

1978 S.C. Op. Atty. Gen. 35 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-23, 1978 WL 22509

Office of the Attorney General

State of South Carolina

Opinion No. 78-23

February 7, 1978

*1 Statutory amendment to provide for advisory referendum on ERA permissible.

The Honorable L. Marion Gressette
President Pro Tempore of the Senate
The State House
Columbia, South Carolina 29202

Dear Senator Gressette:

S-82 is a Joint Resolution to ratify the proposed Equal Rights Amendment to the Constitution of the United States. A proposal has been made to strike out all after the enacting words of S-82 and substitute an amendment which would submit the question to a Statewide referendum.

You have requested my opinion on the question of whether or not such a measure as S-82 can be amended in any form inasmuch as it relates to the ratification of the United States Constitution.

In my opinion, appropriate process may be undertaken to provide for an advisory referendum. It appears definitely settled that the states have no authority to permit the people to participate directly in the amending process, as by a binding referendum (Hawke v. Smith), but there is most probably no reason why they may not call for an advisory vote before the Legislature finally acts. See Orfield, p. 69, cited below.

The proposed article submitted to the states provides:

‘ARTICLE ____

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.’

The foregoing constitutes verbatim the proposed amendment and, in my opinion, no portion thereof may be amended by the states, as any action in this respect is vested in the Congress.

State law, in my opinion, will permit the conduct of advisory referenda. I have previously advised municipalities and counties that advisory referenda may not be conducted. These opinions were issued in 1970, and since that date, the statutes have been amended to specifically authorize such advisory procedures. Moreover, what formerly existed with respect to political subdivisions, which were vested only with the authority granted them by the General Assembly, is not true with respect to the Legislature itself, which may act in any manner except as restricted by constitutional provisions. Our Constitution is not a grant of power but a limit upon the power of the General Assembly, and it does not speak with

reference to advisory referenda. The election laws have been specifically amended so as to permit the submission of ‘any question or issue—to a vote of the people.’ [Section 7–1–40, 1976 Code of Laws of South Carolina](#).

With best wishes,
Very truly yours,

Daniel R. McLeod
Attorney General

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