

The Equal Rights Amendment: Close to Adoption?

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Illinois' recent [ratification](#) of the [Equal Rights Amendment](#) (ERA) to the U.S. Constitution has revived questions about the potential for the amendment to be adopted. First presented to the states in 1972, the ERA provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.” 37 states have now ratified the ERA, and some supporters of the amendment [maintain](#) that ratification by just one additional state could result in its adoption. After ratification by one more state, the ERA will have been ratified by three-fourths of the states, as required by [Article V of the Constitution](#). Whether the ERA can be so adopted, however, is not entirely certain. Questions concerning the expiration of Congress's original ratification deadline without approval by three-fourths of the states, and the rescission of ratifications by five states between 1973 and 1978, would likely have to be addressed before the ERA would be formally adopted.

Background. The power to amend the Constitution is established in Article V. Article V empowers Congress to propose an amendment when two-thirds of both chambers deem it necessary, or, on the application of two-thirds of the state legislatures, to call a convention for proposing an amendment. A proposed amendment becomes part of the Constitution when it is ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. Following ratification by three-fourths of the states, the Archivist of the United States is to [identify](#) the ratifying states and certify that the amendment has become part of the Constitution.

While Article V provides for the proposal and ratification of constitutional amendments, it is silent with regard to other procedural matters, such as the time period for ratifying such amendments. [H. J. Res. 208](#), which first proposed the ERA, was passed by the House and Senate in 1972 during the 92nd Congress. In its proposing clause, H. J. Res. 208 provided that, for the ERA to be adopted, three-fourths of the states would have to ratify the amendment within “seven years from the date of its submission by the Congress.” In accordance with this provision, the ratification deadline became March 22, 1979, seven years after the Senate approved H. J. Res. 208.

By the fall of 1977, 35 states had ratified the ERA. In addition, as discussed further below, between 1973 and 1978, five states passed legislation to rescind their ratifications of the ERA. [H. J. Res. 638](#) was introduced in October 1977 to extend the ERA's ratification deadline until June 30, 1982. Representative Elizabeth Holtzman, the joint resolution's sponsor, indicated that the extension would provide an

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“insurance policy to assure that the deadline will not arbitrarily end all debate on the ERA.” H. J. Res. 638 was passed by the House and Senate in 1978, but no additional states ratified the ERA before the June 30, 1982 deadline. [Nevada](#) became the 36th state to ratify the ERA in 2017.

Legislation to revive consideration of the ERA has been introduced since the 1982 deadline. These measures have generally assumed two approaches. One approach involves restarting the ratification process with a new joint resolution. [H. J. Res. 33](#), for example, has been introduced in the 115th Congress, proposing a new constitutional amendment “relative to equal rights for men and women.” If the joint resolution were passed by the House and Senate, the amendment would be presented to the states for ratification.

A second approach contemplates the continued vitality of the 35 state ratifications and the adoption of the ERA once three additional states ratify the amendment. [H. J. Res. 53](#), for example, assumes this “three-state strategy” approach in the 115th Congress. The measure states: “[N]otwithstanding 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.” In light of Illinois’ ratification of the ERA, proponents of the three-state strategy approach believe that the ERA will be adopted upon ratification by one of the following 13 states: Alabama; Arizona; Arkansas; Florida; Georgia; Louisiana; Mississippi; Missouri; North Carolina; Oklahoma; South Carolina; Utah; or Virginia.

Some commentators have [questioned](#) the three-state strategy approach. Even if H. J. Res. 53 is passed by the House and Senate and a 38th state ratifies the ERA, the amendment would likely face challenges based on the expiration of Congress’s original ratification deadline and the rescission of ratifications by five states between 1973 and 1978. If those rescissions are deemed effective, it would seem that approval by three-fourths of the states will not have been achieved.

Expiration of Ratification Deadline. If a 38th state ratifies the ERA, it is likely that the amendment would face a court challenge, and in the course of that challenge, a court would probably review the 35 state ratifications obtained before the ERA’s original deadline. Opponents of the ERA may argue that these ratifications became invalid once the original ratification deadline passed. In [Dillon v. Gloss](#), a 1921 case involving the ratification of the Eighteenth Amendment, the U.S. Supreme Court maintained that ratification of a constitutional amendment should occur within a reasonable time after the amendment is proposed. The Court explained that “proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.” If an additional state were to ratify the ERA in 2018, for example, 46 years would separate the amendment’s first and 38th ratifications.

What constitutes a reasonable time period for ratification could vary depending on the conditions that prompt consideration of a constitutional amendment. In [Coleman v. Miller](#), a 1939 case involving a proposed constitutional amendment that would have empowered Congress to restrict child labor, the Court maintained that “the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice[.]” The Court in [Coleman](#) indicated that Congress, and not the courts, should decide when an amendment has “lost its vitality” because of a lapse of time. Since [Coleman](#), the Court has not considered a similar case involving the ratification of constitutional amendments.

While [Coleman](#) might arguably suggest that Congress can extend a ratification period based on ongoing conditions, it remains uncertain whether Congress may allow that period to continue indefinitely, particularly when a ratification deadline was previously established. The legislative history of H. J. Res. 638, which extended the ratification deadline in 1978, suggests that an unending ratification period may

not be permissible. During consideration of H. J. Res. 638, the House Committee on the Judiciary [maintained](#) that an extension of the ERA ratification period was permissible. However, the identification of a new ratification deadline in H. J. Res. 638 may have influenced the committee's position. The committee interpreted *Dillon* and *Coleman* as implying congressional authority to extend a ratification deadline if it is reasonable and does not bind subsequent Congresses. The committee was guided by the conclusions of various constitutional law scholars, including Justice Ruth Bader Ginsburg, then a professor of law at Columbia University. Justice Ginsburg maintained that *Dillon* and *Coleman* "bracketed the issue"; that is, *Dillon* held that Congress could establish a ratification deadline at the time an amendment is proposed, and *Coleman* confirmed that Congress could defer the question of a reasonable time period for ratification. According to Justice Ginsburg, an extension of the deadline was a "middle course" that ensured that a proposed amendment would not remain in state legislatures indefinitely, and evidenced a congressional determination that the amendment was still vibrant and reflective of public interests.

Unlike H. J. Res. 638, H. J. Res. 53 in the current Congress would eliminate rather than extend the ERA's ratification deadline. Approval of H. J. Res. 53 would allow the ERA to remain in state legislatures indefinitely until a 38th state ratifies the amendment. While it could be argued that H. J. Res. 53 reflects Congress's determination that there is continued public interest in an ERA, an unending ratification period would seem to undermine the notion that an amendment should not remain in state legislatures indefinitely.

Nevertheless, proponents of the ERA may cite the adoption of the [Twenty-Seventh Amendment](#) to support their position that an amendment can still be viable even if centuries pass before ratification by three-fourths of the states occurs. The Twenty-Seventh Amendment, which addresses congressional pay, was first presented to the states in 1789. The amendment was not adopted until 1992, following ratification by Michigan, the 38th state to ratify the amendment. Unlike the ERA, however, Congress did not establish a ratification deadline for the Twenty-Seventh Amendment. In addition, the Twenty-Seventh Amendment was adopted without the need to consider the effect of state rescissions of prior ratifications.

Notably, in 1982, a federal district court in Idaho concluded that Congress's extension of the ratification period was improper because Congress could not change the ratification deadline once it was established in 1972. In [State of Idaho v. Freeman](#), the court contended that the deadline was part of the amendment itself and could not be changed once the ERA was sent to the states: "Once the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa." On appeal to the Supreme Court, the district court's judgment was vacated and the district court was instructed to dismiss the case as moot because the ERA's extension deadline had passed. Nevertheless, *Freeman* provides at least one example of how a court might consider a removal of the ERA's deadline.

Rescission of Ratifications. If a 38th state ratifies the ERA, opponents of the amendment may contend that the five state rescissions should be recognized. Idaho, Kentucky, Nebraska, South Dakota, and Tennessee rescinded their ratifications of the ERA between 1973 and 1978. In addition to evaluating the validity of the ERA extension, as discussed above, the federal district court in *Freeman* also considered the effect of Idaho's 1977 rescission of its original ratification of the ERA. Reviewing Article V, the court [emphasized](#) that an amendment cannot become part of the Constitution until a state has determined that there is consensus among its people and three-fourths of the states ratify the amendment. Accordingly, the court maintained that a subsequent rescission should be recognized because it promotes "the democratic ideal by giving a truer picture of the people's will[.]" The court concluded that a failure to recognize Idaho's rescission would allow the ERA to become part of the Constitution when the state's people were not unified in their consent. Ultimately, the court contended that a rescission of a prior ratification "is clearly a proper exercise of a state's power . . . especially when that act would give a truer picture of local sentiment regarding the proposed amendment." As indicated, *Freeman* was vacated and

the decision was dismissed as moot following the end of the ERA's extension period. Nevertheless, the case illustrates how one court evaluated a state recession of the amendment.

Whether one of the 13 states that have not ratified the ERA will consider the amendment in the near future is unclear. Notably, efforts to ratify the ERA in at least two of those states, [Arizona](#) and [Virginia](#), were unsuccessful earlier this year.

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