



Why the Equal Rights Amendment Is 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) became the 28th Amendment to the U.S. Constitution on January 27, 2020, and it has been in effect as of January 27, 2022. However, it has not yet been printed in official copies of the Constitution or implemented judicially, legislatively, or administratively.

1. 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 required two-thirds majority 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 was approved by the required three-fourths of the states (38 out of 50) as of January 27, 2020, when Virginia became the 38th state to ratify it.

2. When constitutional requirements have been met, the U.S. Archivist is required by law to immediately proclaim and certify the completion of a new amendment's ratification process through publication in the *Federal Register* and the U. S. Statutes at Large. That action has not yet been taken with the ERA, based on 2020 and 2022 opinions from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ).

The Archivist of the United States is charged by 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 (meaning with no option for exercising discretion or failing to act) related to the ratification process, including duties delegated to the Director of the Office of the Federal Register.

The National Archives and Records Administration (NARA) website (www.archives.gov/federal-register/constitution) explains that when three-quarters of the states have approved a proposed amendment and submitted their documentation to the Archivist in good order, the Archivist is required to forthwith (meaning immediately, without delay) publish notification in the *Federal Register* certifying that the amendment has been duly (meaning according to what is required)

ratified. The amendment is then printed in the Constitution and the U.S. Statutes at Large. The Archivist has not yet performed that ministerial duty with the Equal Rights Amendment.

3. Questions about the circumstances of the ERA's ratification (e.g., time limits, rescissions) do not constitute legal grounds for the Archivist to delay performance of the required duty to publish.

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.

According to the NARA website, "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."

Precedent exists for publication by the Archivist despite questions about the circumstances of an amendment's ratification process. 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 on May 5, 1992. Despite controversy about the 203-year length of its ratification period, Archivist Don Wilson certified its ratification on May 18, 1992, and published it 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.

Archivist Wilson was quoted in an August 26, 2024 article (www.americanprogress.org/article/what-comes-next-for-the-equal-rights-amendment): "I got a lot of pressure from members of Congress and my response was always that I feel pretty strongly this 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, then I would be playing a role not delegated to me."

4. Precedent with time limits and rescissions supports the conclusion that neither issue can be used to prevent publication and implementation of the Equal Rights Amendment.

The main argument against publication in the 2020 and 2022 OLC memorandums was that the ERA's ratification time period had expired. However, the Constitution's Article V 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 time limit was the 18th Amendment (Prohibition), which was sent to the states in 1917 with an arbitrarily chosen seven-year deadline in the text of the amendment itself. The ERA's time limit was placed in the proposing clause of the amendment, not in the text ratified by the states.

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 that the timeliness of a ratification process is a political question for Congress to resolve, not a justiciable one for the courts. These passages, which many legal scholars consider to be dictum (not necessary to resolve the dispute in the case, therefore not establishing precedent), support the premise that Congress has the power to change or remove a time limit in the proposing clause of an amendment.

Each new Congress has full legislative power and is not bound by previous congressional decisions. Congress has already revised the ERA's original deadline once, extending it in 1978 from March 22, 1979 to June 30, 1982. Some legal scholars argue that adding a time limit constraint to the only two Article V requirements for ratification is itself unconstitutional, since such a substantive revision could be accomplished only through another constitutional amendment.

Five states — Idaho, Kentucky, Nebraska, Tennessee, and South Dakota — voted to rescind or otherwise withdraw their approval of the Equal Rights Amendment before the 1982 deadline. Three states — Nevada in 2017, Illinois in 2018, and Virginia in 2020 — ratified the ERA after June 30, 1982, bringing the total to the required 38. In 2021, the North Dakota legislature adopted a resolution saying that its ratification of the ERA had lapsed in 1979.

Article V grants no power of rescission to the states, and no state's withdrawal of its ratification of a constitutional amendment, unsuccessfully attempted with the 14th and 15th Amendments, has ever been accepted as valid. 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 erroneously cited by ERA opponents to support their claim 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.

5. Since January 27, 2020, U.S. Archivists have been in violation of 1 U.S.C. 106b and in dereliction of their duty to publish certification that the Equal Rights Amendment is the 28th Amendment to the Constitution.

During the final year of President Donald Trump’s first administration, in a January 8, 2020 NARA press release, Archivist Ferriero summarized the conclusion of a January 6 OLC communication from the DOJ 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 OLC memorandum also stated that once Congress proposes an amendment to the states, it has no further role in the ratification process and lacks authority to modify the original deadline. Archivist Ferriero defended his failure to publish by stating, “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 DOJ’s OLC under Attorney General Merrick Garland in the administration of President Joe Biden issued an opinion that did not withdraw the 2020 memorandum’s conclusion concerning the deadline, but stated that 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.

During Dr. Colleen Shogan’s May 2023 confirmation hearing to replace David Ferriero as Archivist, she cited the 2020 OLC memo as grounds for not publishing the Equal Rights Amendment until there was confirmation of its proper ratification. Her statement ignored the paradox that the Archivist’s act of publishing the ERA is the only statutorily authorized method of providing that certification. In a December 17, 2024, press release as Archivist, 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 not because of the ratification deadline, but 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 legal status of the ERA’s ratification.

Neither the memorandums nor the Archivists’ explanations have the legal ability to override the statutory requirement of 1 U.S.C. 106b for publication of the Equal Rights Amendment with certification that it is duly ratified. By failing to complete that process, former Archivists Ferriero and Shogan, Secretary of State Marco Rubio (Acting Archivist from February 2025 to February 2026), and current Acting Archivist James Byron (on leave from his position as President/CEO of the Richard Nixon Foundation) have been in dereliction of their ministerial duty under the law.

6. While the Executive Branch has no constitutional role in the amendment process, the President has the constitutional power, executive authority, and legal duty to ensure that 1 U.S.C. 106b is immediately faithfully executed.

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 prevent the President from ensuring that it is fully executed.

The implementation of the Equal Rights Amendment has been delayed for over six years by the failure of the Archivists to fully execute 1 U.S.C. 106b and the failure of President Donald Trump and President Joe Biden to perform the constitutional duty they swore to in their oath of office and take care that 1 U.S.C. 106b is faithfully executed.

Independent of any presidential action or inaction, the U.S. Archivist remains both authorized and legally required to immediately publish certification of the Equal Rights Amendment. Failure to do so is a continuation of the dereliction of duty that has illegally obstructed the Equal Rights Amendment from appearing in print in the Constitution as the duly ratified 28th Amendment.

Statements supporting the ERA's ratification as the 28th Amendment

“[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 6, 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*

“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.”

President Joe Biden, January 17, 2025

March 2026

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 promote the three-state strategy for ERA ratification