

## EQUAL RIGHTS AMENDMENT

In 1920, the 19th Amendment to the U.S. Constitution prohibited any citizen from being denied voting rights on the basis of sex. Realizing that the 19th Amendment alone would be insufficient to prohibit discrimination based on gender, suffragettes set their sights on the next uphill battle: passage of a constitutional amendment guaranteeing that women and men would be treated equally under the law. Suffragettes wrote the language for the Equal Rights Amendment which was co-introduced in Congress, in 1923, by Congressman Daniel Anthony, Susan B. Anthony's nephew. The ERA language states: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. This amendment shall take effect two years after the date of ratification." State legislatures were given until 1979 to ratify the amendment; Congress later extended this deadline to 1982. By 1982, 35 states had ratified the amendment: 3 states short of the 3/4 states required.

Subsequent to the deadline, Nevada, Illinois and, on January 15th of this year, Virginia ratified the amendment. Thus, ratification of 3/4 of the states, required by the Constitution, has been met. The eleven states that have not ratified are: Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, Oklahoma, North Carolina, South Carolina and Utah. However, four states withdrew their ratification before the expiration date: Idaho, Kentucky, Nebraska, and Tennessee. One state, South Dakota, voted to rescind after the 1982 deadline.

So, will the the United States Archivist add the ERA to the Constitution — that is, amend the Constitution to include the ERA as the 28th Amendment — for that is the legal process by which an amendment becomes part of the Constitution? Well, the answer to that question depends on who answers the question.

***First set of questions:*** *Can an amendment be added to the Constitution after the date for ratification has expired? Does Congress have to pass a law extending the ERA? Does Congress have to start all over again with*

*passage of the ERA by 2/3 of the House and Senate and ratification by 3/4 of the states?*

Early amendments to the Constitution did not include an expiration date. Beginning with the 18th Amendment, it became customary to include a requirement that the states ratify an amendment within 7 years. Six amendments have not been passed within the 7 year period. One of these, the ERA has not “died” — since its expiration in 1982, ERA proponents have introduced bills in Congress every year to extend it but there has never been a vote on extension. Proponents of passage of the ERA rely on the 27th Amendment as a precedent. The 27th Amendment, dealing with Congressional pay, was passed by Congress in 1789 and was not ratified by enough states until 1992 — more than 200 years later. BUT, remember, there was no time limit on the 27th Amendment.

The League of Women Voters contends that the issue can be resolved by Congress passing legislation to remove the deadline. The AAUW position is that Congress should vote to extend or to restart the whole process.

The U.S. Department of Justice has issued a legal opinion that states can not ratify the ERA after its deadline expired.

The U.S. Archivist, whose job it is to amend the Constitution when a new amendment is ratified, has stated he will abide by the Department of Justice opinion.

Three state attorney generals, Nevada, Illinois and Virginia, have sued the Archivist to include the ERA in the Constitution now. They argue the Archivist has no legal authority to ignore a duly ratified amendment and to prevent it from being added to the Constitution. The attorney general of South Dakota has sued the Archivist to prevent him from adding the ERA to the Constitution.

***Second Question:*** *Who decides the question? Congress or the courts?*

Even that is up for debate but most authorities say it is a matter for the courts to decide.

**Third Question:** *Can a state legislature rescind its ratification of a constitutional amendment? In other words, have 38 states ratified the ERA or have only 33 ratified because five states have changed their minds? Does it matter whether a state rescinds within the 7 year period?*

Most legal authorities argue that a state cannot rescind its vote. But this is another question on which legal authorities are not unanimous.

**Fourth Question:** *Do we really need the ERA? Many laws addressing gender discrimination have been passed since 1972 when Congress sent the ERA to the states for ratification including Title VII of the Equal Rights Act of 1964 prohibiting sex discrimination in employment, schools, public accommodation and voter registration; the Equal Pay Act; the Lily Ledbetter Fair Pay Act, and Title IX of the Education Act Amendments of 1972 prohibiting sex discrimination in any education program or activity receiving federal aid; as well as state and local laws prohibiting discrimination and giving women the right to own property, divorce, etc.*

Although these laws have addressed many inequities suffered by women, we still need the ERA. First, laws can always be rescinded or modified — depending on legislative, judicial and administrative whim and do not believe that cannot happen — just look at what is happening with changes in Title IX protections against harassment and in the area of contraception and choice. Consider that in 1974, the Supreme Court ruled that discrimination against pregnant women did not constitute sex discrimination. And, in 2014, in Hobby Lobby the Supreme Court parsed the case in terms of religious freedom rather than sex discrimination when holding a company need not include contraception in its insurance coverage. Second, sex discrimination does not have the same legal protection as race, religion and nationality which are guaranteed equal protection under the 14th Amendment. Under the 14th Amendment, any law that impacts race, religion or ethnicity is given the highest level of judicial scrutiny known as “strict scrutiny.” “Strict scrutiny” requires that the law in question be justified by a compelling government interest and that the law is narrowly tailored to achieve that interest in the least restrictive means possible. Not so with laws disparately impacting or discriminating against women, which are reviewed using the less stringent “intermediate scrutiny” standard. “Intermediate scrutiny” only requires that to be upheld

the law or policy furthers an “important” government interest by means that are “substantially related” to that interest. The ERA would change that.

Whether the ERA would protect the right of choice for women over their own bodies, make class action law suits easier; address the pay gap; or better protect women against sexual violence and harassment— that I do not know and is yet to be determined.

Maybe the better question to ask is “Why not amend the Constitution to cover women — to provide for equal rights for women in the country’s most important legal document — to say that we are human beings?” Virtually all Americans, 94% according to a poll in 2016, support the ERA. Let us work, along with our AAUW national office and state office, to assure the ERA becomes part of our constitution in 2020.

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Write your elected officials now. A suggested message:

Dear \_\_\_\_\_: Date \_\_\_\_\_

As your constituent, I urge you to support legislation that would remove the deadline for ratification of the Equal Rights Amendment. The ERA has now been ratified by three-fourths of the states. It is time for Congress to enshrine equality for women in the U.S. Constitution. We women have waited long enough. Please support Senate Joint Resolution 15 / House Joint Resolution 35. Signed: name and address