



# Why the Equal Rights Amendment Is the 28<sup>th</sup> 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 28<sup>th</sup> Amendment to the U.S. Constitution on January 27, 2020, and it has been in effect since January 27, 2022. However, notification of its ratification has not been published as required by law, and it has not been printed in official copies of the Constitution and the United States Statutes at Large or implemented judicially.**

***1. The Equal Rights Amendment has met the two requirements in the Constitution's Article V for ratification as a constitutional amendment: passage in both houses of Congress by a two-thirds majority and ratification by three-fourths of the states.***

Originally introduced in Congress in 1923, the ERA was passed in the 92<sup>nd</sup> Congress by well over the required two-thirds majority (84-8 in the Senate, 354-24 in the House of Representatives) and was ratified by the required three-fourths of the states (38 out of 50) as of January 27, 2020.

The ERA was sent to the states for ratification on March 22, 1972 with a seven-year deadline in the proposing clause. In 1978 Congress extended the deadline to June 30, 1982. By that date, 35 of the necessary 38 states had ratified the amendment, and five states (Idaho, Kentucky, Nebraska, Tennessee, South Dakota) had voted to withdraw their approval. Three more states ratified the ERA (Nevada in 2017, Illinois in 2018, Virginia in 2020), providing the final necessary state approval on January 27, 2020. In 2021, the North Dakota legislature adopted a resolution saying that its ratification of the ERA had lapsed in 1979.

***2. When constitutional requirements have been met, the U.S. Archivist is required by law to immediately proclaim the completion of a new amendment's ratification process.***

The Archivist of the United States is charged by law (1 U.S.C. 106b) with receiving state ratification documents pertaining to constitutional amendments and is responsible for the performance of ministerial duties (meaning with no option for exercising discretion or failing to act) related to the ratification process.

As the National Archives and Records Administration (NARA) website ([archives.gov/federal-register/constitution](https://www.archives.gov/federal-register/constitution)) explains, 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. That action has not yet been taken with the Equal Rights Amendment.

According to the website, “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 ... certification of the facial legal sufficiency of ratification documents is final and conclusive.” Thus the Archivist determines whether the ratification documents submitted by the states are in good order but has no authority to refuse to publish the amendment because of questions about the ratification process.

### ***3. 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.***

Article V of the Constitution, which describes the amendment process, does not mention time limits. The first amendment with a ratification time limit was the 18<sup>th</sup> Amendment (Prohibition), which was sent to the states in 1917 with an arbitrarily chosen seven-year deadline in the text.

Supreme Court decisions have said that Congress has the ability to set time limits to ensure that ratifications are sufficiently contemporaneous (*Dillon v. Gloss*, 1921) and that the timeliness of a ratification process is a political question for Congress to resolve, not a justiciable one for the courts (*Coleman v. Miller*, 1939). Some legal scholars consider these passages to be dictum (not establishing precedent), and some contend that a time limit is sufficiently substantive that it could not be added to the existing Article V requirements except 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 has ever been accepted as valid. In 1868, the Secretary of State issued a proclamation that the 14<sup>th</sup> Amendment was part of the Constitution if withdrawals of ratification were ineffective. Congress then adopted a concurrent resolution declaring the amendment ratified, listing among the ratifying states those that had attempted to rescind their approval. Likewise, New York’s withdrawal of its ratification of the 15<sup>th</sup> Amendment was not 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[.]”

On May 5, 1992, the 27<sup>th</sup> Amendment received its final necessary state ratification after being sent to the states for ratification in 1789 without a time limit. Despite controversy about the 203-year ratification period, Archivist Don Wilson certified its ratification on May 18 and published it in the *Federal Register* on May 19. On May 20, Congress passed a resolution recognizing the ratification’s validity. Archivist Wilson later explained, “[I]f 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 would be playing a role not delegated to me.” ([americanprogress.org/article/what-comes-next-for-the-equal-rights-amendment](http://americanprogress.org/article/what-comes-next-for-the-equal-rights-amendment))

In an October 25, 2012 letter to Representative Carolyn Maloney, lead ERA sponsor in the House, Archivist David Ferriero confirmed, “[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.... [M]y 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 again 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 is sometimes still cited by ERA opponents to support their claim that deadline extensions are invalid and rescissions are permissible. That decision was vacated as moot by the Supreme Court in 1982 and has no standing as a precedent.

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

In a January 8, 2020 press release, Archivist Ferriero said that unless otherwise directed by a final court order, NARA would abide by the conclusion of a January 6 communication from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) under Attorney General William Barr in the first 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.” 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.

On January 26, 2022, the DOJ’s OLC under Attorney General Merrick Garland in the Biden administration issued an opinion that did not withdraw the 2020 OLC conclusion concerning the deadline, but stated that there was no obstacle to Congress’s ability to act regarding the ERA’s ratification or to judicial consideration of questions about the amendment.

In her May 2023 confirmation hearing to replace David Ferriero as Archivist, Dr. 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 act of publishing the ERA is the statutorily authorized method of providing that confirmation. In a December 17, 2024 press release, she claimed that courts had affirmed the validity of the ERA’s ratification deadline.

What the DC Circuit Court of Appeals actually said in its 2023 *Illinois v. Ferriero* decision was that the litigating states, who were requesting the court to order the Archivist to publish the ERA, did not prove that the Archivist had a clear duty to publish or that the time limit was invalid because it was placed in the proposing clause. The decision upheld the lower court’s ruling that the states did not have standing to claim harm from the Archivist’s failure to publish because the Archivist’s actions do not affect the legal status of the ERA’s ratification, reinforcing the legal point that an amendment’s ratification is accomplished when the final necessary state approves it. The court also affirmed the Biden OLC conclusion that Congress continues to be able to act on a state ratification deadline.

The OLC memorandums do not have the authority to override the requirement of 1 U.S.C. 106b for publication of notification of the Equal Rights Amendment’s ratification. 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 all been in dereliction of that statutory duty.

***5. The President and Congress have the authority to take actions to affirm the ratification of the Equal Rights Amendment and expedite its judicial, legislative, and administrative implementation.***

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.” Although the executive branch has no assigned role in the constitutional amendment process, the President has the constitutional authority to ensure by appropriate means that 1 U.S.C. 106b is fully executed through publication of the ERA’s ratification in the *Federal Register*.

Each new Congress has full legislative power and is not bound by previous congressional decisions. Concurrent resolutions *S.J. Res. 38* and *H.J. Res 80* in the current 119<sup>th</sup> Congress state:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States.*

*S.J. Res. 38* has three bipartisan cosponsors and the full support of Senate Democrats but is awaiting further paired Democratic and Republican sign-ons. *H.J. Res. 80* has 219 cosponsors.

Independent of any presidential or congressional action or inaction, the U.S. Archivist remains legally required by 1 U.S.C. 106b to immediately publish certification of the Equal Rights Amendment’s ratification as the 28<sup>th</sup> Amendment to the Constitution.

***6. Statements in support of the ERA as the 28<sup>th</sup> 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 28<sup>th</sup> 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*

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[www.equalrightsamendment.org/faq](http://www.equalrightsamendment.org/faq)

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