

THE EQUAL RIGHTS AMENDMENT'S REVIVAL: QUESTIONS FOR CONGRESS, THE COURTS AND THE AMERICAN PEOPLE

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On March 22, 1972, Congress approved the language of a proposed Equal Rights Amendment.¹ The measure had the simple – and long sought – goal of enshrining the principle of gender equality in our Constitution, giving Congress the express power to enforce its provisions through legislation. To go into effect, the ERA required the approval of 38 of the 50 state legislatures. Congress set a deadline of seven years, which it later extended to ten. But despite strong early momentum, the campaign faltered three states short of the goal.² Complicating matters further, five state legislatures voted to rescind their earlier support. In March 1982, ERA proponents conceded defeat.

Now, after a long period of dormancy, the campaign to ratify the ERA has sprung back to life. In March 2017, the Nevada legislature lent its approval.³ And in May 2018, Illinois became the 37th state to ratify.⁴ Does this mean, as proponents say, that we are just one state away from ratifying the Twenty-Eighth Amendment? The answer hinges on two procedural questions with no settled answer. Also unclear is who gets to decide: Congress, the courts, or the American people?

I. THE QUESTION OF THE LAPSED DEADLINE

Can states act now—47 years after Congress proposed the ERA and 37 years after the prescribed time for action has passed—to ratify it? It remains unclear. The Constitution does not require that constitutional amendments be ratified in a fixed period of time. Congress first imposed a time limit in 1917 when it crafted the Prohibition Amendment. Limiting the time for consideration was the brainchild of straddling senators who wanted to appear supportive of the Prohibitionists' cause while reducing the odds the amendment would actually pass.⁵ A leading supporter of Prohibition, Senator William Borah of California, objected on the grounds that

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¹ H.R.J. Res. 208, 92nd Cong. (1972). See also THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 7 (2013).

² JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789—2002*, 179-180 (3d ed. 2010); Chronology of the Equal Rights Amendment, 1923-1996, Nat'l Org. for Women (Jan. 2014), <https://now.org/wp-content/uploads/2014/01/Chronology-of-the-Equal-Rights-Amendment.pdf> [<https://perma.cc/5QDU-PQC6>].

³ David Montero, *Thirty-five Years Past a Deadline Set by Congress, Nevada Ratifies the Equal Rights Amendment*, L.A. TIMES (Mar. 20, 2017, 6:55 PM), <https://www.latimes.com/nation/la-na-nevada-era-2017-story.html> [<https://perma.cc/7XK8-CE2T>].

⁴ Matthew Haag, *The Equal Rights Amendment Was Just Ratified by Illinois. What Does That Mean?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/equal-rights-amendment-illinois.html> [<https://perma.cc/4CCB-96SB>].

⁵ See ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 87-88 (1978).

the time limit was an unconstitutional modification of the amendment process set forth in Article V. “As the Constitution now exists, there is no limitation upon the time within which the States may ratify an amendment,” he insisted.⁶ But Borah was unable to convince his colleagues. They sent their proposed amendment to the states with a seven-year approval window. As it turned out, the gamesmanship over deadlines proved unnecessary as the measure breezed to ratification in just 13 months.⁷ A few years later, the Supreme Court swatted away a legal challenge to the time limit in the case of *Dillon v. Gloss*, ruling unanimously that nothing in the Constitution’s design prevented Congress from imposing one.⁸ The justices also expressed the view, in what may be dictum, that ratification by the states should be “sufficiently contemporaneous” and not “scattered through a long series of years.”⁹

Since then, Congress has included a seven-year time limit in every amendment proposal but two.¹⁰ One of those measures was a would-be Child Labor Amendment, which Congress sent to the states in 1924.¹¹ The ratification campaign moved slowly. When Kansas lent its approval, 13 years after the measure was proposed, a group of state legislators appealed to the Supreme Court. Citing *Dillon*, they argued that the time to ratify had lapsed and asked the Court to decide what constitutes a reasonable time for ratification. But the Justices demurred in the case of *Coleman v. Miller*. They held, in a finding that is hard to square with the contemporaneity standard articulated in *Dillon*, that the question involved “an appraisal of a great variety of relevant conditions, political, social and economic” that is best conducted by Congress, not the courts.¹²

So, if one more state—say, Virginia or Arizona—votes to ratify the ERA, who decides whether the deadline imposed by Congress remains in force? Would Congress treat this as a political question within its exclusive purview? Or would

⁶ 55 CONG. REC. S5,649 (Daily ed. Aug. 1, 1917) (statement of Sen. Borah).

⁷ GRIMES, *supra* note 5, at 89. See also NEALE, *supra* note 1, at 26.

⁸ *Dillon v. Gloss*, 256 U.S. 368 (1921).

⁹ *Id.* at 375.

¹⁰ U.S. CONST. amend. XIX; Proposed Child Labor Amendment to the Constitution 43 Stat. 670 (1924). The two proposed amendments without time limits were the Nineteenth Amendment (U.S. Const. amend. XIX) and a proposed child labor amendment (43 Stat. 670 (1924)). Congress included seven-year time limits within the text of four ratified amendments: the Eighteenth Amendment (U.S. Const. amend. XVIII, § 1), Twentieth Amendment (U.S. Const. amend. XX, § 6), the Twenty-First Amendment (U.S. Const. amend. XXI, § 3), and the Twenty-Second Amendment (U.S. Const. amend. XXII, § 2). It included seven-year time limits in prefatory language in another four ratified amendments: the Twenty-Third Amendment (U.S. Const. amend. XXIII, 74 Stat. 1057), Twenty-Fourth Amendment (U.S. Const. amend. XXIV, 76 Stat. 1259), Twenty-Fifth Amendment (U.S. Const. XXV, 79 Stat. 1327), and Twenty-Sixth Amendment (U.S. Const. XXVI, 85 Stat. 825). The proposed District of Columbia Voting Rights Amendment (92 Stat. 3795) had a seven-year time limit in both the prefatory language and text. See also Scott Bomboy, *Can a dormant proposed constitutional amendment come back to life?*, CONST. DAILY, NAT’L CONST. CTR., May 31, 2018, <https://constitutioncenter.org/blog/can-a-dormant-proposed-constitutional-amendment-come-back-to-life> [https://perma.cc/2JCD-JV8J].

¹¹ Proposed Child Labor Amendment to the Constitution, 43 Stat. 670 (1924); 65 CONG. REC. 10,142 (1924).

¹² *Coleman v. Miller*, 307 U.S. 433, 453 (1939).

the Supreme Court step in to vindicate the principle set forth in *Dillon* that ratification by the states must be “sufficiently contemporaneous”? One court declined to defer to the legislative branch on this very question.¹³ After Congress extended the ERA’s ratification deadline in 1979, a federal district court in Idaho ruled that Congress had exceeded its power.¹⁴ But the Supreme Court never got the chance to decide if this intervention was proper. It stayed the Idaho court’s ruling¹⁵ and when the deadline for ratification subsequently passed, it vacated the case as moot.¹⁶ Now, all these years later, the justices may have a new opportunity to decide whether to tackle this question or to defer to Congress.

In 1992, Congress grappled with a different controversy related to the timing of ratification—this time in connection with the Twenty-Seventh Amendment, also known as the Madison Amendment. The provision, which prohibits congressional pay raises from taking effect until an intervening election, was drafted by James Madison in 1789 and sent to the states for ratification as part of a package of amendments we know as the Bill of Rights. It was left for dead in the early eighteenth century after receiving the support of only seven states. When a political science student discovered the all but forgotten proposal in 1982, he led a campaign to convince state legislatures to complete the process of ratification.¹⁷ Anti-government and populist in spirit, the Madison Amendment fit the tenor of the times. And so, 203 years after Congress first proposed it, the measure won the support of the requisite 38 states. The Democratic leadership in Congress expressed concern about an irregular process—was it even possible to revive an amendment after nearly two centuries?—but agreed to certify it after the Archivist of the United States forced its hand by declaring the measure adopted.¹⁸

Based on these precedents, some ERA proponents have argued that Congress has the power to waive the expired deadline.¹⁹ They cite the precedent of the Madison Amendment as an example of Congress’s plenary power to consider a previously dormant amendment and override objections based on a lack of contemporaneity.²⁰ Some also say it is significant that the deadline was not included in the text of the proposed amendment but rather in the preamble, which Congress may retain the power to alter.²¹ In an interview after the Nevada legislature ratified the ERA, state Senator Pat Spearman, who shared her insights in this symposium,

¹³ *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

¹⁴ *Id.* at 1152-53.

¹⁵ *Natl Org. of Women v. Freeman*, 455 U.S. 918 (1982).

¹⁶ *Natl Org. of Women v. Idaho*, 459 U.S. 809 (1982).

¹⁷ 2 John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–2010*, 505-06 (3d ed. 2010); see also Don J. DeBenedictis, *Congressional vote ends debate over 203-year-old pay-raise proposal*, ABA J., Aug. 1992, at 26.

¹⁸ Vile, *supra* note 15, at 506; see also Neale, *supra* note 1, at 16-18.

¹⁹ See, e.g., Jessica Neuwirth, *Equal Means Equal: Why the Time for an Equal Rights Amendment is Now* 101 (The New Press, 2015).

²⁰ See, e.g., Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & L. 113 (1997), at 114-115; Neuwirth, *supra* note 17, at 95-97.

²¹ E.g., Neuwirth, *supra* note 17, at 101; see also Neale, *supra* note 1, at 5.

maintained that the deadline was “irrelevant” because it was contained in the resolving clause and not “part of the amendment that was proposed by Congress.”²²

Others question whether the Madison Amendment precedent is relevant.²³ Unlike the ERA, it did not have an express time limit. They also raise concerns grounded in norms of procedural fairness and finality. As scholars Brandon P. Denning and John R. Vile argue, allowing the ERA “a third bite at the apple would suggest that no amendment to the U.S. Constitution ever proposed ... could ever be regarded as rejected.”²⁴

II. THE QUESTION OF RECISSION

A second thorny question relates to the actions of five state legislatures (Idaho, Tennessee, Nebraska, Kentucky and South Dakota) that voted to ratify the ERA but then later acted, between 1973 and 1979, to withdraw their support. Can states act to rescind their support of a constitutional amendment before it is finally ratified? The federal district court in *Freeman* ruled that states retained the right to rescind any time before an amendment takes effect.²⁵ But the Supreme Court has never decided this question. Would the justices consider this to be a political question best left to Congress? Or would they jump into the fray to decide it themselves?

Congress did confront the rescission question in 1868 during the ratification of the Fourteenth Amendment, drafted after the Civil War to provide powerful new legal tools to protect the liberty and equality of newly freed slaves. Obtaining the support of three quarters of the states for this revolutionary amendment was no easy feat. At the last minute, just as the threshold for ratification was reached, two states withdrew their support. In a confused process, Congress passed a resolution declaring the amendment ratified despite the purported rescissions.²⁶ Within a week, however, two additional states lent their approval, allowing Secretary of State William Seward to issue a final certification, sidestepping questions over the legality of the rescissions.²⁷

Does this episode offer any insight into how Congress or the courts would treat the question of rescission today? Not necessarily. The political context of 1868 was unique. As the states of the defeated Confederacy sought readmission to the Union, Congress felt the urgency to push the Fourteenth Amendment toward

²² Colin Dwyer & Carrie Kaufman, *Nevada Ratifies the Equal Rights Amendment ... 35 Years After The Deadline, Morning Edition*, NATIONAL PUBLIC RADIO (Mar. 21, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/21/520962541/nevada-on-cusp-of-ratifying-equal-rights-amendment-35-years-after-deadline>. See also JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW 101 (2015).

²³ E.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *Yale L.J.* 677, 692 (1993); see also Neale, *supra* note 1, at 23.

²⁴ Brandon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, *CONST'L COMMENT.*, Winter 2000, at 598.

²⁵ *Freeman*, 529 F. Supp. at 1155.

²⁶ Neale, *supra* note 1, at 16. See also GRIMES, *supra* note 5, at 50-51.

²⁷ *Id.* See also GRIMES, *supra* note 5, at 51.

ratification and was prepared to take extraordinary action to achieve it.²⁸ One contemporary wrinkle is the heated debate over two campaigns, spearheaded by conservative activists, to convene an amendment-proposing convention under a provision of the Constitution's Article V. One campaign seeks a federal balanced budget amendment. The other, styled a "Convention of States," aims to restrict the power of the federal government to act in the national interest. Under the process set forth in Article V, if two-thirds of the state legislatures petition for a convention, Congress must convene one.²⁹ The two campaigns are working toward the goal of securing the 34 state petitions needed to force a convention. At the same time, progressive advocates worried about the prospect of a wholesale rewrite of the Constitution by a "runaway convention" have lobbied lawmakers to withdraw their petitions, with notable success.³⁰ One day soon, Congress or the courts may have occasion to decide whether those actions are valid. A decision to disregard the five state rescissions of support for the ERA might set a problematic precedent for those fighting to head off the Article V convention campaigns, most of whom are progressive allies who support the goal of ratifying the ERA.

III. HOW WILL CONGRESS AND THE COURTS RESPOND?

These unresolved procedural questions make it difficult to predict how Congress and the courts might respond once an additional state legislature acts to ratify the ERA. How much weight will they give to the view of the American people? Recent public opinion research reveals that Americans support the ERA by an overwhelming margin. A 2016 survey commissioned by the ERA Coalition/Fund for Women's Equality found that 94 percent of those polled said they would support an amendment to the Constitution that guarantees equal rights for men and women.³¹ And a new poll of voters in Virginia, one of the 14 states that have never ratified the amendment, shows 81 percent support for the ERA.³²

One thing is clear: the battle would be joined at an extraordinary moment in the long fight for women's equality. The election of Donald Trump and cascading revelations of sexual harassment and abuse in the worlds of media, entertainment and business have fueled a powerful resurgence of women's activism and civic engagement—from the Women's Marches to the #MeToo movement to record

²⁸ GRIMES, *supra* note 5, at 50-51.

²⁹ U.S. CONST. art. V ("The Congress ... on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments").

³⁰ Michael Leachman, *Nevada Joins Maryland, New Mexico in Rescinding Calls for a Constitutional Convention, Off the Charts*, CTR. ON BUDGET & POLICY PRIORITIES (May 10, 2017, 10:30 AM), <https://www.cbpp.org/blog/Nevada-joins-maryland-new-mexico-in-rescinding-calls-for-a-constitutional-convention> [https://perma.cc/EQG5-WQGD].

³¹ Press release, ERA Coal., BREAKING: Americans—by 94 %—Overwhelmingly Support the Equal Rights Amendment (ERA) (June 17, 2016), <http://www.eracoalition.org/files/ERAPollingPressRelease.pdf> [https://perma.cc/6YZN-TXNA].

³² Public opinion survey, Watson Ctr. for Public Policy, Voters Back Amazon Deal, Sports Betting, ERA & Independent Redistricting Commission (Dec. 5, 2018), <http://wasoncenter.cnu.edu/wp-content/uploads/2018/12/Dec-5-2018-Final-1.pdf> [https://perma.cc/DGP6-3WB5].

numbers of women running for office (and winning).³³ With a strong base of public support for the ERA and an energized women's vote, would Congress risk standing in the way? Or would the more expedient course be to exercise its plenary power to certify the proposal as the Twenty-Eighth Amendment? Already, Senators Ben Cardin of Maryland and Lisa Murkowski of Alaska, and Representative Jackie Speier of California, have introduced bipartisan legislation to remove the deadline for ratification, paving the way for Congress to declare the measure valid.³⁴

IV. THE FRESH START STRATEGY AS AN ALTERNATIVE

If the push to ratify the 1972 version of the ERA were to fail on procedural grounds, proponents always have the option of starting over. While the challenge of winning the support of Congress and the requisite 38 state legislatures from scratch is by all accounts daunting, a “fresh start strategy” offers distinct advantages as well.

First, a reignited amendment campaign would present an opportunity to engage and mobilize women (and men) across the entire country, not just in a single tipping-point state, providing a channel for activism and engagement. The campaign would start in Congress, which would have to pass a resolution proposing an amendment by a two-thirds vote in both houses. In this time of sharp political polarization, it may seem like an insurmountable challenge. While the amendment would likely win the overwhelming support of Democrats in Congress, Republicans exhibit far less willingness to support the ERA now than they did in 1972. Of the 169 co-sponsors of H.J. Res. 33, a “new ERA” proposal sponsored by New York Democratic Representative Carolyn Maloney, only six are Republicans. But the recent ratification votes in Nevada and Illinois show that winning at least some bipartisan support is possible.³⁵ It is not hard to imagine that a campaign to ratify a new version of the ERA would be a hot topic of debate in every House and Senate election campaign. Given the high level of public support, lawmakers would have to weigh the political price of opposing the ERA—making equal rights for women a potent electoral wedge issue.

Assuming the hurdle of congressional approval can be met, the campaign to win ratification in state legislatures could rack up a significant number of wins in a relatively short time. Congress approved the current version of the ERA in 1972,

³³ See Grace Sparks and Annie Grayer, *256 Women Won House and Senate Primaries, a Huge New Record*, CNNPOLITICS (Sept. 17, 2018), <https://www.cnn.com/2018/09/16/politics/house-women-update-september/index.html> [<https://perma.cc/8S6D-G9QC>]; Meredith Conroy, *At Least 123 Women Will Be In The Next Congress. Just 19 Are Republican*, FiveThirtyEight (Nov. 16, 2018), <https://fivethirtyeight.com/features/at-least-123-women-are-headed-to-congress-just-19-are-republicans/> [<https://perma.cc/U4XQ-YW6W>].

³⁴ S.J. Res. 5, 115th Cong. (2017), H.R.J. Res. 53, 115th Cong. (2017).

³⁵ This was especially evident in Illinois. In the state Senate, 8 Republicans voted with 35 Democrats in support of ratification. In the General Assembly, 10 Republicans joined 62 Democrats to advance the amendment. See, e.g., *Voting History For SJRCA0004*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/votehistory.asp?GA=100&DocNum=4&DocTypeID=SJRCA&GAId=14&LegID=99262&SessionID=91> [<https://perma.cc/V96W-YLS9>] for the official ERA vote tallies for the Illinois House and Senate.

and 30 state legislatures ratified it by the end of 1973.³⁶ That kind of a winning streak, which could be replicated today, can help build momentum and energize supporters while demoralizing opponents.

The history of constitutional amendments shows that popular measures with the backing of a powerful social movement can advance in the states with surprising speed. It took over six decades before the temperance movement succeeded in persuading Congress to propose the Eighteenth Amendment. But once the measure was sent to the states in 1917, this capstone of the Prohibitionists' crusade to rid the nation of "demon rum" achieved ratification in a mere 13 months.³⁷ The Twenty-Sixth Amendment, which lowered the national voting age to 18, followed a similar trajectory. President Dwight Eisenhower first advocated the proposal in 1954.³⁸ But when Congress finally proposed an amendment in 1971, tapping into the energy unleashed by the anti-war and youth movements, it sprinted to ratification in less than four months.³⁹

Second, a new ERA provides an opportunity to update the amendment's language and framing. For example, Representative Carolyn Maloney's "new ERA" proposal inserts an additional sentence into the 1972 version. It reads: "Women shall have equal rights in the United States and every place subject to its jurisdiction."⁴⁰ More than mere rhetoric, this added language is an affirmative statement of rights that would put the word "women" into the Constitution for the first time—and clarify that the amendment's purpose is to address historical discrimination against women. This "new ERA" would also give the states, and not just Congress, the power to enforce its provisions through appropriate legislation.⁴¹

Third, an energetic movement to pass the ERA can help raise the salience of women's issues in the arenas of politics and public policy, prodding the courts and political branches in a positive direction. That is precisely what happened in the 1970s. Alongside the push for the ERA, legal advocates operating on a parallel track executed a powerfully effective legal strategy that invoked the equal protection guarantee of the Fourteenth Amendment to invalidate laws that discriminated against women.⁴² Congress also took inspiration from the movement to ratify the ERA, enacting significant new legislation including Title IX of the Education

³⁶ Neale, *supra* note 1, at 14. See also Alex Cohen & John F. Kowal, *Is the GOP Warming Up to the Equal Rights Amendment?*, BRENNAN CTR. FOR JUSTICE (Mar. 19, 2019), <http://www.brennancenter.org/blog/gop-warming-equal-rights-amendment> [<https://perma.cc/FVU2-3VUH>].

³⁷ GRIMES, *supra* note 5, at 89.

³⁸ See Jose D. Villalobos, *Twenty-Sixth Amendment*, in *ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR* 803 (Kenneth F. Warren ed., 2008).

³⁹ GRIMES, *supra* note 5, at 143, 147.

⁴⁰ H.J. Res. 33, 115th Cong. § 1 (2017).

⁴¹ *Id.* at § 2.

⁴² *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (adopting "heightened scrutiny" standard of review to evaluate legal distinctions based on sex), Reed v. Reed, 404 U.S. 71 (1971) (state statute providing that men must be preferred to women in estate administration violates Equal Protection Clause of the Fourteenth Amendment); see also *Timeline of Major Supreme Court Decisions on Women's Rights*, ACLU (Oct. 19, 2017), https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf [<https://perma.cc/MA5X-JDH8>].

Amendments Act of 1972, which prohibits sex discrimination in education programs that receive federal support,⁴³ and the Pregnancy Discrimination Act of 1978, which prohibits sex discrimination on the basis of pregnancy.⁴⁴ In this way, as Julie C. Suk observed at this symposium, the politics of the ERA can be more important than what the courts can do with it. The push to ratify the amendment creates a mobilization that adds “moral legitimacy” to a broader array of efforts to advance gender equality.

To be sure, the “fresh start strategy” will require planning, perseverance and hard work. It is daunting to know that 13 state legislatures or a third of the membership of either house of Congress, representing the interests of a small minority of the population, have the power to block even the most popular amendment proposals. But when a powerful social movement with deep popular support takes up the goal of constitutional change, history shows that this is a battle that can be won.

⁴³ 20 U.S.C. § 1681 (a) (1972).

⁴⁴ 42 U.S.C. § 2000e-(k) (1976 & Supp. II 1978).