An Explainer On

The Status of the Equal Rights Amendment to the U.S. Constitution

The Equal Rights Amendment is a constitutional amendment that prohibits sex discrimination.[1] Today, the ERA is more popular than ever before in its over 100-year history,[2] and has satisfied all requirements for constitutional amendment under Article V of the Constitution. However, finalization of the ERA as the 28th Amendment has stalled with debate focused on procedural questions. This explainer provides an overview of the status of the ERA and the issues preventing its final recognition as the 28th Amendment.

What are the requirements for amending the U.S. Constitution?

Article V of the U.S. Constitution provides a process for proposing and ratifying amendments to the Constitution. Amendments may be proposed by either a two-thirds vote by both Houses of Congress or by a constitutional convention called by the states. Once proposed, an amendment will only become a part of the constitution when either ratified by the legislatures of three-quarters of the states, or by conventions in three-quarters of the states.

Has the ERA met the requirements for Constitutional amendment?

Yes, as of 2020 when Virginia became the 38th state to ratify, the ERA has met all of the above requirements for Constitutional amendment. Ratification by three-quarters of the states was completed nearly a century after the first ERA was introduced into Congress in 1923.[3]

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[1] *See* Proposed Amendment to the Constitution of the United States, 92d Cong., 2d Sess. (1972) ("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." "SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." "SEC. 3. This amendment shall take effect two years after the date of ratification.")

[2] According to a national poll conducted in 2023, seven out of ten voters support the Equal Rights Amendment. Roxanne Szal, *The 2024 Election Will Be a Referendum on Abortion and Women's Equality, According to New Ms. Poll,* Ms. Magazine (Oct. 9, 2023), https://msmagazine.com/2023/10/09/2024-election-women-voters-equal-rights-amendment-abortion/.

[3] This version of the ERA was never passed by Congress, and read: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction."

Various versions of the ERA were reintroduced in every session of Congress from 1923 through 1970. In 1972, two-thirds of the 92nd Congress passed the current ERA:

> **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 ERA resolution passed by Congress in 1972 included a preamble with a seven-year deadline for ratification by the states. By 1977, only 35 states had ratified the ERA. Congress extended the deadline by three more years, to 1982, but no additional states ratified the amendment, and the ERA was three states short of the 38 required.

Three additional states ratified the ERA decades after both deadlines had expired: Nevada (2017), Illinois (2018), and Virginia (2020). Although these final ratifications occurred long after Congress's anticipated timeline, the ERA has met the constitutional requirement of ratification by three-quarters of the states, and Article V is silent as to time limits for ratification. Indeed, the"Congressional Pay Amendment" was passed by both houses of Congress in 1789 and was then fully ratified and published as the 27th Amendment over 200 years later.

What effect does the Congressionally set deadline have on the status of the ERA?

While Article V of the Constitution makes no mention of a timeframe for ratification, in *Dillon v. Gloss* (1921) the Supreme Court recognized the power of Congress to create a reasonable deadline for state ratification of a proposed amendment. *Dillon* involved a challenge to the seven-year deadline that Congress created for ratification included in the 18th Amendment (prohibiting the sale or importation of intoxicating liquors). Time limits are a modern invention—Congress injected a time limit for ratification for the first time when it passed the Prohibition Amendment in 1917. The Supreme Court's ruling in *Dillon* does not answer the question of the validity or effect of the time limit on ERA ratification. The time limit upheld by the Court in *Dillon* was within the Prohibition Amendment itself, whereas the deadline for ratification of the ERA was placed in the *preamble* to the ERA resolution passed by Congress.

Courts have not ruled on the legal effect of placing a deadline in the preamble, and it remains an issue of debate. One view is that the validity of the ERA deadline is not dependent on whether it is found in the body of the proposed amendment or the preamble. Another view is that the deadline in the ERA's preamble is without legal effect because states only ratified the ERA itself, and not the introductory words.

Another position is that the preamble's ratification deadline has legal effect, but that Congress can change it. The introductory preamble is not part of the proposed amendment, so any changes to it do not need to be adopted by two-thirds of Congress or ratified by three-fourths of the states to be legally effective. Congress can change the deadline by a simple majority vote, as it did in 1978 when it extended the deadline to 1982. If Congress determines that the proposed amendment remains necessary, then it has the power to change or remove the deadline, even retroactively.

What is the role of the Archivist in the amendment process?

The legal meaning of Archivist publication of a new constitutional amendment is unclear. The Archivist is a congressionally created role that is responsible for the certification and publication of amendments to the Constitution.[4] The Archivist is chief administrator of the National Archives and Record Administration (NARA) and falls within the executive branch. The Constitution does not mention a role for the Archivist, or the executive branch more broadly, in the amendment process. According to Article V of the Constitution, an amendment becomes valid upon ratification by the 38th state. Still, the legal impact of publication by the Archivist is a matter of debate among legal scholars.

Despite the passage of the 1979 and 1982 deadlines, the Archivist certified the ratifications by Nevada in 2017 and Illinois in 2018. However, the Office of Legal Counsel (OLC, a division of the Justice Department) issued a memo that the ERA was no longer valid due to the expiration of the deadline. The memo was issued in anticipation of Virginia becoming the 38th state to ratify the ERA in 2020 and claimed that the state ratifications of Nevada and Illinois and imminent

[4] To learn more about the Archivist and the future of the ERA, see FAQ on the U.S. Archivist and the future of the Equal Rights Amendment , ERA Project (Sep. 20, 2022),https://gender-sexuality.law.columbia.edu/content/faq-us-archivist-and-future-equal-rights-amendment.

ratification by Virginia had no legal effect. Following the OLC memo, then-Archivist David Ferriero refused to certify Virginia's ratification of the ERA. This dispute resulted in *Illinois v. Ferriero* which was ultimately dismissed by the D.C. Circuit Court of Appeals.

Is there currently any legislation in Congress relating to the ERA?

Several ERA-related measures have been introduced in the U.S. Congress in recent congressional sessions. In 2021, three joint resolutions were introduced in Congress: a "fresh start" resolution (HJ Res. 28 and SJ Res. 28) proposed restarting the ratification process with a new ERA without a deadline. A deadline removal resolution (HJ Res. 17 and SJ Res. 1) proposed lifting the 1972 deadline for ratification of the ERA. Lastly, a House resolution (HJ Res. 891) was introduced recognizing that the ERA has met all Constitutional requirements for ratification and affirming it as the 28th amendment.

In 2023, the deadline removal resolutions were reintroduced in Congress (now HJ Res. 25 and SJ Res. 4) along with new ERA affirming legislation (HJ Res. 82 and SJ Res. 39). Sometimes referred to as the ERA Now Resolution, HJ Res. 82/SJ Res. 39 calls on the National Archivist to immediately certify and publish the ERA in the Constitution and affirm the ERA as the 28th amendment.

In February 2023, the first hearing on ERA legislation in the Senate in over 40 years was held to consider SJ Res. 4. Two months later, in April 2023, SJ Res. 4 also received the first vote on ERA legislation since 1979 when the deadline on the ERA was extended for three more years. The resolution did not overcome the filibuster and resulted in a motion to reconsider. Meanwhile, the companion HJ Res. 25, remains stuck in the House Judiciary Committee. A discharge petition, an action to release the legislation from the committee, was filed and is collecting signatures.

What can we expect if Congress passes the deadline removal resolutions?

HJ Res. 25 and SJ Res. 4 will remove any deadline requirement for the ratification of the ERA, and recognize the ERA as valid and part of the Constitution whenever it has been ratified by three-quarters of the state legislatures. Unlike the original ERA resolution, this legislation only requires a simple majority vote, not a two-thirds vote, but the Senate resolution will need 60 votes to overcome the filibuster. If the House and Senate both pass the resolutions, the ERA will

become part of the U.S. Constitution, subject to subsequent legal challenges.

Should the "deadline lifting" resolution be passed by both the House and the Senate, the finalization of the ERA would likely be challenged on two principal grounds:

1. That the earlier deadline expired in 1979, and that states relied on the deadline. Therefore Congress is without power to change the deadline, especially after it expired long ago.
2. That three-quarters of the states have not ratified the ERA because at least five states have rescinded their earlier ratification. For more about this issue, see below.

Can a state rescind an earlier ratification of the ERA?

This is a question of ongoing debate. Between 1973 and 1979, five state legislatures that previously ratified the ERA subsequently voted to rescind those ratifications: Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979). Kentucky's governor vetoed the legislature's resolution to rescind ratification of the ERA. In 1979 the South Dakota legislature approved a "sunset" amendment to its 1973 ratification of the ERA, meaning that the legislature voted to have its ratification of the ERA essentially expire if three-quarters of the states did not ratify the ERA by 1979.

The Constitution is silent as to whether a state can rescind or revoke its ratification of a Constitutional Amendment, either before or after the ratification process has been completed. The Supreme Court has not ruled on the issue of states rescinding their ratifications. Rescissions, governor vetoes of rescissions, and "sunsetting" ratifications are not mentioned in Article V of the Constitution or any federal law relating to amendments to the Constitution. Some advocates and scholars argue that ratification is a one-time event, and once done it cannot be undone as the Constitution only provides for ratification, not un-ratification.

The issue of ratification rescission is not new and has not prevented an amendment from being added to the Constitution. New Jersey and Ohio voted to ratify the 14th Amendment and then voted a second time to rescind their prior ratifications. Congress responded by passing a resolution declaring the 14th Amendment fully ratified and listed New Jersey and Ohio as two of the ratifying

states. The 14th Amendment's legitimacy as part of the Constitution has not been seriously questioned in the courts.

Q A **Who has the power to decide the contested issues of deadlines and rescissions?**

Congress is the only federal institution provided by the Constitution with a role to play in constitutional amendments. That role has been confirmed in the history and tradition of other amendments.[5] Legally debatable amendments to the Constitution have been the norm throughout history, and the ERA's ratification process is no exception.[6] Article V may seem clear on its face, but it leaves numerous procedural issues unanswered—including questions about deadlines and rescissions.[7] When debates over a proposed amendment's legal status have arisen, Congress has resolved them as a political matter in every case.[8]

In *Coleman v. Miller* (1939) the Supreme Court ruled that the controversies around the promulgation or proclamation of constitutional amendments were political questions for Congress, not courts, to decide. The ongoing precedential force of *Coleman*, however, has been widely questioned by scholars. The text of Article V does not specify a role for Congress in the amendment process after proposing it to the states for ratification, and the Supreme Court has actually adjudicated several cases contesting the validity of the amendment process.

After the final ERA ratification in January 2020, the three most recent states to ratify (Nevada, Illinois, and Virginia) brought suit in a D.C. federal court seeking an order that the Archivist publish the ERA. On March 5, 2021, a U.S. district court in D.C. dismissed the case for lack of standing, meaning that the three states had not shown that they suffered a legally recognized injury. On appeal, the D.C. Circuit Court of Appeals in *Illinois v. Ferriero* affirmed the lower court's

[5] For further discussion on the procedural barriers to finalization of the ERA, *see Memorandum on Possible Avenues for Action Related to the Equal Rights Amendment*, ERA Project (Feb. 23, 2023), https://gender-sexuality.law.columbia.edu/content/memo-era-action-2023; *see also* Katherine Franke et al, T*estimony to the Senate Judiciary Committee by the ERA Project at Columbia Law School and Constitutional Law Scholars on Joint Resolution S.J.Res. 4: Removing the Deadline for the Ratification of the Equal Rights Amendment* (Feb. 28, 2023), https://gender-sexuality.law.columbia.edu/sjres4-testimony-feb-2023

[6] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 Colum. L. Rev. 2317, 2348 n. 149 (2021).

[7] For example, Article V does not state whether an amendment must be passed by a two-thirds majority of the full body of Congress or simply a quorum. *See* Id. at 2346-2347.

[8] *See* Id. at 2339-2368.

dismissal and declined to express an opinion on the ratification issues. However, the decision left these questions to the political process and affirmed Congress's constitutional authority under Article V to resolve legal issues within the ratification process, as it has done for nearly all of the previous amendments to the Constitution.[9]

About The ERA Project

The ERA Project at Columbia Law School's Center for Gender and Sexuality Law is a law and policy think tank established in January 2021 to develop academically rigorous research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment (ERA) to the U.S. Constitution, and on the role of the ERA in advancing the larger cause of gender-based justice.

[9] For further discussion and analysis of Illinois v. Ferriero, see *FAQ on the Court of Appeals decision in Illinois v. Ferriero,* ERA PROJECT (Mar. 2, 2023), https://gender-sexuality.law.columbia.edu/content/faq-court-appeals-decision-illinois-v-ferriero.