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WHY THE EQUAL RIGHTS AMENDMENT REMAINS LEGALLY VIABLE AND PROPERLY BEFORE THE STATES FOR RATIFICATION

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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 Equal Rights Amendment to the U.S. Constitution, first proposed by Alice Paul in 1923, was passed by the Senate and the House of Representatives on March 22, 1972, by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline in the proposing clause was later extended by Congress to June 30, 1982. At that date, only 35 of the necessary 38 of the states had ratified the ERA. It has not yet become part of the Constitution.

Political action in the unratified states has led to ratification of the ERA by Nevada in 2017.

In the 1990s, supporters began to advocate for passage of ERA ratification bills in the 15 so-called "unratified" states (Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia). By 2017, such bills had been introduced in one or more legislative sessions in 12 of these states (all but Alabama, Georgia, and South Carolina). Between 1995 and 2016, ERA ratification bills were released from committee in several states and were passed by one but not both legislative houses in two of them. The Illinois House but not the Senate passed an ERA ratification bill in 2003, while the Senate but not the House did so in 2014. The Virginia Senate passed a bill ratifying the Equal Rights Amendment five times between 2011 and 2016, but the House of Delegates never released its companion bill from committee for a floor vote.

On March 22, 2017, 45 years to the day after Congress sent the amendment to the states, Nevada became the 36th state to ratify the ERA. Ratification bills have also been introduced in 2017 in the legislatures of Arizona, Florida, Illinois, North Carolina, Utah, and Virginia.

The three-state strategy posits that the ERA is still legally viable and properly before the states.

Political activity in the unratified states is the result of a "three-state strategy" for ERA ratification, which was developed after the 27th ("Madison") Amendment was added to the Constitution in 1992, more than 203 years after its 1789 passage by Congress. Acceptance of that unprecedentedly long ratification period as sufficiently contemporaneous led some ERA advocates to develop the argument that the ERA is still properly before the states and its existing 35 state ratifications remain legally viable. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14th, 15th, and 19th Amendments shows that rescissions or other legislative retractions of ratifications have not been accepted as valid. Therefore, it is possible that state ERA ratifications occurring after 1982 could be added to the existing 35 ratifications, and when 38 states have ratified, the ERA could become part of the Constitution.

This untrodden constitutional ground is explored 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. The Library of Congress's Congressional Research Service discussed this analysis in 1996 and 2014 reports on the status of ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the ERA's three-state strategy and that the issue is more of a political question than a constitutional one. (See www.equalrightsamendment.org/strategy.htm for further information.)

No precedent exists for withdrawing a state ratification by rescission or other means.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment after ratifying it. However, based on precedent, case law, and statutory language, a state's vote to rescind or otherwise withdraw its ratification of a constitutional amendment has never been accepted as valid.

During the ratification process for the 14th Amendment, New Jersey and Ohio voted to rescind their ratifications after first voting yes, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as one of the ratifying states. Tennessee, the final state needed to ratify the 19th Amendment, approved the amendment by one vote on August 18, 1920, but the Tennessee House "non-concurred" on August 31. However, the U.S. Secretary of State had already proclaimed the amendment's inclusion in the Constitution on August 26 (now commemorated as Women's Equality Day).

In *Leser* v. *Garnett* (1922), the Supreme Court upheld the constitutionality of the 19th Amendment with language supporting the claim that a state's ratification of a federal amendment ends its ability to further participate in that amendment's ratification process:

> The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the Legislatures of 36 states, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that:

> … an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.… Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. 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.

A 1981 court decision (*Idaho* v. *Freeman*) in the U.S. District Court of the District of Idaho is sometimes inaccurately cited as support for the claim that the ERA time extension was invalid and rescission votes are permissible. This decision was appealed to the Supreme Court, which did not hear arguments on the appeal before the June 30, 1982 ratification deadline passed. As the *Congressional Quarterly's* 1982 *CQ Almanac* explained, "Not only did the justices dismiss the cases as moot, they also vacated the lower court decision [*Idaho* v. *Freeman*], wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it."

In an October 25, 2012 letter to Congresswoman Carolyn Maloney (NY), longtime lead sponsor of the traditional ERA ratification bill in the House of Representatives, Archivist of the United States David Ferriero wrote:

> [The National Archives and Records Administration's] website page "The Constitutional Amendment Process" (www.archives.gov/federal-register/constitution) … 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.…These statements are derived from 1 U.S.C. 106b.

Bills in Congress support implementation of the three-state strategy for ERA ratification.

Since 1994, bills have been introduced in each session of Congress to support the premise that ERA ratification will be accomplished when an additional three states beyond the existing 35 ratify it. In the 115th Congress (2017-2018), Senator Benjamin Cardin (MD) and Representative Jackie Speier (CA) are the lead sponsors of companion bills *S.J.Res. 5* and *H.J.Res. 53*, which are intended to maintain the legal viability of the 35 state ratifications achieved before the 1982 deadline by affirming that "notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States."

Following the recent ratification of the ERA by Nevada, increasing action on the amendment at federal and state levels will test the premise of the three-state strategy and determine the relative influence of a time limit in the proposing clause of an amendment compared with other political, legal, and judicial considerations.