures for proposing and successfully ratifying proposed amendments are essentially political questions, properly left to the authority of political bodies to resolve.

For these reasons, disagreements related to proposed amendments should be addressed in ways that reflect and reinforce the underlying democratic structure and values of the amendment process itself. As between possible resolutions to a dispute relating to the ratification of a proposed amendment, the most democracy-enhancing answer should be favored.

Article V requires that any amendment be proposed by 2/3 of both houses of Congress and ratified by 3/4 of the state legislatures. The ERA has satisfied this high bar, yet uncertainties linger surrounding a congressionally created seven-year time limit for state ratification of the ERA and the impact of state efforts to rescind prior ratifications.

While Article V seems quite clear in what is required to amend the Constitution, in practice its implementation has resulted in a wide range of divergent procedures and irregularities. Debates like those surrounding the ERA have been the norm for nearly all of the 27 amendments to the Constitution.

The questions we seek to clarify about the status of the ERA are not unusual but the norm. Examples of legal uncertainties in previous amendments include:

- The 12th Amendment (which provides for separate Electoral College votes for President and Vice President), was approved in the Senate by 2/3 of a quorum and not the full body.
- The 13th, 14th, and 15th Amendments were ratified in the immediate aftermath of the Civil War and were accomplished through legal maneuvers that were highly unusual in violation of Article V—yet are widely and justly regarded as foundational elements of our modern democracy.
- The text of the 16th Amendment (which authorizes the federal income tax) varied between state ratifications, yet now forms the basis for the ubiquitous federal income tax.
- The 27th Amendment (sometimes called the "Madison Amendment," which governs Congressional pay raises) was proposed by the First Congress and then took more than 200 years to be ratified by 38 state legislatures, and is now accepted as a part of the Constitution.[2]

1. Relevance of the Time Limit to the ERA's Final Ratification

[2] Pozen, David E. and Schmidt, Thomas P., The Puzzles and Possibilities of Article V (2021). Columbia Law Review, Vol. 121, pp. 2317-95, 2021, Available at SSRN: https://ssrn.com/abstract=3834066

a. Congress has the clear authority to amend, extend, or repeal the ratification time limit placed in the preamble to the Equal Rights Amendment

In 1973, the resolution passed by Congress proposing the ERA was prefaced by a resolving clause that included a seven-year time limit for state ratification of the amendment: "the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."[3] Congress subsequently extended the time limit for another three years, to June 30, 1982.[4]

Given that the 38th state to ratify the ERA occurred after the expiration of the time limit, thus securing the requisite number of state ratifications under Article V, questions remain regarding 1) the validity/legal effect of the time limit itself; 2) the significance of state ratifications after the expiration of the time limit; and 3) Congress's power to extend and/or remove the time limit retroactively.

In *Dillon v. Gloss,* the Supreme Court held that Congress's authority to impose a reasonable time limit for state ratification is implicit in Article V and "an incident of its power" to determine the mode of ratification under Article V.[5] In that case, the Court upheld Congress's specification of a seven-year time limit on the ratification of the 18th Amendment establishing prohibition. This principle was affirmed by the Supreme Court in *Coleman v. Miller*, holding that "Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."[6]

If Congress has the power to set the time limit for ratification, then it would follow from the principle of anti-entrenchment that a subsequent Congress could amend, extend, or repeal a previously established time limit. Of course, this conclusion may be different in cases where the time limit is included in the body of the amendment's text itself, raising different concerns about authority to amend or repeal the time limit after states have ratified both the amendment and the time limit.

As such, Congress has the power through resolution to extend or repeal the time limit set forth in the preamble to the original resolution proposing to the states ratification of the ERA.

b. What weight should be given to a federal court ruling, the Congressional Research Service, and the Office of Legal Counsel maintaining that the time limit for state ratifications of the ERA expired in 1982?

In 2020, a federal judge in the District of Columbia ruled that "Congress set deadlines for

[3] House Joint Resolution 208 (1972).
[4] House Joint Resolution 638, (1978).
[5] 256 U.S. 368, 375–76 (1921).
[6] 307 U.S. 433, 456 (1939).

ratifying the ERA that expired long ago" and that the recent ratifications asserted by Nevada, Illinois, and Virginia "came too late to count."[7] This case is on appeal before the D.C. Circuit and was argued in Fall 2022.

The central holding of the District Court's ruling was that the plaintiffs did not have standing to bring the suit in the first place, so the court's discussion of the time limit is *dicta*, meaning that it was not essential to the holding and is not legally binding. The District Court's opining on the court's jurisdiction to determine the validity of the congressionally imposed time limit and the validity of the last three state ratifications in Nevada, Illinois, and Virginia was outside the scope of its ruling based on narrow standing grounds.

The Congressional Research Service (CRS) has concluded several times that the ERA "formally died on June 30, 1982, after a disputed Congressional extension of the original seven-year period for ratification." Of course, the CRS's interpretations of legal questions are advisory, not binding, on Congress. More importantly, the positions taken by the CRS on the ERA time limit do not contradict the position that Congress had the power to extend the time limit in 1977, and this power should, and does, include the power to extend or repeal the time limit through joint congressional resolution.

The Office of Legal Counsel's (OLC) opinions on this issue have swung back and forth depending on the position of various presidential administrations. First, during the Carter administration (concluding that Congress has the authority to extend the ERA time limit by simple majority), then the Trump administration (stating that the congressionally imposed time limit was binding and, upon its expiration, Congress did not have the power to remove or extend it), then back to the Biden administration (Congress is best positioned to resolve unresolved issues). The currently operative memo leaves the question to Congress to resolve, which is the appropriate forum for the resolution of this issue.

The current OLC has now cleared a path for Congress to consider and pass a joint resolution that would lift the time limit on final ratification of the ERA. It is important to recognize, however, that Article V enumerates no role for the Executive Branch in the process of amending the Constitution, and as such, OLC's opinions are informative but not binding on Congress in any way.

Some opponents have taken the position that upon the expiration of the time limit for ratification of the ERA in 1982, the ERA became a legal nullity and that Congress had to act while the measure was actually pending; that is, before it expired with the passage of the ratification time limit. Unfortunately, these parties cite no authority for this position. In fact, there is no grounding or justification for this position in the text of Article V, in the past practices of Congress related to other amendments, or in any court decisions interpreting congressional authority under Article V.

c. Is there any legal significance to the fact that the time limit for state ratification of the ERA was placed in the *preamble* of the congressional resolution proposing the amendment and not in the *text* of the amendment itself?

[7] Virginia v. Ferriero, 525 F.Supp.3d 36, 40 (D.D.C. 2021).

Time limits on ratification of proposed amendments to the Constitution are a relatively modern feature of the amendment process. Twenty-three of the 27 amendments to the Constitution were proposed by Congress for state ratification without a time limit. Indeed, the most recent amendment to the Constitution, the 27th, was originally introduced in Congress by James Madison in 1789, did not have a time limit, and took over 200 years for the states to fully ratify in 1992.

Congress first began placing seven-year time limits for amendment ratification in 1917 with the proposal of what would become the 18th Amendment. The 18th, 20th, and 22nd Amendments all contain a time limit clause in the text of the amendment declaring that these articles "shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress." Congress took a different approach with the ERA, placing the time limit not in the amendment's text but in the preamble, thus raising important questions about its enforceability. Generally, the preamble to legislation, or the Constitution itself, is not regarded as a source of law or enforceable.[8]

To the extent that Congress has the authority to set the time for state ratification of proposed amendments, this power comes not from Article V, which is silent as to time limits, but rather from Congress's implicit power to determine the *mode* of ratification under Article V.[9]

2. What effect is to be given to states that have voted to rescind prior ratifications of the ERA?

Five state legislatures, Nebraska, Tennessee, Idaho, Kentucky, and South Dakota, have voted to rescind their earlier ratifications of the ERA. How should those votes be treated under Article V?

Article V's text says nothing about a state's power to *rescind* or *withdraw* an earlier ratification of a proposed amendment; instead, it speaks only to state *ratification*. One way to read this language is to conclude that once a state has ratified an amendment, it cannot reverse that decision. Another is to hold that the question is left to Congress to decide as a political question, attendant to Congress's implicit power to determine the mode of ratification under Article V.

There is precedent for the latter position, relating to the ratification of the 14th Amendment when Congress ignored rescissions by two, or more, states. New Jersey (in 1866) and Ohio (in 1867) ratified the 14th Amendment, and in 1868 the legislatures of both states voted to rescind, or "withdraw," their previous ratifications.

In July of 1868, Secretary of State William Seward sent a message to Congress stating that, notwithstanding the complexities of state ratifications, the three-quarters requirement for ratification had been satisfied, discounting the withdrawals of previous ratifications by New Jersey and Ohio:

[8] *See e.g. Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).
[9] *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921).

> "It appears ... that New Jersey and Ohio have passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States ... I do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining in full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said states from such resolution, then the aforesaid amendment has been ratified ... and has been ratified ... for all intents and purposes ... as a part of the Constitution of the United States."[10]

Congress responded to Seward's message with a concurrent resolution that declared the 14th Amendment ratified, and included New Jersey and Ohio on the list of ratifying states.

The 14th Amendment precedent could be interpreted to conclude that Congress has the power to recognize or reject state legislative rescissions/withdrawals of earlier ratifications of a proposed amendment, and that the matter of final declaration is an essentially political question to be resolved by Congress, sometimes upon the recognition or recommendation of other political authorities.

Conclusion

The text of the Constitution, along with historical and legal precedents, instruct that incident to Congress's power to determine the mode of ratification under Article V, Congress has the authority to create, amend, and remove a time limit for state ratification of proposed constitutional amendments, and that the meaning and validity of state rescissions of prior ratifications can be determined by Congress as an essentially political, not legal, question.

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[10] William H. Seward, 15 Stat. Leg. 706 (July 20, 1868).

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