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THE ERA : IS SEVEN YEARS ENOUGH ?

INTRODUCTION

For nearly five years the Equal Rights Amendment to the Constitution has been stalled short of ratification by the required three-fourths (thirty-eight) of the states. With overwhelming votes of approval in both the House and the Senate, Congress sent the ERA to the states on March 22, 1972. Initial enthusiasm in the state legislatures produced thirty ratifications within one year. Since that time, only five additional states have ratified the amendment while three have rescinded previous ratifications. As state legislatures across the country prepare for new sessions in January, the possibility of ratification of the ERA before the 7-year time limit expires on March 22, 1979, is in doubt. Additionally, the legality of rescission presents an unprecedented problem for legal experts, the Congress and, perhaps, eventually the Supreme Court. Does the ERA need three more states for ratification or six more?

During the summer of 1977, supporters of the ERA, apprehensive that the time limit might expire and kill the amendment altogether, began to investigate the legal possibility of extending the time limit for ratification. This investigation led to the introduction of H.J. Resolution 638 (by Congresswoman Elizabeth Holtzman, D-N.Y., and twenty co-sponsors) which provides for an additional seven years for ratification. The bill was referred to the House Subcommittee on Civil and Constitutional Rights, which held hearings at the beginning

of November. Arguments were heard from six professors of Constitutional law and from the Justice Department.

This paper is not concerned with the merits of the Equal Rights Amendment itself but instead presents an analysis of the history of ratification of the other twenty-six amendments to the Constitution, an analysis of the ratification history of the ERA by the states, and an inquiry into the question of rescission.

AMENDMENT PRECEDENCE

Since the Bill of Rights was ratified in 1791, there have been nearly 6,000 Constitutional amendments introduced into the U.S. Congress. Only twenty-two of those proposed amendments have been passed by the required two-thirds majority of both houses and sent to the states for ratification. Only sixteen have been ratified by the states and become part of the Constitution.

James Madison, in Federalist No. 43, explains that the ratification procedure decided upon for amending the Constitution "guards equally against that extreme facility, which might render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. The mode preferred by the convention seems to be stamped with every mark of propriety." Alexis de Tocqueville, writing in his famous work Democracy in America, states that "The Federal system therefore rests upon a theory which is necessarily complicated, and which demands the daily exercise of a considerable share of discretion on the part of those it governs."

Article V of the Constitution provides that amendments to the Constitution shall be proposed when they are deemed "necessary." In Dillon v. Gloss (1921) the Supreme Court states that Article V of the Constitution strongly implies that "proposal and ratification were but succeeding steps in a single endeavor," that amendments "should be considered and disposed of presently," and that "ratification must be within some reasonable time after the proposal." The Court stated further that "nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some states might be separated from that in others by many years and yet be effective."

The original Constitution left unanswered a number of questions on the detailed operation of the amending process. In Dillon v. Gloss and Coleman v. Miller (1939), the Supreme Court

attempted to outline some general principles which are relevant to the amending process, for instance, the principle of a "reasonable time," already quoted. But what constitutes a reasonable time? What are the standards which will ensure that the amending process will be stamped with the "propriety" of which Madison speaks and the "discretion" of which Tocqueville speaks?

Nearly 200 years of Constitutional history show that there has been contemporaneous agreement between the U.S. Congress and the state legislatures about how and when the fundamental law of the land should be altered. Most Constitutional amendments were ratified expeditiously, and no ratified amendment can be said to have brought up questions of propriety, discretion, reasonable time or lack of necessity. The history of amending the Constitution seems to have provided a precedence of practical experience concerning the question of the relevance and timeliness of Constitutional amendments.

Does the ERA violate this precedent of experience? The following table shows the ratification time of all amendments to the Constitution.

AMENDMENT	YEAR RATIFIED	TIME PENDING RATIFICATION
Bill of Rights	1791	1 year, 2½ months
Eleventh	1798	3 years, 10 months
Twelfth	1804	8½ months
Thirteenth	1865	10½ months
Fourteenth	1868	2 years, 1½ months
Fifteenth	1870	1 year, 1 month
Sixteenth	1913	3 years, 7½ months
Seventeenth	1913	1 year, ½ month
Eighteenth	1919	1 year, 1½ months
Nineteenth	1920	1 year, 2½ months
Twentieth	1933	11 months
Twenty-first	1933	9½ months
Twenty-second	1951	3 years, 11½ months

Twenty-third	1961	9 months
Twenty-fourth	1964	1 year, 5½ months
Twenty-fifth	1965	1 year, 6½ months
Twenty-sixth	1971	4 months

PROPOSED AMENDMENTS NOT RATIFIED

Subject of Amendment	Date Proposed
Apportionment	1789
Pay of Senators and Congressmen	1789
Titles of Nobility	1810
States Rights Amendment Protecting Slavery	1861
Child Labor Amendment (has been ratified by 28 states to date)	1924

Summary Analysis

Six amendments took less than one year to be ratified.
Seven amendments took less than two years to be ratified.
Only three amendments took more than three years to be ratified.
No amendment took four years to be ratified.
The twenty-six amendments took an average of 1.2 years each to be ratified.
Of the four most recent amendments, the longest ratification period was 1½ years.

The ERA, sent to the states on March 22, 1972, has been pending ratification for 5 years, 7½ months (as of the date of this Backgrounder). As compared to the history of ratification of amendments, the states have proved more hesitant about the ERA than any other amendment which has become part of the Constitution. The expeditious ratification of all amendments to the Constitution seems to be a proof of their necessity, broad consensus of the states, and correspondingly, a mandate of the people's will. The ERA shatters precedent.

RATIFICATION HISTORY OF THE ERA*

The Congress sent the ERA to the states on March 22, 1972. The votes approving it were 354-24 in the House and 84-8 in the Senate.

STATE	RATIFICATION*	HOUSE	SENATE
Hawaii	March 22, 1972	51-0	25-0
Delaware	March 23	37-0	16-0
New Hampshire	March 23	179-81	21-0
Idaho	March 24	59-5	31-4
Iowa	March 24	73-14	44-1
Kansas	March 28	86-37	34-5
Nebraska	March 29	unicameral legislature	unanimous
Texas	March 30	139-9	unanimous
Tennessee	April 4	70-0	25-5
Alaska	April 5	38-2	16-2
Rhode Island	April 14	70-12	39-11
New Jersey	April 17	62-4	34-0
Colorado	April 21	61-0	30-1
West Virginia	April 22	unrecorded	31-0
Wisconsin	April 26	81-11	29-4
New York	May 18	117-25	51-4
Michigan	May 22	90-18	voice vote
Maryland	May 26	86-32	unanimous
Massachusetts	June 21	205-7	voice vote
Kentucky	June 26	56-31	20-18
Pennsylvania	September 27	178-3	43-3
California	November 13	54-16	29-9
Wyoming	January 26, 1973	41-20	17-12
South Dakota	February 5	42-27	22-13
Oregon	February 8	50-9	23-6
Minnesota	February 8	104-28	48-18
New Mexico	February 28	40-22	33-8
Vermont	March 1	120-28	19-8
Connecticut	March 15	83-77	27-9
Washington	March 22	76-21	29-19
Maine	January 18, 1974	78-68	19-11
Montana	January 25	73-23	35-14
Ohio	February 7	54-40	20-12
North Dakota	March 19, 1975	52-49	30-20
Indiana	January 24, 1977	54-45	26-24

*Data for all tables in this paper was taken from research done by the Congressional Research Service of the Library of Congress.

STATE	HOUSE	SENATE
Alabama		1 floor vote
Arizona	3 committee votes 1 floor vote	2 committee votes 4 floor votes
Arkansas	1 committee vote	1 floor vote
Florida	3 floor votes	1 committee vote 3 floor votes
Georgia	1 committee vote 1 floor vote	1 floor vote
Illinois	6 floor votes	1 committee vote 5 floor votes
Louisiana	4 committee votes 1 floor vote	2 floor votes
Mississippi		3 committee votes
Missouri	2 floor votes	1 committee vote 2 floor votes
Nevada	2 floor votes	3 floor votes
North Carolina	1 committee vote 3 floor votes	2 floor votes
Oklahoma	6 floor votes	1 floor vote
South Carolina	3 floor votes	
Utah	2 floor votes	
Virginia	2 committee votes 1 floor vote	4 committee votes 2 floor votes
TOTALS	12 committee votes 31 floor votes	12 committee votes 27 floor votes

Summary Analysis

Only one state has had no floor votes.
Four states have had floor votes in only one house.
Nine states have had at least five committee and/or floor votes.
Seven states have had at least six committee and/or floor votes.
Six states have had at least seven committee and/or floor votes.
Seven states have had at least four floor votes.

RESCINDING RATIFICATION

For the first time in American Constitutional history, rescission of state ratifications of a Constitutional amendment has become a significant problem. The schizophrenic history of the ERA, that is, overwhelming enthusiasm for ratification during its first year, and circumspection and hesitation during the last four and a half years, has produced a thorny Constitutional question. As mentioned earlier, three states have voted in favor of rescission: Idaho, Nebraska, and Tennessee. Seven additional states have had significant attempts to rescind the ratification.

RESCISSIONS

State	Date	House	Senate
Idaho	February 8, 1977	44-22	18-17
Nebraska	March 15, 1973	31-17	(unicameral legislature)
Tennessee	April 23, 1974	56-33	17-11

SIGNIFICANT ATTEMPTS TO RESCIND

Kansas - House rejected rescission in 1977, 66-56

Kentucky - House voted to rescind in 1976, 57-40

Montana - Senate rejected rescission in 1977, 25-25

North Dakota - Senate rejected rescission in 1977, 32-18

South Dakota - House rejected rescission in 1977, 34-33

West Virginia - Senate rejected rescission in 1974, 18-15

Wyoming - Senate rejected rescission in 1977, 16-14

In addition, Wisconsin, which ratified the ERA overwhelmingly in its state legislature in 1972, rejected an equal rights amendment to its state constitution by more than 60,000 votes in a statewide referendum on April 3, 1973. New York and New Jersey, whose legislatures ratified the ERA in 1972, both rejected equal rights amendments to their state constitutions in statewide referendums in November of 1975.

ARE RESCISSIONS CONSTITUTIONAL?

ERA proponents have often cited the ratification of the 14th amendment to support their claim that it is illegal for state legislatures to rescind a previous ratification. The 14th amendment was very close to being ratified by the requisite three-fourths of the states when New Jersey and Ohio decided to rescind their ratifications. Ratification by the required twenty-eight states, including those two which decided to rescind, was completed on July 9, 1868. The Reconstruction Congress decided not to accept the rescissions. And before Congress adopted a joint resolution declaring the amendment a part of the Constitution on July 21, 1868, two more states, Alabama and Georgia, ratified. So the real importance of the recissions became moot since even without the two states which had rescinded, there were still twenty-eight states to meet the ratification requirements.

In Coleman v. Miller, the Supreme Court, citing the ratification of the 14th amendment, declared that the decision of Congress not to accept the rescissions of New Jersey and Ohio was entirely proper because the subject of rescissions was "a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." So the Court stated that it is the proper province of Congress to make a decision about accepting or rejecting rescissions, but the Court did not rule on the constitutionality of the act of rescissions itself. The present Congress can take the ruling of Coleman v. Miller as a precedent that declares that only Congress has the authority to decide. But there is no guiding precedent that includes all the circumstances of the present case of the ERA. The magnitude of the problem facing the present Congress is more severe than that which faced the Reconstruction Congress.

In view of this, Congess will have to take into its considerations the fact that no amendment has ever been added to the Constitution without the contemporaneous ratifications of three-fourths of the states. Professor Charles Black of the Yale Law School, in testimony before the House Subcommittee on Civil and Constitutional Rights, stated that "The crucial question is whether or not three-fourths of the states favor the amendment at the same time...It seems to me that it would be entirely impermissible to extend the time for ratification without also extending the time for rescission. Extension of time, in my view, must be for action on the amendment, and not simply for one kind of action on the amendment."

Professor William Van Alstyne of the Law School of William and Mary, while maintaining on the one hand that an

act of ratification within the original seven-year period "should be deemed conclusive and irrevocable, that is, that each state, acting within that seven-year period, once having determined to ratify should be held to have exhausted its power for further consideration," on the other hand stated that "to regard a state's ratification as conclusive when made within the originally-provided seven-year period is not the same as to treat it as conclusive after Congress subsequently resolves to provide for still another seven years. I do regard it as fair that a state might reasonably believe that, in light of that extension, its own original ratification should now be subject to reconsideration, i.e., that its original ratification, timely and conclusive when made within the original seven-year period, is not necessarily timely or conclusive in light of the greater number of years which Congress has now provided for allowing the proposed amendment to rest before the States."

On the opposite side, John Harmon of the Justice Department testified that "We think that the whole history is that Article V, as interpreted, does not permit states to rescind or otherwise place conditions upon their ratifications. If we are correct in this view, we think it follows that such a power can be granted only by an amendment to Article V itself."

CONCLUSION

Although Ervin Griswold, former dean of Harvard Law School, in his testimony before the Subcommittee on Civil and Constitutional Rights, declared that "the only thing that is clear about this question is that no one except five justices of the Supreme Court can answer it with authority," the other six witnesses before the subcommittee maintained that Congress, since it has sole authority over amendments to the Constitution, can indeed act to extend the time period. At any rate, that is probably the easiest of the many questions that Congress must consider. The following questions will have to be resolved:

- Should the time period be extended at all?
- Should the time period be extended for seven more years? If not, for how many?
- Since Article V of the Constitution states that Congress acts to propose amendments and then delivers them to the states for consideration, would any Congressional action on the ERA at this time be an unwarranted intrusion into the process of ratification which the Constitution declares is the exclusive jurisdiction of the states?

- If the time period is extended for seven more years, can Congress presume that a state ratification in 1972 can be interpreted as contemporaneous consent with a state ratification in 1986?

- What is the Congress to do with the thorny problem of rescission? What if more states rescind? Should Congress issue some resolution on this matter now or wait until the ERA receives three more ratifications, if, indeed, it does receive those three ratifications?

- Since both proponents and opponents of the ERA understood the amendment to have a seven-year life, is it fair or necessary to extend the time period at this late date?

- Since the Constitution requires that the original resolution sending the ERA to the states had to be passed by a two-thirds vote of both houses, should the same vote be required on a resolution to extend the time period? Or can Congress extend the time period with a simple majority vote?

Opponents of the ERA have declared that they will take any extension resolution to court. Although Congress will probably want to proceed in a manner that will keep the Supreme Court out of the issue, the possiblity of a Court ruling is not out of the question. The Court ruled, in both Coleman v. Miller and Dillon v. Gloss, that it had not yet seen the necessity for intervening into the Congressional prerogative of authority over amendments to the Constitution, and that it did not want to get involved in the process. But there has never been such a complicated series of legal questions about any proposed amendment to the Constitution. The possibility that the Court would see a place for itself in this debate is a real one.

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