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FAQ on the Current Status of the Equal Rights Amendment to the U.S. Constitution

Center for Gender and Sexuality Law

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The ERA Project at Columbia Law School

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Several measures have been introduced into the U.S. Congress this session that relate to the Equal Rights Amendment (ERA). One is a resolution that would lift the deadline for ratification of the ERA that was passed by Congress in 1972, and the other is a new ERA that would begin a new process of amending the Constitution to add explicit protections for sex equality. This FAQ is designed to explain what each of these measures would do and the legal complexities that surround them.

What are the requirements for amending the U.S. Constitution?

Under Article V of the U.S. Constitution, a proposed amendment to the Constitution, when approved by 2/3 of both Houses of Congress, shall become a part of the constitution when ratified by the legislatures of 3/4 of the states.[i]

The First ERA - 1923

The first ERA was introduced into Congress in 1923:

"Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." [ii]

This version of the ERA was never passed by Congress.

The 1972 ERA

Various versions of the ERA were introduced in Congress from 1923 through 1970. The one that was adopted by two-thirds of both Houses of the 92nd Congress in 1971-72 read as follows:

> 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.

This version of the ERA was passed by Congress in 1972, and included a preamble that created a seven-year deadline for ratification by 3/4 of the state legislatures.[iii] By 1977, 35 states ratified the ERA. Congress extended the deadline by three more years, to 1982, but no additional states ratified the amendment. By both the 1979 deadline and 1982 extended deadline, the ERA was three states short of the 38 required.

Three additional states ratified the ERA decades after both deadlines had expired: Nevada (2017), Illinois (2018), and Virginia (2020) – thus meeting the constitutional requirement of ratification by 3/4 of the states, albeit long after Congress's anticipated timeframe for ratification.

Does Congress Have the Power to Include a Deadline for The Ratification Process to be Completed?

Yes. While Article V of the Constitution makes no mention of a timeframe for ratification, in *Dillon v. Gloss* (1921) the Supreme Court recognized the power of Congress to create a reasonable deadline for state ratification of a proposed amendment. *Dillon* involved a challenge to the seven-year deadline that Congress created for ratification included in the 18th Amendment (prohibiting the sale or importation of intoxicating liquors).[iv]

Congress injected a time limit for ratification for the first time in 1917, when it included a seven-year time limit in the Prohibition Amendment.

Why Is There a Dispute About the Deadline for Ratification of the ERA?

The Supreme Court's ruling in *Dillon* does not answer the question of the validity or effect of the deadline on ERA ratification. The deadline upheld by the Court in *Dillon* was contained in the third section of the Prohibition Amendment itself (see text in endnote 4 below), whereas the deadline for ratification of the ERA was placed in the *preamble* to the ERA that was passed by Congress. Some argue that the validity of the ERA deadline does not depend on whether the deadline was contained in the body of the proposed amendment or in the preamble. They point to the 23rd, 24th, 25th, and 26th Amendments – all of which were passed by Congress with a deadline for state ratification in the preamble. Their view is that Congress has recently adopted the practice of placing the deadline in the preamble so as to not clutter up the Constitution with language that was irrelevant once the amendment was fully ratified.

Others argue that a ratification deadline in the preamble is without binding legal effect. They maintain that, when the states ratified the ERA, they only ratified the proposed amendment, and not the introductory words in the resolution creating the deadline. Thus, states were free, according to this position, to ratify the amendment at a time of their choosing.

Another position is that a ratification deadline in the preamble has legal effect, but can be changed by Congress upon Congress's assessment of whether the proposed amendment remains vital and requires more time for full and fair debate, and consideration by the states. The introductory preamble is not part of the proposed amendment, and therefore need not be adopted by two-thirds of Congress or ratified by three-fourths of the states in order to be legally effective. Congress has the power to change the deadline by a majority vote, as it did in 1978 when it extended the deadline to 1982. This power includes the power to change the deadline, even retroactively, or to remove it altogether upon Congress's political judgment that the proposed amendment remains vital and necessary.

Those who advocate the 1972 ERA's continued viability in 2021 point to the 27th Amendment (prohibiting pay changes for members of Congress from taking effect until after the next set of congressional elections), in which Congress proposed the amendment by a two-thirds' vote in 1789; yet the requisite ratification by 3/4 of the states did not occur until 1992, more than 200 years later. This example shows, some argue, that a pending amendment does not grow stale through the passage of time needed to complete state ratification. Nonetheless, the 27th Amendment did not contain a deadline in the preamble, and thus does not unequivocally answer the question of whether an amendment with an expired deadline can continue across generations to be ratified.

In short, no existing precedent, from *Dillon v. Gloss* to the 27th Amendment, squarely answers the most challenging questions on which the viability of the ERA currently turns.

What Will House Joint Resolution 17 Do?

House Joint Resolution 17 will remove any deadline requirement for the ratification of the ERA, and recognizes the ERA as valid and part of the Constitution whenever it has been ratified by 3/4 of the state legislatures. So, if the House and Senate both pass the resolution (by a majority vote, not a 2/3 vote – though the resolution would have to overcome the filibuster in the Senate, requiring 60 votes to move it to the floor for a majority vote), the ERA would become part of the U.S. Constitution, subject to subsequent legal challenges.

If Both Houses Pass the Deadline Removal Resolution, What Legal Challenges Might We Expect?

Should the "deadline lifting" resolution be passed by both the House and the Senate, it is likely that the finalization of the ERA would be challenged on two principal grounds:

1. That the earlier deadline had already expired in 1979, and Congress did not have the power to change or retroactively lift that deadline. In *Dillon v. Gloss* (1921) the Supreme Court held that Congress has the power "to fix a definite period for" ratification, but unratified and rescinding states maintain that states relied on the deadline (whether it is in a preamble or the proposed amendment) and therefore Congress is without power to change it, especially to revive an amendment after the deadline expired long ago. This is a legal question on which constitutional law experts disagree, and the Supreme Court has never addressed.
2. That 3/4 of the states have not ratified the ERA because at least five states have rescinded their earlier ratification. Whether states that ratified and then rescinded should be counted as "ratified" states or not is a complex legal question, on which there is a range of reasonable positions. The Supreme Court has not addressed it, but Congress has, in its handling of the 14th Amendment.

Can a State Rescind an Earlier Ratification of the ERA?

Between 1973 and 1979, five state legislatures that had previously voted to ratify the ERA subsequently voted to rescind that ratification. Nebraska (1973), Tennessee (1974), Idaho (1977),

Kentucky (1978), and South Dakota (1979). Kentucky's governor vetoed the legislature's resolution to rescind ratification of the ERA. In 1979 the South Dakota legislature approved a "sunset" amendment to its 1973 ratification of the ERA, meaning that the legislature voted to have its ratification of the ERA essentially expire if 3/4 of the states had not ratified the ERA by the original deadline of 1979. The legal status of these rescissions, governor's veto of a legislative rescission, and "sunset" provision, is unclear as the Supreme Court has not ruled on this issue, and none of these measures are mentioned in Article V of the Constitution or in any federal law relating to amendments to the Constitution.

The Constitution says nothing about whether a state can rescind or revoke its ratification of a Constitutional Amendment, either before the ratification process has been completed (before 3/4 of the states have ratified) or after. Some advocates and scholars argue that ratification is a one-time event, once done it cannot be undone as the Constitution only provides for ratification, not un-ratification.

The issue of rescission of a prior ratification of a Constitutional amendment is not new. Three states voted to rescind their ratifications of the 14th Amendment.[v] Yet these states were counted when the federal government tallied the total states that had ratified the Amendment, thus declaring that it was officially part of the Constitution.[vi] The validity of the official count was contested, however, by those who sought to validate a state's right to rescind.

To make the question of the legality of states changing their vote even murkier, several states voted to ratify the 14th Amendment after having voted to reject it.[vii] When every Confederate state except Tennessee refused to ratify the 14th Amendment, Congress passed a law requiring all states to do so as a condition of seating their members of Congress.[viii] Subsequently, states that had voted against ratification of the 14th Amendment voted again and ratified it, thus enabling their elected representatives to be seated in Congress. Congress declared the 14th Amendment was fully ratified as a political matter, and its legitimacy as part of the Constitution has not been seriously questioned in the courts.

Who Has the Power to Decide the Contested Issues of Deadline and Rescission?

Not clear. In *Coleman v. Miller* (1939) the Supreme Court ruled that the controversies around the promulgation or proclamation of constitutional amendments were political questions for Congress, not courts, to decide. The ongoing precedential force of *Coleman*, however, has been widely questioned by scholars. The text of Article V does not specify a role for Congress in the amendment process after proposing it to the states for ratification, and the Supreme Court has actually adjudicated several cases contesting the validity of the amendment process.

On March 5, 2021 a U.S. district court in D.C. ruled that challenges to the ERA deadline were issues the court had jurisdiction to decide, reading the *Coleman* case quite narrowly. See the ERA Project's FAQ on the D.C. court's decision.

Recent Litigation Regarding the Deadline

Two cases have been brought in federal court aimed at forcing the federal government to acknowledge that the ERA was fully ratified when Virginia ratified the ERA in January 2020. One suit was brought in a U.S. district court in D.C. by the three most recent states that ratified the ERA (Nevada, Illinois, and Virginia), and the other was brought in federal court in Boston by the advocacy group Equal Means Equal. Both suits argued that the deadline was invalid, and asked the court to order that the ERA become a part of the Constitution when Virginia ratified in January 2020. Both suits were dismissed on account of the fact that parties bringing the suits did not have standing to challenge the ERA's legality. For a more detailed explanation of the Virginia case, see the ERA Project's FAQ on the Virginia court's decision.

The Third ERA - 2021

A third version of the ERA, sometimes referred to as the "fresh start" ERA, was introduced into Congress on March 1, 2021 by Representative Carolyn Maloney (having introduced it in every session of Congress starting in 2007). H.J. Res. 28 provides:

> Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. 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. Congress and the several States 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.

This new measure would start the process all over again, meaning that both houses of Congress would have to pass the resolution by a 2/3 majority, then 3/4 of the state legislatures would have to ratify it. Note that this version of the ERA is broader than the 1972 version, specifically extending sex equality rights to both the public and private sectors rather than simply prohibiting government from abridging those rights. As currently proposed, the "fresh start" ERA does not contain a deadline.

Visit the ERA Project's website here.

The ERA Project, a law and policy think tank, develops rigorous academic research, policy papers, expert guidance, and strategic leadership to support the Equal Rights Amendment (ERA) to the U.S. Constitution, and the broader project of advancing gender-based justice.

The Center for Gender and Sexuality Law at Columbia Law School develops research projects and initiatives focused on issues of gender, sexuality, reproductive rights, bodily autonomy, and gender identity and expression in law, policy, and professional practice. The Center's mission is to formulate new approaches to complex issues facing gender and sexual justice movements.

[i] The Constitution sets out another process to add amendments, but it has never been used: 2/3 of the states can vote to convene a Constitutional Convention at which an amendment can be approved, and then 3/4 of the states have to ratify that amendment.

[ii] House Joint Resolution No. 75, December 13, 1923.

[iii] H.J. Res. 208, 92nd Congress: "the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."

[iv] Senate Joint Resolution 17 (1917):

> **Section 1**
> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
> **Section 2**
> The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
> **Section 3**
> This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[v] New Jersey (ratification 1866, rescission 1868), Oregon (ratification 1866, rescission 1868, and Ohio (ratification 1867, rescission 1868) voted to rescind their ratifications after having voted in favor of the 14th Amendment. All three states later voted to re-ratify the 14th Amendment: New Jersey (re-ratification 2003), Oregon (re-ratification 1973), Ohio (re-ratification 2003).

[vi] See *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*. Library of Congress. p. 708.

[vii] North Carolina (ratification July 4, 1868 after rejection December 14, 1866), Louisiana (ratification July 9, 1868 after rejection February 6, 1867), South Carolina **(**ratification July 9, 1868 after rejection December 20, 1866), Georgia **(**ratification July 21, 1868 after rejection November 9, 1866).

[viii] An Act to provide for the more efficient Government of the Rebel States, enacted March 2, 1867, 14 Stat. 428, 429