Why the Equal Rights Amendment Is Duly Ratified as the 28th Amendment to the U.S. Constitution

THE EQUAL RIGHTS AMENDMENT

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 Equal Rights Amendment (ERA) was duly ratified as the 28th Amendment to the U.S. Constitution on January 27, 2020 and, per Section 3, took effect on January 27, 2022.

The Equal Rights Amendment has met the only two requirements in the Constitution's Article V for ratification as a constitutional amendment.

The ERA was proposed by a vote of well over the necessary two-thirds supermajority in both houses of the 92nd Congress (84-8 in the Senate, 354-24 in the House of Representatives) and was sent to the states for ratification on March 22, 1972. It has been duly (in accordance with what is required) ratified by the necessary three-fourths of the states (38 out of 50) as of January 27, 2020, when Virginia became the 38th state to approve it.

The Archivist of the United States is charged by law (1 U.S.C. 106b) with receiving and maintaining custody of state ratification documents pertaining to amendments to the Constitution and with performing ministerial duties (with no option for exercising discretion or failing to act) in connection with the constitutional amendment process.

When at least three-quarters of the states have approved a proposed amendment and submitted their documentation to the Archivist in good order, it is the Archivist's duty under the law to forthwith (immediately, without delay) issue a certification proclaiming that the amendment is duly ratified and part of the Constitution. Some ministerial duties associated with the constitutional amendment process have been delegated to the Director of the Office of the Federal Register, but the delegation of those functions does not relieve the Archivist of the legal responsibility for their execution.

This process is described on the National Archives and Records Administration (NARA) website (www.archives.gov/federal-register/constitution): "When a State ratifies a proposed amendment, it sends the Archivist an original or certified copy of the State action, which is immediately conveyed to the Director of the Federal Register. The OFR examines ratification documents for facial legal sufficiency and an authenticating signature. If the documents are

found to be in good order, the Director acknowledges receipt and maintains custody of them.…

"When the OFR verifies that it has received the required number of authenticated ratification documents, it drafts a formal proclamation for the Archivist to certify that the amendment is valid and has become part of the Constitution. This certification is published in the Federal Register and U.S. Statutes at Large and serves as official notice to the Congress and to the Nation that the amendment process has been completed.

"In a few instances, States have sent official documents to NARA to record the rejection of an amendment or the rescission of a prior ratification. The Archivist does not make any substantive determinations as to the validity of State ratification actions, but it has been established that the Archivist's certification of the facial legal sufficiency of ratification documents is final and conclusive."

Questions concerning the circumstances of the ERA's ratification (e.g., timelines, rescissions) do not constitute legal grounds for delaying the Archivist's performance of the required ministerial duty to immediately publish certification of the ERA's status as the 28th Amendment to the Constitution after the 38th state has duly ratified it.

The expiration of a Congressionally imposed time limit for the ERA's ratification does not affect the intrinsic legal validity of state ratification documents submitted to the Archivist in good order after that date.

Article V's description of the ratification process does not mention time limits, and no amendments proposed during the Constitution's first 130 years had time limits attached. The first amendment with a ratification deadline was the 18th Amendment (Prohibition), which was sent to the states in 1917 with an arbitrary seven-year deadline in the text of the amendment itself. The ERA's time limit was placed in the proposing clause of the language that Congress sent to the states, not in the text that the states voted to ratify.

Supreme Court decisions in *Dillon* v. *Gloss* (1921) and *Coleman* v. *Miller* (1939) discuss the issue of time limits in the constitutional amendment process. *Dillon* said that ratifications should be sufficiently contemporaneous and that Congress has the ability to set time limits to that end. *Coleman* said that the timeliness of a ratification is a political question for Congress to resolve, not a justiciable one for the courts. Whether or not those passages are considered to be dicta (not establishing precedent), they support the premise that if Congress votes to change or remove the time limit on an amendment, the validity of that action is not open to litigation.

In accordance with the constitutional precept that each new Congress has full legislative power and is not bound by previous congressional decisions, Congress revised the ERA's original deadline in 1978, extending it from March 22, 1979 to June 30, 1982. Resolutions passed in a current or future Congress could affirm recognition of the validity of the ERA's ratification, notwithstanding any time limit.

Some legal scholars contend that the addition of a time limit constraint to the only two Article V requirements for ratification is unconstitutional, because such a substantive revision could be accomplished only through another constitutional amendment.

Article V grants no power of rescission to the states, and no state's withdrawal of its ratification of a constitutional amendment (as was unsuccessfully attempted with the 14th and 15th Amendments) has ever been accepted as valid.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – voted to rescind or withdraw their approval of the Equal Rights Amendment before the 1982 deadline. In 2021, the North Dakota legislature adopted a resolution saying that its ratification of the ERA had lapsed in 1979.

In 1937, the United States Constitution Sesquicentennial Commission's *The Story of the Constitution* explained that "an amendment was in effect on the day when the legislature of the last necessary State ratified.… The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve[.]"

Archivist David Ferriero wrote in an October 25, 2012, letter to Representative Carolyn Maloney, lead sponsor of the ERA in the House of Representatives: "NARA's website … states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution.… [The Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and … a later rescission of a state's ratification is not accepted as valid.… Once the process in 1 U.S.C. 106b is completed, the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment."

His accompanying list of the 35 states that had ratified the ERA by 2012 included the five states that had attempted to withdraw their approval, marked by asterisks and listed separately in a column marked "Purported Rescission." In 2020, he updated that list with the inclusion of Nevada, Illinois, and Virginia, marked by double asterisks and a footnote saying that those state actions had been taken after expiration of the deadline.

A 1981 *Idaho* v. *Freeman* U.S. District Court ruling, sometimes still cited to support the contention that deadline extensions are invalid and rescissions are permissible, was vacated as moot by the Supreme Court in 1982 and has no legal standing as a precedent.

The ratification history of the 27th ("Madison") Amendment to the Constitution has implications for the ERA's ratification.

The 27th Amendment, dealing with financial compensation for members of Congress, was sent to the states for ratification in 1789 without a time limit and received its final necessary state ratification in 1992. Despite controversy in Congress about the 203-year length of its ratification period, Archivist Don Wilson certified its ratification on May 18, 1992, and it was published in the *Federal Register* on May 19. On May 20, Congress passed a resolution

affirming its recognition of the ratification's validity, a ceremonial act not necessary for completion of the process.

As reported in an August 26, 2024 article by the Center for American Progress (www.americanprogress.org/article/what-comes-next-for-the-equal-rights-amendment), Archivist Wilson said, "I got a lot of pressure from members of Congress and my response was always that I feel pretty strongly this is a ministerial function, … a bureaucratic issue, not a political one. And if I don't certify and there are 38 states that have ratified, then I'm interpreting the Constitution beyond the ministerial function given to me by Congress, and I didn't feel it was appropriate for me to do that. If I didn't publish the 27th [Amendment], then I would be playing a role not delegated to me."

The failure of former Archivist David Ferriero and current Archivist Colleen Shogan to publish a proclamation certifying that the Equal Rights Amendment is the 28th Amendment to the Constitution is a violation of 1 U.S.C. 106b and a dereliction of duty.

In a January 8, 2020 NARA press release, Archivist Ferriero summarized the conclusion of a January 6 communication from the Office of Legal Counsel (OLC) in the Trump administration's Department of Justice under Attorney General William Barr: "Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States … [and] the ERA's adoption could not be certified." The memorandum also stated that once Congress proposes an amendment to the states, it has no further role in the ratification process and therefore lacks authority to modify the original deadline. Archivist Ferriero stated, "NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order."

On January 26, 2022, the Biden administration's OLC in the Department of Justice under Attorney General Merrick Garland issued an opinion that did not withdraw the 2020 memorandum's conclusion concerning the deadline but said there was no obstacle to Congress's ability to act with respect to the ERA's ratification or to judicial consideration of questions regarding the constitutional status of the amendment.

Neither memorandum has the authority to override the statutory requirements of 1 U.S.C. 106b. By following the direction of either memorandum in contradiction of that process, Archivist Ferriero and Archivist Shogan have been in violation of the law.

During her May 2023 confirmation hearing, Colleen Shogan cited the 2020 OLC memo as grounds for not publishing the Equal Rights Amendment until there was confirmation of its proper ratification, ignoring the paradox that the Archivist's ministerial act of certifying and publishing the ERA is the only statutorily authorized method of providing that notice. In a December 17, 2024, press release, she said inaccurately that the validity of the ERA's ratification deadline had been affirmed by court decisions. In fact, the DC District Court of Appeals had dismissed *Illinois* v. *Ferriero* in 2021 on grounds that the litigating states did not have standing to claim harm from the Archivist's failure to publish, since the Archivist's actions have no effect on the ERA's legal status.

The executive branch has no official role in the amendment process, but the President has the constitutional power, executive authority, and legal duty to ensure that 1 U.S.C. 106b is fully executed immediately.

> The President takes an inaugural oath to "preserve, protect and defend the Constitution," which in Article II, Section 3 assigns to the President the duty to "take care that the laws be faithfully executed." The fact that 1 U.S.C. 106b deals with the constitutional amendment process does not affect the President's ability to exercise that authority.
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> For almost five years, two successive Archivists have failed to fully execute the law governing ratification of constitutional amendments, and two Presidents have failed to "take care" that the law was fully executed. Independent of any action by the President, the Archivist remains authorized and statutorily required to immediately publish certification of the Equal Rights Amendment as the 28th Amendment to the Constitution.

The Equal Rights Amendment is duly adopted and in effect, but it is not yet printed in official copies of the Constitution, and its status in administrative, legislative, and judicial proceedings at all levels of government remains unclear. Publication certifying the ERA's ratification will provide official notice of its inclusion in the Constitution and defend the country's rule of law.

"Today I'm affirming what I have long believed and what three-fourths of the states have ratified. The 28th Amendment is the law of the land, guaranteeing all Americans equal rights and protections under the law regardless of their sex."

Statement by President Joe Biden, January 17, 2025

"[A]s 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.

Resolution 601, adopted by the American Bar Association, August 2024

"Article V of the Constitution expressly makes any proposed Amendment to that document 'Part of this Constitution, when ratified by the Legislatures of three fourths of the several States.' Nothing in Article V makes the Constitution's binding contents depend on any further official action by any branch of the federal government, whether Congress or the Judiciary or indeed the Executive."

Laurence Tribe, Professor of Constitutional Law Emeritus, Harvard University
Kathleen M. Sullivan, Professor of Law, Harvard University and Stanford University
The Contrarian*, January 17, 2025*

"We continue to call on the National Archivist of the United States to do her job. But whether she does or not does not change the fact that the Equal Rights Amendment is the 28th Amendment to the U.S. Constitution."

Zakiya Thomas, President & CEO, ERA Coalition

February 2025

Roberta W. Francis
ERA Education Consultant, Alice Paul Center for Gender Justice
www.equalrightsamendment.org/faq

Statue of Liberty logo created by the ERA Summit in 1998 to advance the three-state strategy for ERA ratification