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ERA Task Force
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The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*

(Summary of Law Article on the Three-State Strategy for ERA Ratification)

The Equal Rights Amendment, passed by Congress in 1972, would have become the 27th Amendment to the Constitution if three-fourths of the states had ratified it by June 30, 1982. However, that date passed with only 35 of the necessary 38 state ratifications. Instead, the so-called "Madison Amendment," concerning Congressional pay raises, became the 27th Amendment in 1992. This amendment had been sent to the states for ratification in 1789 and finally reached the three-fourths goal 203 years later. The fact that a ratification period of this length was accepted as valid has led ERA supporters to propose that Congress has the power to maintain the legal viability of the ERA's existing 35 state ratifications. If so, only three more state ratifications would be needed to put the ERA into the Constitution. Legal support for this premise is based on the following analysis:

- Article V of the Constitution gives Congress the power to propose an amendment and to determine the mode of ratification.
- A 1921 Supreme Court decision (*Dillon* v. *Gloss*) said that Congress may fix a time limit for ratification, that an amendment is part of the Constitution once ratified by the final state constituting a three-fourths majority, and that ratification should be within a "reasonable" and "sufficiently contemporaneous" time frame with respect to the "necessity" of the amendment.
- A 1939 Supreme Court decision (*Coleman* v. *Miller*) held that Congress, upon receiving notification of an amendment's ratification by three-fourths of the states, may determine whether the amendment is valid or whether it "has lost its vitality through lapse of time." Congressional acceptance ("promulgation") of an amendment is not constitutionally required, however, and has occurred only with the 14th and the 27th Amendments.
- Time limits have been imposed on the ratification period only since 1917 (with the 18th Amendment, Prohibition). The 19th Amendment (Woman Suffrage) had no time limit. Seven-year time limits were placed in the text of Amendments 20-22, but were moved to the proposing clause of Amendments 23-26. The ERA was passed with a seven-year time limit in the proposing clause, not in the text.
- In 1978, Congress demonstrated its belief that it may alter a time limit in a proposing clause by extending the original ERA ratification deadline from March 1979 to June 1982. A challenge to the extension's constitutionality was dismissed by the Supreme Court as moot after the deadline expired, and no lower-court precedent stands.
- Precedent regarding state retractions (rescissions) of ratifications indicates that such actions are not valid. In promulgating the 14th Amendment in 1868, Congress listed as ratifying states both states which had rescinded their ratifications and states which had first rejected and then ratified the amendment.

Thus, under the principles of *Dillon* and *Coleman*, and considering that Congress voted to extend the ERA time limit and to accept the Madison Amendment's 203-year ratification period as "sufficiently contemporaneous," it is likely that Congress has the power to legislatively adjust or repeal the time limit constraint on the ERA if it chooses, to determine whether or not state ratifications after the expiration of a time limit in a proposing clause are valid, and to promulgate the ERA after the 38th state ratifies.

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*By Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager, in *William & Mary Journal of Women and the Law* (Vol. 3, No. 1), Spring 1997. Summary by Roberta W. Francis, Co-Chair, NCWO ERA Task Force.