The Washington Post Sunday February 13, 1994

George F. Will

Night of The Living Dead Amendment

Were Madison alive he would die of embarrassment about what his state is considering doing to his Constitution.

In Richmond and some other state capitals, women's groups are attempting to resuscitate the Equal Rights Amendment. A Virginia legislative committee has refused summarily to dismiss, with the derision it deserves, the pretense that the ERA is still alive and can be ratified. The committee will consider the matter next year. By then perhaps the legislators will have refreshed their memories regarding the ERA and constitutional values.

On March 22, 1972, Congress sent the ERA to the states to be ratified or rejected by March 22, 1979. As has been customary since the 18th Amendment, Congress stipulated a seven-year period of deliberation in order to ensure that ratification would reflect a "contemporaneous" consensus of three-fourths of the states. As one of the ERA's principal Senate supporters said in 1972, if 38 states did not ratify in seven years, "we must begin the entire process once again." ERA supporters in Congress have implicitly conceded that point by regularly reintroducing the ERA, which no longer commands sufficient support even to get out of Congress.

State legislatures responded to the ERA cavalierly, in several senses. Most of the 22 states that rushed to ratify in 1972—20 in three months—dispensed with hearings. Hawaii ratified it the day Congress passed it. Nebraska, hot to be second, did it improperly and had to do it again. Then states began to have second—actually, first—thoughts, and the ERA's surge stalled.

As the seven-year deadline neared, ERA supporters sought and got unequal treatment: Congress chivalrously extended the deadline to 1982. And, stacking the deck, Congress extended it only for states that had not ratified, in order to prevent any state from rescinding its ratification. This extension, which changed ratification rules after some states had rendered decisions, was declared unconstitutional by the only court to rule on it.

Seventeen years ago, in January 1977, four years and 10 months after the ERA was sent to the states, Indiana became the last state to ratify it. Indiana was the 35th state, so ERA supporters say that if the ratification process can be declared to be continuing, they are just three votes from victory.

However, five states, including pell-mell Nebraska, rescinded their ratifications before the 1979 deadline passed. Surely states had a right to reconsider while the amendment was still a live issue.

The extremists trying to breathe life back into the ERA make two arguments, the first of which is weak and the second weaker still. The first is that a state's ratification of an amendment is a sacramental act, impervious to attempts to rescind it. The second is the 27th Amendment, which Madison wrote.

That amendment, limiting increases in the compensation of members of Congress, suddenly was brought back to life by the anti-Congress fever of 1992, when, after 203 years, a 38th state ratified it. Timidity prevented political leaders from vigorously challenging its validity on the grounds that state decisions made 203 years apart hardly constitute "contemporaneous" consensus. However, this episode does not vindicate today's ERA supporters because Madison's Congress did not attach a deadline to deliberations about Madison's amendment.

The first 10 amendments were ratified in 27 months. The average time for subsequent amendments, other than the 27th, has been 19 months. No ratification, other than that of the 27th, has taken even four years. The 26th Amendment, lowering the voting age, took less than four months. Yet ERA supporters demand more than 22 years.

Today, nearly 22 years after Congress passed the ERA with a deliberation deadline, nearly 15 years after that deadline passed, and nearly 12 years after the extended deadline passed, ERA supporters want Congress to repeal the original deadline, rewriting the rules of the process a generation after it began. It is fitting that ERA supporters are contemptuous of constitutional process: Their amendment radiates impatience with democracy. The ERA says: "Equal rights under the law shall not be denied or abridged by the United States or by any state on account of sex." What would it do? No one knows.

Either it is a constitutional redundancy, adding nothing to the "equal protection" and other guarantees the Constitution affords to all "persons," or it is a license for judicial legislating. Judges might be persuaded to do many things with it, and one aim of its supporters is to set social policy by judicial fiats rather than by the deliberations of representative institutions.

ERA supporters also say it is a "consciousness-raising symbol." It is appropriate that people who would clutter the Constitution with such a thing also treat the Constitution contemptuously regarding the ratification process.