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CONGRESSIONAL RESEARCH SERVICE ANALYSIS OF THREE-STATE STRATEGY FOR EQUAL RIGHTS AMENDMENT RATIFICATION¹

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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 achieving ratification by 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 limit, 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.” While ERA opponents might argue that further state 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.”

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. Congress has already shown that it claims authority to alter time limits in resolving clauses by extending the original ERA deadline from 1979 to 1982.² 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 pursuing a three-state strategy:

¹David C. Huckabee, “Equal Rights Amendment: Ratification Issues,” Memorandum, March 18, 1996 (Congressional Research Service, Washington, DC).

²*Idaho v. Freeman*, a 1981 U.S. Circuit Court decision that rescissions were permissible and that Congress had no authority to extend the ratification deadline, was appealed and later vacated by the Supreme Court after the June 30, 1982 deadline. It has no current legal validity.

(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*,³ 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 1995 monograph “Why the ERA Remains Legally Viable and Properly Before the States,”⁴ 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 *H.Res. 39* commitment of the House to affirm ERA ratification after three more states ratify 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 approved, 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 recognize the ERA as part of the Constitution.

This CRS analysis supports in general the premise of the three-state strategy for ERA ratification:

- 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.
- 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 to be so.
- The existing 35 state ratifications remain potentially viable if three more states ratify the ERA.
- Congress retains authority to declare the ERA ratification process valid after the 38th state ratifies.

³Bill number of the three-state strategy bill in 1996; most recently introduced as *H.Res. 794* in the 112th Congress (2011-2012).

⁴Allison Held *et al.*, *William & Mary Journal of Women and the Law* (Vol. 3, No. 1), Spring 1997.