LEGAL FACT SHEET

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

December 9, 2024

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 has been duly ratified as the 28th Amendment to the U.S. Constitution as of January 27, 2020 and has been in effect since 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 well over the necessary two-thirds supermajority vote 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 ratify 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 approve a proposed amendment and submit their documentation to the Archivist in good order, it is the Archivist's legal duty to issue a certification forthwith (immediately, without delay) proclaiming that the amendment is duly ratified and part of the Constitution. The National Archives and Records Administration (NARA) website (www.archives.gov/federal-register/constitution) notes that the Archivist has delegated many of the ministerial duties associated with the constitutional amendment process to the Director of the Office of the Federal Register, but the delegation of functions does not relieve the Archivist of responsibility for the administration of such functions.

The NARA website describes the process as follows: "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 Office 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 [OFR] 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. *(emphasis added)*

"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." (*emphasis added*)

This argument is reinforced by the American Bar Association's resolution adopted at its August 2024 annual meeting in support of the validity of the ERA's ratification: "[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. The Archivist's role in the Constitutional amendment process is purely 'ministerial'."

Questions about the circumstances of the ERA's ratification (e.g., timelines, rescissions) do not constitute legal grounds for delaying the Archivist's performance of the legally required ministerial duty of publishing forthwith a 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, originally set at seven years and later extended to June 30, 1982, 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 time limit of seven years in the text of the amendment itself. The ERA's deadline was placed in the proposing clause of the resolution that Congress sent to the states in 1972, not in the amendment's text that the states voted to ratify.

In accordance with the constitutional precept that each new Congress has full legislative power and is not bound by the decisions of a previous Congress, Congress revised the ERA's original deadline in a 1978 resolution, extending it from March 22, 1979 to June 30, 1982. Resolutions introduced in the 118th Congress would, if passed, affirm recognition of the validity of the ERA's ratification, notwithstanding any time limit.

Supreme Court decisions in *Dillon* v. *Gloss* (1921) and *Coleman* v. *Miller* (1939) speak to 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 the question of the timeliness of a ratification is a political question for Congress, not a justiciable one for the courts. Whether or not these passages are considered to be dicta (meaning that they do not establish 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 a question for the courts.

Some legal scholars contend that the addition of a time limit requirement to the only two requirements for ratification in the text of Article V is a sufficiently substantive revision that it 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 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.

The United States Constitution Sesquicentennial Commission's *The Story of the Constitution*, published in 1937, 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 page "The Constitutional Amendment Process" 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." (*emphasis added*) 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 also listed separately in a column marked "Purported Rescission."

A 1981 *Idaho* v. *Freeman* U.S. District Court ruling, sometimes 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 process for the 27th 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 extraordinary 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 ratification 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 function given to the Archivist to certify and publish once three-quarters of the states ratified. It is 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 as of January 27, 2020 is a violation of law and a dereliction of duty.

The Department of Justice's Office of Legal Counsel (OLC) has issued two recent memoranda regarding the Equal Rights Amendment's ratification process.

In a January 8, 2020 NARA press release, Archivist Ferriero summarized the conclusions of a January 6 communication from the Department of Justice under Attorney General William Barr in the Trump administration: "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 under 1 U.S.C. § 106b." The DOJ memo also stated that once Congress proposes an amendment to the states, Congress has no further role in the ratification process and therefore lacks authority to modify the original deadline. Archivist Ferriero stated that "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 OLC in the Department of Justice under Attorney General Merrick Garland in the Biden administration issued a memorandum that did not withdraw the conclusion of the 2020 memorandum concerning the deadline but said there is no

obstacle either 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.

During her May 2023 confirmation hearing, Colleen Shogan cited the 2020 OLC memo in saying that she would not publish the Equal Rights Amendment until there was confirmation of its proper ratification, disregarding the paradox that the Archivist's ministerial act of certifying and publishing the amendment is the only statutorily authorized method of providing notice that it is ratified.

Because the executive branch has no role in the constitutional amendment process, neither memorandum has the authority to override the statutory process required by 1 U.S.C. 106b. By following the direction of either memorandum in contradiction of that process, the Archivist is in violation of the law and is guilty of dereliction of duty.

Although the executive branch has no role in the constitutional amendment process, the President has the constitutional power, authority, and responsibility to ensure that 1 U.S.C. 106b is fully executed forthwith through the Archivist's performance of the ministerial duty of certifying and publishing the Equal Rights Amendment.

The President took an oath at his inauguration to "preserve, protect and defend" the Constitution, which says in Article II, Section 3 that the President "shall take Care that the Laws be faithfully executed."

For almost five years, two successive archivists have failed to fully execute the law governing ratification of constitutional amendments. Their failure to publish certification of the ERA's ratification does not mean that the ERA is not ratified, but it leaves the amendment in legal limbo, adopted and in effect but unacknowledged and unemployed in administrative, legislative, and judicial proceedings at all levels of government.

The President has both the constitutional power and the executive authority to take whatever action is necessary through appropriate channels to ensure that 1 U.S.C. 106b is immediately fully executed by the current archivist. The fact that the law deals with the constitutional amendment process does not affect the president's authority to exercise his legal responsibility to "take care that the laws be faithfully executed."

Immediate publication by the Archivist of a proclamation certifying ratification of the ERA fulfills the requirements of 1 U.S.C. 106b and provides official notification that the Equal Rights Amendment has been the 28th Amendment to the Constitution since January 27, 2020 and has been in effect since January 27, 2022.

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Statue of Liberty logo used by the ERA Summit in the 1990s to promote the three-state strategy for the ERA's ratification