

# The never-ending fight over whether to include the Equal Rights Amendment in the Constitution

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Yesterday at 2:22 p.m. EST



As of last week, the Constitution was supposed to include the Equal Rights Amendment saying women have equal rights as men — but a 40-year-old deadline stands in its way.

As the New York Times’s Jesse Wegman reported, the national archivist is refusing to add a 28th Amendment to the Constitution, all because the deadline for states to ratify it expired decades ago.

Two-thirds of the states have ratified the ERA, which meets the constitutional requirements for adding to the Constitution. But a few ratified it after a deadline imposed by Congress, which could leave ERA supporters back at square one.

Here’s what’s going on. Let’s start from the beginning.

## What is the Equal Rights Amendment?

It’s a proposed addition to the Constitution that tries to do exactly what the name suggests: say that under the law, women and men have equal rights. It’s short, reading: “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”

Practically, its passage means discrimination based on gender, or treating women differently than men when it comes to divorce, property rights or anything else, is unconstitutional.

The battle over this amendment is a century long, and its supporters have been tantalizingly close for decades. It was originally proposed in 1923 by leaders of the suffrage movement, who had just succeeded in getting a woman’s right to vote into the Constitution. In the 1960s, conservative lawyer Phyllis Schlafly rallied conservative women around opposing it.

Congress approved the Equal Rights Amendment in the 1970s. (“It didn’t help that for most of the twentieth century, Congress was comprised almost entirely of men,” [the Brennan Center for Justice notes](#) of the decades-long delay.)

But getting Congress on board is only half the battle in changing the Constitution. The real debate on this amendment, as we’ll explore, lies in the states.

Support or opposition to the amendment tends to fall along traditional political battle lines. Supporters tend to lean

left and argue that this basic guarantee of rights deserves to be in the Constitution. President Biden has issued his support as recently as this month, saying in a statement: “No one should be discriminated against based on their sex — and we, as a nation, must stand up for full women’s equality.”

Opponents lean right, and they argue such an amendment is redundant, since so many states have passed similar protections. An amendment in the 1970s probably would have had much more of an impact than adding it in 2022. The antiabortion movement — which is as strong as ever right now — often leads opposition to this amendment, and activists argue it could make it harder to restrict abortions.

## Its winding route to the Constitution

Changing the Constitution is one of the most difficult things in all of governing. There are a couple different ways to do it. One of the most common processes — the one being used here — requires a two-thirds vote in Congress and then three-fourths of states to ratify it on their own. That’s 38 states.

In 1972, after a decade or so of debate, Congress passed the ERA and sent it to the states for ratification.

Congress gets to determine the deadline for states to consider whether to ratify a constitutional amendment. It gave the states a decade for 38 of them to ratify it. Thirty-five did before the deadline expired in 1982.

Debate over this amendment has tended to ebb and flow with civil rights debates in America more broadly. The push for Congress to ratify it revved up in the ’60s (which is the subject of the 2020 miniseries “[Mrs. America](#)”). Right after President Donald Trump took office, and women started getting much more involved in politics, the issue got revived again. In 2017, [Nevada](#) became the first state in decades to ratify it. Illinois followed. Then [Virginia](#) in 2020.

**What the hand-up is**

## What the hang up is

Congress arguably added a third hurdle: a deadline for states to ratify it. And that deadline expired 40 years ago.

Around the time Virginia was moving to become the 38th and final state to ratify the amendment, the Justice Department under former Trump issued a memo saying flatly that the deadline for ratification had expired and ERA supporters had to start over from scratch. “[E]ven if one or more state legislatures were to ratify the proposed amendment, it would not become part of the Constitution, and the Archivist could not certify its adoption,” the memo said.

The administration noted that Supreme Court Justice Ruth Bader Ginsburg, a feminist icon, had made comments suggesting she realized the deadline was immovable: “I hope someday it will be put back in the political hopper, starting over again, collecting necessary number of States to ratify it.”

Plus, in the late 1970s, in a conservative backlash, five states actually rescinded their ratification — Idaho, Kentucky, Nebraska, Tennessee and South Dakota. No one really knows whether to count their votes for or against the ERA.

Some supporters of the ERA say Congress can vote to remove the ERA deadline it originally imposed. But the Justice Department under Trump said no. “That time has come and gone.”

## Supporters of the ERA have a few ways around all this

But they all feel like long shots, says Loyola Marymount University constitutional law professor Jessica Levinson. One is to go to the courts.

This is already happening. The three states that ratified the ERA after the deadline have sued the government to recognize their ratifications, arguing — correctly — that there is a federal law requiring the national archivist to edit the Constitution once the requirements to add a constitutional amendment have been met.

That means there are conflicting federal laws on this: the deadline for states to ratify the ERA and the law requiring a constitutional amendment after 38 states do so.

This is probably headed to the conservative-majority Supreme Court, which has sided with conservatives on some hot-button issues.

Another option is for Congress to ignore Justice Department opinions on this and pass a law retroactively removing the deadline. A resolution in the House to do that passed the House of Representatives last year with minimal Republican support.

Biden has urged Congress to pass another resolution just saying the ERA is now the 28th Amendment, and Biden’s Justice Department recently issued a memo saying nothing is preventing Congress from trying.

But that would face an insurmountable filibuster in the Senate. Even if it passed Congress, conservative states have been litigious in trying to stop the ERA from going into effect. So this would almost certainly be tied up in court for years to come.

While this is an easy issue for Democrats to support, it’s also not top of mind for the party. That adds to the many

hurdles the ERA faces to being added to the Constitution. It may never get there, short of starting over completely.

“If you combine our legal practice with apparent lack of political will,” Levinson said, “my inclination is this isn’t going to happen.”

