Excerpts from the American Bar Association's Resolution Supporting the Implementation of the Equal Rights Amendment

Current Legal Issues in Contention:

There are two legal issues relating to the status of the ERA. The first issue concerns the timing of the ERA's ratification by the 38 states. The second issue concerns the purported rescissions of ratification by six of those states. In light of these two issues, the National Archivist has not yet undertaken publication and certification of the ERA pursuant to 1 U.S.C. § 106b.

A. The Timing of Ratifications:

Three of the requisite three-fourths of the states (38 states) – Nevada (2017), Illinois (2018), and Virginia (2020) – ratified the Amendment well after the time specified in the ERA's "resolving clause" (as extended), with full ratification of the Amendment spanning 48 years, from 1972 to 2020. Focusing principally on the "resolving clause" and the legislative language in that clause concerning the timing of ratification, ERA opponents contend that the three most recent and any future ratifications by states are too late to "count" towards the 38 states required by Article V. But, in fact, there are no timing issues that preclude recognition of the ERA as the 28th Amendment to the Constitution.

1. *The Constitution Does Not Limit the Time for State Ratifications:*

    - Some opponents of the ERA also argue that any legislation to extend or eliminate the June 30, 1982 date must be passed by two-thirds of each house of Congress (rather than a simple majority), because that date is an extension of the March 21, 1979 date established by Congress' original 1972 Joint Resolution, which similarly required a two-thirds majority, per Article V of the U.S. Constitution.

      Crucially, however, the legislative language at issue was not in the text of the proposed amendment itself. And it is the text of the proposed amendment itself that required a two-thirds majority vote of Congress. The legislative language at issue was in the "resolving clause," which, like most Congressional action, requires only a simple majority. Significantly, when Congress adopted H.J. Res. 638 in 1979 to substitute June 30, 1982 for the ERA's original legislative language on the timing of ratification, Congress did so by a simple majority.

1. *The Constitution Includes No Requirement of "Contemporaneity":*

    - Historic precedent further lays to rest any suggestion that concerns of "contemporaneity" preclude recognition of the ERA. In particular, the 27th (Madison)

Amendment remained pending for ratification by the states for a period of nearly 203 years. Congress sent that amendment out to the states in 1789, but ratification by the 38th state – Michigan – did not come until May 7, 1992. Notwithstanding the extraordinary timing, the National Archivist had no hesitation in promptly publishing and certifying the Madison Amendment as part of the Constitution.

The ERA's pendency of 48 years pales by comparison to the nearly 203 years of the Madison Amendment and is no impediment to the recognition of the ERA as the 28th Amendment to the Constitution.

B. Purported Rescissions of Ratification:

Uniform past practice stretching back more than 150 years similarly compels rejection of the purported rescissions. In three prior cases, states that had ratified an amendment subsequently voted to rescind. Specifically, after ratifying the 14th Amendment, Ohio and New Jersey voted to rescind. Similarly, after ratifying the 15th Amendment, New York voted to rescind. And, after ratifying the 19th Amendment, Tennessee voted to rescind. Consistently, in each instance, the rescissions were ignored, and the states were treated as having ratified the respective amendments.39 So too the rescissions at issue here must be ignored and the six states – Nebraska, Tennessee, Idaho, Kentucky, South Dakota, and North Dakota – must be "counted" as having ratified the ERA.

C. Publication and Certification of the ERA

Raising arguments such as those outlined above concerning the timing of the states' ratifications and the purported rescissions of ratification by some, ERA opponents oppose publication and certification by the Archivist. However, as Constitutional scholars point out, when 38 states have ratified an amendment, that amendment automatically becomes a part of the Constitution, whether or not the amendment is so published and certified. The Archivist has no authority to judge the validity of ratifications by the states. The Archivist's role in the Constitutional amendment process is purely "ministerial."

Because the act of publication and certification is purely ministerial, there may be little or no legal significance to the fact that the ERA has not yet been officially published and certified. However, the practical consequences of that are very real. Publication is legal evidence of the law;44 and it serves notice to all branches of state and federal government for purposes of compliance, enforcement, adjudication, and further legislation. Publication carries great symbolic weight as official performance of public affirmation. By establishing the ABA's support for the principle that time limits for ratification of Constitutional amendments are not consistent with Article V of the U.S. Constitution and the ABA's support for the principle that Article V does not permit a state to rescind its ratification, the resolution will support publication and certification of the ERA pursuant to 1 U.S.C. § 106b.