

**Fact Sheet on the Equal Rights Amendment
February 2022 Update**

ARTICLE –

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.

Current Status:

The ERA has satisfied all the requirements set forth under Article V of the Constitution. On January 27, 2020, Virginia became the 38th state to ratify. Having now been “ratified by the legislatures of three fourths of the several States,” the ERA “shall be valid to all intents and purposes” as part of the Constitution. U.S. Const. art. V.

Under federal law (1 U.S.C. 106(b)), what should happen next is that the National Archivist should certify and publish the amendment as part of the Constitution. Yet the National Archivist has stated publicly that he will not certify the ERA unless a court orders him to. He initially took that position in 2020, based on advice from the Office of Legal Counsel of the Trump Administration’s Department of Justice. As of now, the current administration has not changed that advice.

Status of Litigation

The National Archivist is currently the target of a lawsuit in federal court by the last three ratifying states: Virginia, Illinois, and Nevada. The lawsuit seeks to compel the Archivist to comply with his statutory duty to publish the ERA as the 28th Amendment.

The states’ argument is that as a matter of constitutional law, the seven-year time limit imposed by Congress in 1972 cannot stand in the way of an amendment that has met all the requirements for ratification under Article V. The time limit appears only in the preamble of the joint resolution that proposed the ERA to the States in 1972. Because the time limit appears only there – rather than as part of the text of the amendment to be ratified by the States – it is merely advisory. It cannot change the process for amendment set forth in Article V, which leaves no room for time limits. This position has the support of a host of amici, including in a brief filed in the D.C. Circuit by constitutional scholars Kathleen Sullivan, Laurence Tribe, Geoffrey Stone, Martha Minow, Lawrence Lessig, Kimberle Crenshaw, Jessica Neuwirth, and Catharine MacKinnon, among others.

The district court (Judge Contreras of the D.C. District) dismissed the lawsuit for lack of standing, on the ground that publication by the

Archivist has no legal significance; if the ERA is valid today, it is valid, whether or not the Archivist has published it. The court also held in the alternative that even if the states had standing to sue, it would not issue a writ of mandamus, because the time limit still exists, has not yet been removed by Congress, and (in the court's view) stands in the way of the ERA's effectiveness.

The states appealed the dismissal to the D.C. Circuit. The opening brief and amicus briefs have been filed; the brief by the National Archivist (represented by the Department of Justice) is due on March 4. The case will be argued and decided later in 2022. It is unclear what position (if any) the government's brief will take on the issue of whether the time limit is effective and stands in the way of the ERA.

Legislation

There are bipartisan resolutions pending in Congress today that would eliminate any question about the time limit and make clear that the validity of the ERA depends on the provisions of Article V, not the 1972 joint resolution. The litigation is no substitute for this legislation. If Congress removes the time limit (or otherwise affirms that the time limit is not binding), the courts will likely defer to that determination as resolving a political question.

S.J. Res. 1 provides that "notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States." A similar measure passed in the House of Representatives as H.J. Res. 17 on March 17, 2021 and has been held at the desk in the Senate.

H. Res. 891 was also proposed in the House last month on the two-year anniversary of Virginia's ratification, marking the effective date of the ERA's protections. This resolution recognizes that the ERA has met all constitutional requirements for an amendment, that the time limit imposed in 1972 is not binding, and that the ERA has been ratified by 38 States. The resolution was patterned after the one adopted in Congress following the final ratification of the 27th Amendment, which governs congressional pay and took 203 years to ratify.

Simple Majority

Congress has already concluded that it has the power to alter a time limit for ratification contained in a joint resolution, and that it may do so with a simple majority. In 1979, this topic was the subject of extensive debate and testimony. Congress resolved the debate by voting by simple majority to extend the seven-year time limit for the ERA by another three years, into 1982. A House Judiciary Committee report at that time concluded that a simple majority was all that was required to pass this measure, and a separate House Judiciary Committee report in 2022 echoed that conclusion. H. Rep. 116-378 at 7-9.

OLC Opinion and Clarification

In January 2020, in response to a question by the National Archivist, the Office of Legal Counsel for the Department of Justice issued an opinion about the status of the ERA. That opinion concluded that because the requisite number of States had not ratified before the expiration of that time limit, the ERA is not part of the Constitution today and the National Archivist may not certify it as such. The opinion also took the view that once Congress proposes an amendment to the states, Congress has no further role in the ratification process and lacks the authority to modify the time limit. This opinion reached issues that were beyond the purview of the Executive Branch, which has no role to play in ratification, and conflicted with another opinion of the OLC from the 1970s.

In January 2022, the OLC clarified its earlier opinion. Although the OLC stopped short of rescinding the opinion, it made clear that “nothing in the opinion stands as an obstacle to Congress’s ability to act.” It also observed that the issues relating to Congress’s power to change the time limit are “closer and more difficult than the opinion suggested.” Finally, the OLC explained that “[w]hether the ERA is part of the Constitution will be resolved not by an OLC opinion but by the courts and Congress.” Essentially, the OLC removed its prior opinion as an impediment and put the ball squarely in Congress’s court.

“Rescissions” by Nebraska, Tennessee, Idaho, Kentucky, South Dakota in the 1970s

Under Article V, the only question is whether a state has “ratified.” Ratification is something that happens at a moment in time; it either happened, or it did not.

History tells us that once a state ratifies, it can’t take it back. The 14th Amendment became part of the Constitution even though two states had attempted to rescind prior ratifications – and those states were included on the list of states that ratified.

The effectiveness of a purported rescission is ultimately a question for Congress. In *Coleman* (1939), the Supreme Court held that “the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress.” The House Judiciary Committee Report affirmed this conclusion in 2020. H. Rep. 116-378 at 9-10. It is because of this conclusion that the new resolution recently proposed by members in the House affirmatively lists the ratifying states (including those that have purported to rescind).

Relationship to Applications for Constitutional Convention

Some have wondered whether, if a state cannot rescind a ratification, it also cannot rescind an application for a Constitutional Convention. This is relevant to the efforts by some states to push for a Balanced Budget Amendment.

The answer is no. A Constitutional Convention is an alternative way to propose amendments. Under Article V, Congress must call a Constitutional Convention to propose amendments if three-quarters of the States ask it to. But if a state asks for a Convention to be held, but then no longer wishes to participate, it can rescind its request. An application for a Convention is essentially a request to propose an amendment in the future. It would make no sense to hold a Convention if the states that requested it no longer wish to propose an amendment.

Ratifications are different. Every amendment – whether proposed by Congress or through a Constitutional Convention – must be ratified by three-quarters of the states. A ratification is something that happens at a particular moment in time. As a result, Congress has historically refused to recognize the rescission of a ratification, even though it has allowed states to rescind their applications for a Constitutional Convention.

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