



Common Questions by the ERA Coalition and Alice Paul Institute*

**Common Legal Questions taken from the ERA Coalition Fund for Women's Equality and the Alice Paul Institute FAQs. Both documents have been revised by the LWV-NC ERA LAT leaders to show the current status.*

1. What is the current status of the Equal Rights Amendment?

The Equal Rights Amendment would add a provision to our Constitution saying that "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 passed the ERA in 1972 with broad, bipartisan support, including from the Republican Party and President Nixon. The amendment then went to the states for ratification. By the late 1970s, the legislatures of 35 states had ratified it—three short of the 38 required for a constitutional amendment.

Almost 40 years later, Nevada revived the effort by becoming the 36th State to ratify. In 2018, Illinois became the 37th state. Finally, on January 27, 2020, Virginia became the 38th state to ratify. The ERA has now fulfilled the requirements of Article V of the Constitution to become an amendment.

As noted by the ERA Coalition in their news release, "It is an historic day for the women of America. More than two hundred years after women were intentionally left out of the Constitution and exactly one hundred years after women achieved the right to vote through the 19th Amendment, The Equal Rights Amendment has been ratified. Now, we must finish the job."

The final battle will be fought in the Congress and in the Courts.

2. Can Congress Remove the Deadline?

On February 12, 2020, House Joint Resolution 79, to remove the ERA deadline, was approved by the House of Representatives. We thank the ERA champions in the House for this historic vote. Now, it is up to the Senate. Currently, Senate Joint Resolution 6, to remove the ERA deadline, is in the Senate Judiciary Committee. Our mission is to do everything in our power to persuade Senators Tillis and Burr to support getting the

resolution out of committee and on to the floor for a vote. Then, to vote Yes to remove the deadline.

The deadline can be removed because the original deadline appeared in a joint resolution, rather than in the text of the amendment itself. A joint resolution can be changed, under the basic principle that one Congress cannot bind subsequent Congresses.

If the deadline remains in place, the courts may ultimately be asked to decide whether a deadline in a joint resolution can really stop an amendment from becoming part of the Constitution once it has been ratified by three-quarters of the states.

3. Will the Courts have to be brought in?

If the deadline remains in place, the courts may ultimately be asked to decide. Therefore, the League of Women Voters and partner organizations are supporting lawsuits requiring the Archivist to certify ratification.

On January 30, 2020, Attorney General Mark Herring of Virginia, Attorney General Kwame Raoul of Illinois and Attorney General Aaron Ford of Nevada, filed a lawsuit to require the Archivist to certify ratification of the Equal Rights Amendment to support constitutional equality for women. The following is an excerpt from the press release by the ERA Coalition:

"The legislators and advocates in these three states have brought us to this historic moment in time. In Nevada, State Senator Pat Spearman; in Illinois, current Lt Governor Julianna Stratton and former Representative Steven Andersson; in Virginia legislators like Senator Jennifer McClellan and Delegate Jennifer Carroll Foy—these names will be remembered with others as leaders who refused to take no for an answer, and brought us to this day when three fourths of the states have ratified the Equal Rights Amendment as required by the Constitution, a glorious day for women across America."

It is time for equality. We have waited too long already for equal rights, and it is shameful that there are those who would have us wait a moment longer. We have been on the ERA journey for almost a century. Alice Paul's idea to prohibit discrimination based on sex was a good idea in 1923 when it was first introduced in Congress. It was a good idea when it was passed by Congress in 1972. And it was still a good idea when it was ratified by Nevada in 2017, Illinois in 2018 and Virginia, the 38th state, on Monday January 27, 2020. The ERA is as American as apple pie, and ERA Coalition polling indicates says that 94 percent of Americans – and 99% of millennials – agree that the Constitution should be amended to include equal rights for women.

Over the years we have made some progress, and we have built a strong women's movement, as evidenced most recently by the #MeToo outcry, a wave of protest that

highlights the fact that women are still second-class citizens in this country. It is time to put these days behind us, 100 years – a full century – after women got the right to vote. We need the ERA because 80 per cent of our poor are women, trying to house and feed children; women are still woefully behind in pay and promotion, and inequality is a life or death issue on a daily basis as women in the home and workplace continue to fear sexual and physical assault with no recourse to federal courts because without the ERA there is no basis for such jurisdiction.

Women were intentionally omitted from the Constitution when it was written, despite the fervent plea of Abigail Adams for our inclusion. Generation after generation of grandmothers, mothers, daughters, granddaughters have dreamed of fixing this shameful omission. That is what the ERA does for us, and we welcome this 28th Amendment to the Constitution. We are determined to see it through and we will never give up on an equal future."

4. What about the 5 states that rescinded their votes to ratify?

In the 1970s, five of the states that ratified the ERA later passed resolutions attempting to limit or rescind their prior ratifications. But historically, resolutions like these have not prevented the original ratifications from counting toward the threshold. When the 14th Amendment was ratified in 1868, for example, it became part of the Constitution even though two states had passed resolutions attempting to rescind their prior ratifications— and those two states were included on the list of states that ratified. Although one court held in 1981 that a state *does* have the power to rescind its ratification of the ERA, the Supreme Court vacated that decision after the ERA deadline had passed, so it is no longer on the books.

5. The 14th Amendment and Equal Rights for Women by Sheila Denn, LWV of Wake Count

The 14th Amendment was drafted for expressing the rights of black men who had recently been emancipated from slavery. It was not understood at the time of its ratification to refer to equality of rights in a more general sense. Had it been the case that women's rights were guaranteed under the 14th Amendment, there surely would have been no need for a separate Amendment – namely the 19th – to guarantee women's right to vote.

Constitutional scholars have expressed skepticism about the use of the Equal Protection Clause in sex discrimination cases. The late Supreme Court Justice Antonin Scalia stated in a 2011 interview in response to a question about the Equal Protection Clause and sex discrimination that "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant."

It is correct that the Equal Protection Clause of the 14th Amendment provides for *heightened scrutiny* of laws challenged in sex discrimination claims. However, sex is not

included as a suspect classification, as race, religion, and national origin are, so sex discrimination challenges are not granted *strict scrutiny*. The fact that the classification of sex -- a classification that covers wholly half the population -- is not considered a suspect classification clearly demonstrates that the 14th Amendment does not protect the full rights of women. It is for this reason that the Equal Rights Amendment is necessary.