

DAN O'HANLON ESSAY COMPETITION

- First Prize: \$1,000
- Second Prize: \$500

The 2022 Essay Question

Should the U.S. Constitution guarantee equal rights for women?

On January 15, 2020, nearly 50 years after Congress passed and sent the Equal Rights Amendment to the states for approval, Virginia became the 38th state to ratify the ERA. The Equal Rights Amendment guarantees 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. The 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. *See*

<https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf>

Despite being ratified by $\frac{3}{4}$ of the states – as required by Article V of the Constitution – the Equal Rights Amendment has not been added as the 28th Amendment for reasons summarized in the “Background” below.

This year’s essay question asks the writer to consider whether -- regardless of the fate of the recently-ratified ERA -- our nation’s governing document should guarantee gender equality, and, if so, why. In addition, if you argue in favor of such a guarantee, how should proponents go about achieving this in our current political environment? Conversely, if you conclude that such a Constitutional guarantee is unnecessary, you should explain your reasoning for that conclusion.

Your essay should demonstrate an understanding of the history of the ERA, the challenges to making it the 28th Amendment, and the legal impact that would result if this guarantee were provided by the U.S. Constitution.

Background

Demands for equal citizenship for women are nothing new. Indeed, in March, 1776, Abigail Adams wrote her husband John while he was away in Philadelphia at the Continental Congress, working to win approval of the Declaration of Independence:

“I long to hear that you have declared an independency -- and . . . in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.” *See Massachusetts Historical Society Archive:* <https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa> (spelling modernized).

Despite Abigail’s request, the white, property-owning males who wrote the Constitution did not recognize women (or Black, brown, or indigenous people, or those without property) as having equal rights. Women are not mentioned in the nation’s governing documents. In fact, women were not guaranteed the right to vote until 1920, when the 19th Amendment was ratified after a long campaign by suffragists, who at times were jailed, force-fed, and otherwise abused as they fought to participate in selecting the leaders of their country.

Soon after ratification of the 19th Amendment, Alice Paul and Crystal Eastman, leaders in the suffrage movement, pressed forward with a campaign for an Equal Rights Amendment to guarantee women’s legal equality. A proposed amendment was introduced in Congress in 1923, stating: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.” *See* <https://catalog.archives.gov/id/7452156>

Equal rights amendments were repeatedly introduced in Congress for the next five decades. Finally, in 1972, the Equal Rights Amendment quoted above in the essay question secured passage by huge majorities in both houses of Congress and was sent to the states for ratification pursuant to Article V.

At first, it appeared the amendment would be easily ratified, as most Americans supported it. However, a “STOP ERA” campaign led by conservative lawyer Phyllis Schlafly successfully ended its momentum. Congress had set a 7-year deadline for approving the amendment, which it later extended for 3 additional years. In the decade that followed its passage in Congress, 35 of the required 38 states had ratified, but, in 1982, Congress’s deadline expired without the ERA achieving approval in the necessary $\frac{3}{4}$ of the states. Adding another legal wrinkle, after the STOP ERA campaign, several state legislatures voted to “rescind” their earlier ratification votes.

Despite this, ERA proponents in the 21st Century continued to seek ratification by the needed three additional states. Ultimately, they were successful when the legislatures of Nevada, Illinois, and Virginia ratified in 2017, 2018, and 2020, respectively. For an excellent summary of the ERA’s history, *see* “The Equal Rights Amendment: A Century in the Making:

Symposium Forward,” by NYU Law Professor Melissa Murray:

<https://socialchangenyu.com/harbinger/the-equal-rights-amendment-a-century-in-the-making-symposium-foreword/>

Article V of the Constitution provides two methods for amending the Constitution, including the one used here, by which Congress approved the proposed amendment by a two-thirds vote and sent it to the states for ratification. Federal statute provides the process after ratification is reached; After three-fourths of the states ratify the amendment (either through their legislatures or in special ratifying conventions), federal statute requires the Archivist of the United States to identify the ratifying states, publish the amendment, and certify that it has been added to the Constitution. See https://www.everycrsreport.com/files/2022-04-25_LSB10731_84d78f0d202d296e9e79d0a7fca2a602b50eeac0.pdf

After Virginia’s 2020 ratification, however, the ERA was not added by the Archivist as the 28th Amendment on the basis of the lapsed deadlines. Some constitutional lawyers argue that a Congressional deadline is not part of the ratification process set out by Article V, and therefore is not a legitimate requirement. Moreover, the Supreme Court has never directly confronted the question of whether states can “rescind” a ratification vote, and proponents argue they cannot effectively do so, citing the necessity of a new amendment having been required to repeal Prohibition. Nevertheless, after a 2020 opinion from the Office of Legal Counsel for the U.S. Justice Department advised that the amendment was ineffective because the ratification deadline had expired in 1982, the Archivist refused to add the amendment to the Constitution. See <https://www.washingtonpost.com/politics/2022/02/09/era-us-archivist-anatomy-false-claim/> A 2019 article written by John F. Kowal of the Brennan Center for Justice anticipated these problems and explains them further. See <https://socialchangenyu.com/harbinger/the-equal-rights-amendments-revival-questions-for-congress-the-courts-and-the-american-people/>

Some people question whether the ERA is still needed, arguing that advances in laws protecting women from discrimination pursuant to the 14th Amendment and statutes such as Title VII, Title IX, and the Pregnancy Discrimination Act suffice to guarantee their legal equality. Others, however, point out that the heightened scrutiny that Courts apply to government actions impacting fundamental Constitutional rights would greatly strengthen the legal landscape for gender equality. For further explanation, see “Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment,” by Lenora M. Lapidus, <https://socialchangenyu.com/harbinger/ruth-bader-ginsburg-and-the-development-of-gender-equality-jurisprudence-under-the-fourteenth-amendment/>.

In any event, considering the challenges standing in the way of having the now-ratified ERA added as the 28th Amendment, some have suggested that perhaps the best course is for proponents to start over. A Pew Research Center opinion poll conducted in 2020 showed

that 78% of the American people support the Equal Rights Amendment, *see* <https://www.aei.org/politics-and-public-opinion/women-making-history-polls-on-the-equal-right-amendment/> , while polls commissioned by the Equal Rights Coalition in 2016 showed that over 90% of Americans belonging to both parties supported having such a guarantee added to the Constitution, and that 80% of Americans had no idea there was not one already. *See* <https://www.prnewswire.com/news-releases/breaking-americansby-94---overwhelmingly-support-the-equal-rights-amendment-era-300286472.html>

What, if anything, do you think should happen? Why? And to what effect?

The Successful Essay

Your entry can rely on the sources cited above. In addition, you should conduct and cite **your own research**. Generally, you are expected to cite sources to support your arguments, including peer-reviewed and scholarly sources. Your research should reflect a high degree of information literacy. You must be sure that all of your sources are properly cited and thus can be located and verified by the contest judges. All entries will be submitted to SafeAssign and checked to ensure they comply with the Marshall University policies regarding academic integrity.