

THE "EQUAL RIGHTS AMENDMENT"

An In-Depth Special Report

February 13, 2024

Executive Summary

Pro-abortion groups, seeking a replacement for *Roe v. Wade*, are engaged in an intensive, long-term effort to flatten constitutional guardrails and ram the long-expired 1972 Equal Rights Amendment into the U.S. Constitution. Many elected Democratic officeholders have enlisted in this extra-constitutional campaign. However, for decades federal judges of every political stripe have rebuffed the politically contrived, legally untenable claims of the ERA revivalists.

During 2024, the ERA-revival movement will continue to rely heavily on strongly sympathetic and often willfully gullible news media to promote the claim that the ERA is on the verge of becoming part of the Constitution, and that any lawmaker or judge who resists the scheme is an enemy of "equality."

In the wake of the U.S. Supreme Court's June 24, 2022 ruling in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*, pro-abortion activists now loudly proclaim as true a position that for decades they denied or deflected: The Equal Rights Amendment (ERA) in the form proposed by Congress in 1972, if it ever became part of the U.S. Constitution, could be employed as a strong legal foundation for challenges to (and in their view, invalidation of) virtually all state and federal limits on abortion, and to require funding of elective abortion at all levels of government.

To those ends, pro-abortion activists are pulling out all stops to try to ram the 1972 ERA into the Constitution. Yet their effort could only succeed if multiple constitutional guardrails were first demolished, with far-reaching ramifications for possible future revisions to the text of the Constitution.

ERA revivalists, including President Biden, have urged that Congress adopt a joint resolution purporting to retroactively "remove" a ratification deadline, despite the multiple constitutional impediments to any such exercise in legislative time travel. Such a measure failed in the U.S. Senate in April 2023 and has no prospect of success in the House of Representatives during 2024. Nevertheless, nearly every Democrat in Congress has endorsed the concept. Some have gone further, demanding that the Archivist of the United States certify the ERA without waiting for congressional action, or that the President order her to do so.

Far from eliciting media outcries about attacks on the rule of law or the constitutional order, during 2021-2023 the anything-goes ERA-revival campaign was overtly promoted in prestigious organs of the national media such as the *New York Times*, *The Atlantic*, NBC News, ABC News, and National Public Radio. In most cases, these promotional treatments have given short shrift to the actions of the federal courts regarding the status of the ERA, or even have ignored the court decisions altogether.

The tension between objective requirements for amending the Constitution and political gamesmanship are illustrated by the fact that President Biden has endorsed the unsuccessful congressional proposals to proclaim the ERA as having been ratified, even though his Justice Department has recognized in federal court that the ERA has not been ratified—a position affirmed in a 42-year unbroken string of federal court decisions.

Federal Courts Stand Fast Against ERA Deadline Denialism

The ERA Resolution submitted to the states by Congress on March 22, 1972, contained a seven-year ratification deadline. The deadline expired on March 22, 1979 with the ERA short of the 38 states required for ratification. There is no judicial authority to support any claim that the ERA continued to exist as a viable proposal after that date. Nevertheless, since winning adoption of ostensible “ratification” resolutions from the legislatures of Nevada (2017), Illinois (2018), and Virginia (2020), ERA revivalists have asserted that the ERA is already part of the Constitution—or at least, that it will become part of the Constitution if so declared by the Archivist of the United States, or by the Congress, or both.

So far, the constitutional rule of law has prevailed. The federal courts have remained uniformly unreceptive, over a 42-year period, to the legal claims advanced by the ERA revivalists. As the *Washington Post* Fact Checker noted on February 9, 2022:

[E]very time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican.... Moreover, two major court rulings have concluded that the ERA’s ratification deadline, as set by Congress, has expired—a position embraced by both the Trump and Biden Justice Departments. The Supreme Court in 1982 also indicated support for the idea that the deadline has passed. ([“The ERA and the U.S. archivist: Anatomy of a false claim,”](#) *Washington Post*, February 9, 2022, also awarding Congresswoman Carolyn Maloney “Four Pinocchios” for her claims that the Archivist of the U.S. could and should unilaterally add the ERA to the U.S. Constitution.)

The most recent major judicial blow to ERA deadline-denialism occurred on February 28, 2023, when a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia rejected a lawsuit by the attorneys general of Illinois and Nevada. Those two states had asked that the court order the Archivist of the United States to certify (“publish”) the ERA as part of the Constitution. The appeals panel ruling was written by Judge Robert Wilkins, appointed by President Obama; he was joined by Judge Michelle Childs, appointed by President Biden, and Neomi Rao, appointed by President Trump.

Douglas Johnson, a researcher who has covered the ERA ratification process since 1983, wrote in January 2024: “Since 1982, 30 federal judges have had an opportunity to vote to validate or advance some element of the ERA-revivalists’ legal claims, but the ERA-revival litigants have yet to win a single vote, from a single judge, on a single component in their hodge-podge array of novel legal claims. These 30 judges have been equally divided as to the political parties of the presidents who selected them. From 2021 through 2023, the federal judges who ruled against ERA-revival legal claims were picked by Democratic presidents by a 10 to 2 ratio. ERA revivalism at this point is best recognized not as a serious constitutional theory or set of theories, but as an extended exercise in political theater, sustained mainly by a cooperative news media, and by principle-free political opportunism among many office holders and office seekers.”

[An article by Mr. Johnson, [“Federal Judges Scorn ERA Revival Legal Claims,”](#) detailing the various federal court cases dealing with the status of the ERA, from 1982 through 2023, may be downloaded from the NRLC website.]

In 1983 and since, National Right to Life has expressed strong opposition to any federal ERA, unless an “abortion-neutralization” amendment is added, which would state: “Nothing in this Article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof.” ERA proponents have vehemently rejected such a modification to any “start over” ERA.

THE EQUAL RIGHTS AMENDMENT

The balance of this Special Report is divided as follows:

- The Rise and True Demise of the 1972 ERA (1972-1982)
- The Origin and Execution of the Unconstitutional “Three-State Strategy” (1993-2020)
- The Fake-It-To-Make-It Misinformation Campaign (2020 and ongoing)
- The Campaign Against the Archivists (2019 and ongoing)
- Overt Attacks on Article V and on the Role of the Judiciary
- ERA Revivalism in Congress: Legislative Failures and the “Messaging Exercise”
- Doublethink by Democrats on Rescissions
- How Support for the Equal Rights Amendment in the U.S. House of Representatives Has Plunged Over a 50-Year Period
- The ERA-Abortion Connection: The Mask Comes Off
- NRLC Letter to the U.S. Senate (April 24, 2024)
- Additional Resources

The Rise and True Demise of the 1972 ERA (1972-1982)

Article V of the Constitution spells out two possible methods of amending the Constitution. Only one of the methods has ever been employed: Congress, by a two-thirds vote of each house, adopts a joint resolution that proposes a constitutional amendment to the states. The proposed text to be added to the Constitution is always preceded by a “Proposing Clause” specifying the “mode of ratification.” If three-quarters of the states (currently, 38) ratify the amendment, then the amendment

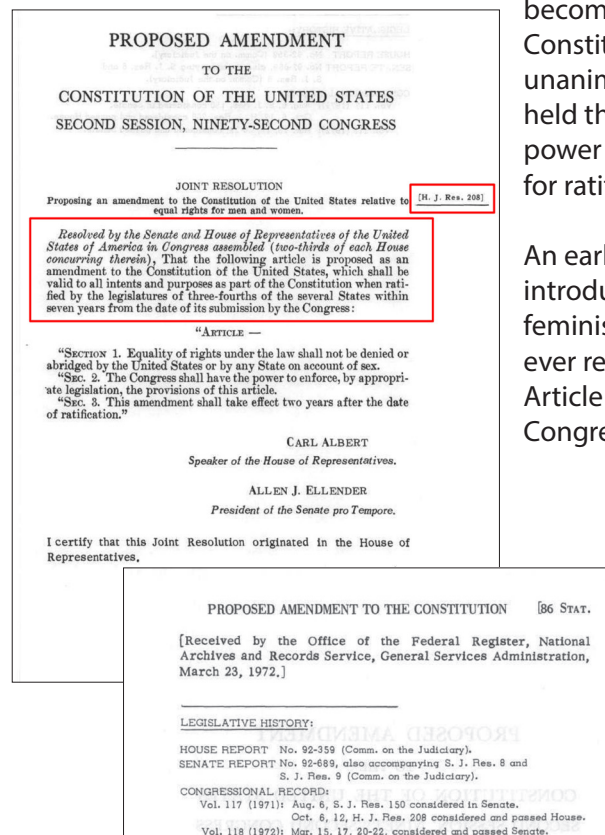
Article V

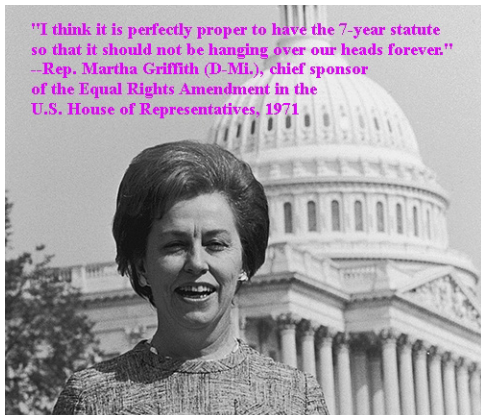
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

becomes part of the Constitution. In 1921, a unanimous Supreme Court held that Congress has the power to include a deadline for ratification.

An early version of the Equal Rights Amendment was first introduced in Congress a full century ago, in 1923, at the urging of feminist leader Alice Paul. However, until 1972, no such proposal ever received the level of congressional support required under Article V—a two-thirds vote in each house, during a single two-year Congress.

In the 92nd Congress (1971-1972), a compromise was struck that broke the long deadlock: A seven-year deadline for ratification was added. With the change, the ERA cleared both the Senate and the House by more than the two-thirds margins required by Article V, and was submitted to the states on March 22, 1972. As federal district Judge Rudolph Contreras observed in a March 2021 ruling, “Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.”





"I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever."
--Rep. Martha Griffith (D-Mi.), chief sponsor of the Equal Rights Amendment in the U.S. House of Representatives, 1971

The chief sponsor of the ERA in the U.S. House of Representatives, Rep. Martha Griffith (D-Mi.), [observed at the time](#), "I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever. But I may say I think it will be ratified almost immediately."

Placement of the Deadline

The ERA's ratification deadline was placed in the opening section of the ERA Resolution, the Proposing Clause. The Proposing Clause is not a mere "preamble," but a constitutionally required element of every constitutional amendment submission, which instructs the states on what method of ratification to employ.

A unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia, in a February 28, 2023 ruling rejecting the claim that the Archivist must publish the ERA, gave no credence whatever to the ERA-revivalist claim that the placement of the deadline in the Proposing Clause rendered it non-binding. The panel noted dryly that "[I]f that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative." (page 25)

EQUAL RIGHTS AMENDMENT - PROPOSED MARCH 22, 1972 LIST OF STATE RATIFICATION ACTIONS

The following dates reflect the date of the state legislature's passage, the date of filing with the Governor or Secretary of State, or the date of certification by the Governor or Secretary of State, whichever is the earliest date included in the official documents sent to the NARA, Office of the Federal Register. (Updated as of: 03/24/2020)

STATE	RATIFICATION	STATE	RATIFICATION
Alabama	not ratified	Montana	Jan. 25, 1974
Alaska	April 5, 1972	Nebraska*	March 29, 1972
Arizona	not ratified	Nevada**	March 22, 2017
Arkansas	not ratified	New Hampshire	March 23, 1972
California	Nov. 13, 1972	New Jersey	April 17, 1972
Colorado	April 21, 1972	New Mexico	Feb. 28, 1973
Connecticut	March 15, 1973	New York	May 18, 1972
Delaware	March 23, 1972	North Carolina	not ratified
Florida	not ratified	North Dakota	Feb. 3, 1975
Georgia	not ratified	Ohio	Feb. 7, 1974
Hawaii	March 22, 1972	Oklahoma	not ratified
Idaho*	March 24, 1972	Oregon	Feb. 8, 1973
Illinois**	May 30, 2018	Pennsylvania	Sept. 26, 1972
Indiana	Jan. 24, 1977	Rhode Island	April 14, 1972
Iowa	March 24, 1972	South Carolina	not ratified
Kansas	March 28, 1972	South Dakota*	Feb. 5, 1973
Kentucky*	June 27, 1972	Tennessee*	April 4, 1972
Louisiana	not ratified	Texas	March 30, 1972
Maine	Jan 18, 1974	Utah	not ratified
Maryland	May 26, 1972	Vermont	March 1, 1973
Massachusetts	June 21, 1972	Virginia**	January 27, 2020
Michigan	May 22, 1972	Washington	March 22, 1973
Minnesota	Feb. 8, 1973	West Virginia	April 22, 1972
Mississippi	not ratified	Wisconsin	April 26, 1972
Missouri	not ratified	Wyoming	Jan. 26, 1973

* Purported Rescission

Nebraska	March 15, 1973
Tennessee	April 23, 1974
Idaho	Feb. 8, 1977
Kentucky	March 20, 1978
South Dakota	March 5, 1979

** Ratification actions occurred after Congress's deadline expired. See U.S. Dept of Justice, Office of Legal Counsel, *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. ___, Slip Op. (Jan. 6, 2020).

The National Archives' official list of state legislative actions on the Equal Rights Amendment as of January 2020.

The Unconstitutional and Failed "Deadline Extension"

As the ERA's March 22, 1979 ratification deadline approached, the ERA was three states short of the required 38 state ratifications—and four of the states that had ratified during an initial rush had rescinded their ratifications.

Under pressure from pro-ERA groups, in 1978 Congress passed a joint resolution—by simple majority votes—that purported to extend the deadline for 39 months. Many members of Congress, and many constitutional experts, criticized the ostensible "deadline extension" as clearly unconstitutional. The only federal court to ever consider the matter subsequently ruled that the "deadline extension" was unconstitutional in two different ways (and that the rescissions were valid) (*Idaho v. Freeman*, 1981). But no additional states ratified during the 39-month pseudo-extension, so as of June 30, 1982, even those that had promoted the "extension" agreed that the 1972 ERA had failed. The U.S. Supreme Court declared that the legal disputes about the deadline extension and the rescissions were moot, because any way you cut it, the 1972 ERA was dead.

THE EQUAL RIGHTS AMENDMENT

The Failed Attempt by Congressional Democrats to Start Over

At that point, the only constitutionally sound option for ERA supporters was to re-start the process by seeking congressional approval again. Democratic leaders in Congress attempted to do just that. When Congress convened in 1983, a top priority of the Democratic majority leadership of the U.S. House of Representatives was *restarting* the constitutional amendment process for the ERA.

A House Judiciary subcommittee held five hearings on a new ERA resolution (H.J. Res. 1) (containing exactly the same language as the 1972 proposal), after which the full Judiciary Committee voted to reject all proposed amendments and sent the start-over ERA to the full House. Democratic leaders and pro-ERA groups were stunned when the ERA went down to defeat on the House floor on November 15, 1983, in large part because of opposition from National Right to Life and other pro-life groups. The measure received the support of 65% of the voting House members—short of the two-thirds margin required under Article V.



The Baltimore Sun
November 16, 1983

[Associated Press
dispatch]

A dour-looking Representative Patricia Schroeder (D, Colo.) and Representative Peter W. Rodino, Jr. (D, N.J.), supporters of the equal rights amendment, talk to reporters after the defeat.

House falls six votes short of bringing back the ERA

Washington (AP) — The House of Representatives spurned impassioned pleas from the Democratic leadership yesterday and rejected a revival of the proposed equal rights amendment on a vote that fell six short of the required two-thirds majority.

The 278-147 tally followed last-minute threats by women's rights advocates and their opponents in the anti-abortion movement to judge lawmakers at the ballot box next year solely by their votes on the issue.

Voting for the ERA were 225 Democrats and 53 Republicans, while 109 Republicans and 38 Democrats opposed it.

The proposed constitutional amendment, which reads simply 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," has twice cleared Congress but fell three states short of ratification — with 38 needed by last year's deadline.

The ERA went down this time after Republicans assailed the Democratic leadership for trying to railroad the legislation without giving members a chance to amend it and with only 40 minutes of debate.

The lawmakers rejected a final appeal by House Speaker Thomas P. O'Neill Jr. (D, Mass.) who urged support for the ERA without an anti-abortion rider "in fairness to the women of America."

Representative Hamilton Fish, Jr. (R, N.Y.) said after the vote that he would reintroduce the ERA and seek to have it considered later this week under a rule permitting full debate and amendments.

The spectator galleries were nearly filled with supporters of women's groups favoring the ERA, and backers of anti-abortion organizations opposing it without the rider. Lobbyists for both sides worked furiously in the final hours in their attempts to sway votes.

"We are outraged once again that it failed," said Sally Rosloff, president of the Los Angeles chapter of the National Organization for Women. "But we are pleased that we do have a vote with House members on record for or against women's equality. With

this on record, we can plan our strategy for 1984 accordingly."

Until Mr. O'Neill approved the shortcut, Representative F. James Sensenbrenner, Jr. (R, Wis.) stood ready to introduce an amendment that would have ensured continuation of laws restricting government financing of abortions to cases where a woman's life is endangered. Such anti-abortion measures are known as "Hyde amendments," after Representative Henry J. Hyde (R, Ill.).

Mr. Sensenbrenner also planned to offer an amendment that would have prevented use of the ERA to draft women and send them into combat.

Mr. O'Neill said without the no-amendment rule, the anti-abortion forces likely would have won.

He told the House, "In fairness to women of America, the thing to do is send a lean, clean package" to the Senate. He told those saying they would vote against ERA because of the rule, "In your hearts you were never with us. You were looking for an escape."

But Representative Marilyn Lloyd Bouquard (D, Tenn.) accused her own party leadership of ignoring concerns that will be raised in state legislatures. "If we fail to deal with the issues now, we will sow the seeds of confusion. Let's not settle for a meaningless victory on a hollow symbol."

And Representative Michael DeWine (R, Ohio) added that, without amendments on abortion and women in combat, "This ERA is dead. If you want to put it in the Constitution, vote no."

Maryland's House delegation of five men and three women voted solidly in favor of the equal rights amendment. But for Beverly B. Byron it was a last-minute decision.

The Western Maryland Democrat never had to vote on the issue before and had never taken a position. Even her staff could not predict which way she would go.

She explained it was "upsetting" that the equal rights vote had become symbolically entwined with the questions of abortion and combat roles for women in the military — though the amendment addresses neither issue. She said she also has "problems" with constitutional amendments generally.

As one of the last House members to cast her vote, Mrs. Byron joined the ERA supporters, she said, because, "Sooner or later you've finally got to make your mind up."

Maryland was one of the first states to ratify the first federal ERA, in 1972, and also added an Equal Rights Amendment to the state Constitution that year.

Mrs. Byron said, however, that she suspects a majority of her constituents in the mountainous and rural west oppose the notion.

Mr. O'Neill told reporters he scheduled the vote "at the insistence of women's organizations who want to find out who their friends are."

"That's the vote people are going to look at," Mary Jean Collins, a vice president of the National Organization for Women, said before the roll call. "NOW's political activity will be based at least partially on how people vote" on the ERA.

Doug Johnson, legislative director of the National Right to Life Committee, said, "I'm not prepared to say how exactly it's going to be defined with respect to individual candidates, but it's a heavier vote than a vote on the Hyde amendment, because it could invalidate all Hyde amendments, past, present and future."

POST-DISPATCH

MONDAY, OCTOBER 4, 1982

Supreme Court Declares ERA Issues Legally Dead

WASHINGTON (UPI) — The Supreme Court today closed the coffin lid on the 16-year-old Equal Rights Amendment. The court declared the amendment legally dead and refused to rule on questions raised about the ratification process.

The justices dismissed a case over a federal court ruling that upheld Idaho's revocation of its earlier approval of the ERA. They declared the issues "moot" — no

longer presenting a live controversy.

The court had temporarily blocked the ruling in January. Today, it wiped the decision off the books so that it could not serve as a precedent.

The amendment was adopted by Congress in March 1972. It officially died on June 30, when the amendment gained approval of only 35 states. This was 3 states short of the required 38.

See COURT, Page 8

The Origin and Execution of the Unconstitutional “Three-State” Strategy (1993-2020)

Although the real ERA proposed by Congress ceased to exist in the constitutional sense on March 22, 1979, the ERA re-emerged as a political construct in 1993, with the development of what came to be called “the three-state strategy.”

Under a federal statute enacted in 1984, when a state legislature ratifies a proposed constitutional amendment, it sends notification to the Archivist of the United States. The Archivist is an official nominated by the president and confirmed by the U.S. Senate, with no fixed term. When an Archivist receives 38 *valid* ratifications, he or she publishes the amendment in the *Federal Register*, which is a formal notification that the text of the U.S. Constitution has been revised.

A rather inconsequential amendment proposal now called the Congressional Pay Amendment (CPA) was originally submitted to the states by Congress in 1789, but failed to achieve ratification. However, the proposal contained no deadline. In the late 1980s, it became the subject of a successful campaign to promote ratification, and crossed the 38-state threshold in early 1992.

The Archivist of the United States, Don W. Wilson, was unsure how to proceed, since many doubted that a 203-year-old proposal was still viable. (Indeed, in 1921 the U.S. Supreme Court had remarked in passing that it was “quite untenable” to think that the CPA was still pending before the states.) Wilson properly sought and received guidance from the Office of Legal Counsel (OLC) of the Department of Justice. The primary function of the OLC is to provide legal opinions that are binding on agencies of the Executive Branch (unless overturned by later court decisions).

In a memorandum opinion dated May 13, 1992, Assistant Attorney General for the Office of Legal Counsel Timothy Flanigan said that Wilson must certify the CPA. Five days later, Wilson certified the CPA as the 27th Amendment to the Constitution. Subsequently, OLC issued a longer opinion explaining its full legal reasoning, reaffirming the authority of Congress to set ratification deadlines, but noting that Congress had not done so with respect to the CPA. The memo also noted that no state had attempted to rescind its ratification of the CPA. Subsequently, each house of Congress approved a separate joint resolution expressing the opinion that the ERA had been ratified, but neither resolution passed both houses, so Congress as a branch of government never expressed an opinion on the matter (yet some ERA revivalists have falsely claimed that Congress acted to affirm the ratification of the Congressional Pay Amendment).

(In December 2022, Wilson co-authored an odd opinion piece, published in *Ms.*, in which he claimed he had certified the CPA on his own authority. Not only did Wilson fail to mention the binding guidance he had received from the OLC, but even went on to criticize his successors for heeding OLC’s conclusion that the ERA had not been ratified. This was an exercise in historical fiction on Wilson’s part, since the well-documented record shows that Wilson properly deferred to the OLC’s legal guidance with respect to the certification of the CPA, just as his successors have done with respect to not certifying the ERA.)

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The "Three-State Strategy" Meets Constitutional Reality

The odd history of the CPA has little real legal relevance to the ERA, since the CPA contained no deadline and involved no rescissions. Nevertheless, in 1993, ERA advocates seized on the certification of the CPA to concoct the "three-state strategy." They asserted ERA deadlines didn't matter and that rescissions should not be allowed, and therefore, the ERA could still become part of the Constitution, if only three more states would adopt "ratification" resolutions.

The Sacramento Bee • Sunday, December 12, 1993

Pa. 4

NATION

New strategy adopted to revive ERA

By Kim I. Mills
Associated Press

WASHINGTON — Hoping to take advantage of the more supportive Clinton administration, a coalition of women's groups is trying again to pass the 70-year-old Equal Rights Amendment.

This time, feminists are adopting a tactic that at least one constitutional scholar says might work. They plan to ask Congress to nullify the 1982 deadline for ratification that had been imposed on the measure back in the 1970s. "We are aware that it is within the prerogative of Congress to lift that expired deadline so that ratification of three additional states may be secured," said Allie Corbin Hixson, spokeswoman for the coalition, ERA Summit. "With an administration that favors constitutional equality for women, we also believe the time is now favorable to push our suit for justice for all."

Since the measure passed 35 of the 38 state legislatures required by the deadline, only three more states must pass it to make the amendment law, she said at a news conference in the Capitol.

"We think a concurrent resolution could be passed that says putting a deadline on the amendment was in error," she said.

The coalition does not yet have sponsors for the proposed resolution, Hixson said.

Mary Cheh, a professor of constitutional law at George Washington University, called the strategy plausible.

Congress "put a limitation on it, they can take a limitation off it," she said in an interview.

Equal rights proposal

Here is the text of the proposed Equal Rights Amendment:

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

"It would work in their favor if they could get a simple majority of Congress to do this," she added. "They would be aided by the courts' reluctance to get involved. . . . If they seize the initiative, they may prevail."

Patricia Ireland, president of the National Organization for Women, said the 12-year Reagan-Bush era was, for women, "like being a hamster in an exercise

wheel, running as hard as we could just to stay even."

"We are going to mobilize the movement once again around what has been the Holy Grail of the feminist movement once we won the right to vote," she said at the news conference, in front of a statue of suffragists Susan B. Anthony, Elizabeth Cady Stanton and Lucretia Mott.

The Equal Rights Amendment was first introduced in Congress in 1923. It states simply: "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 measure failed, but it was reintroduced in 1972, and passed

both houses with a seven-year limit for ratification by at least 38 states. The deadline was extended for three years, but elapsed before enough states could pass it.

The ERA has been reintroduced in Congress every two years since but has never again won the two-thirds support needed to submit it to the states.

Hixson said the coalition will focus its efforts on the 15 states that failed to ratify the ERA by 1982. She said Virginia, which defeated the ERA by one vote, would be the next state in which there would be an attempt to pass it.

The other prime target states are Illinois, Florida, North Carolina, Oklahoma and Missouri.

Based on this mishmash of constitutional novelties, beginning in 1994, "ratification" resolutions were proposed repeatedly in legislatures among the 15 states that had never ratified the ERA. For more than two decades—from 1994 through 2016—none of those attempts was successful, with opposition from NRLC affiliates and other pro-life forces in many instances decisive in defeating such resolutions. Finally, in 2017, the Nevada legislature adopted such a "ratification," followed by Illinois in 2018 and Virginia in January 2020.

In 2019, Archivist David Ferriero (appointed by President Obama in 2009), although personally an ERA supporter, properly recognized that the status of the ERA was quite distinct from that of the 1992 CPA, because the ERA Resolution contained a deadline.

Moreover, the question of the validity of *rescissions* was implicated with respect to the ERA. Therefore, Ferriero properly sought authoritative guidance from the Justice Department Office of Legal Counsel.

On January 6, 2020, Assistant Attorney General for the Office of Legal Counsel Steven A. Engel [issued a 38-page legal opinion](#), noting that a unanimous 1921 Supreme Court opinion held that Congress had power to include a binding ratification deadline in a constitutional amendment resolution before submitting it to the states—an element of Congress's power to set the "mode of ratification."

VIRGINIA

Too late to ratify ERA, Justice Dept. says in opinion

BY PATRICIA SULLIVAN

The U.S. Justice Department says the Equal Rights Amendment can no longer be ratified because its deadline expired decades ago, throwing a barrier in the path of activists who want the amendment enacted if Virginia's new, majority Democratic legislature approves it.

The opinion from the Office of Legal Counsel was dated Monday and made public Wednesday, the first day of Virginia's legislative session.

"We conclude that Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States," Assistant Attorney General Steven A. Engel wrote. "Congress may not revive a proposed amendment after the deadline has expired."

Thirty-eight states are required to pass a constitutional amendment, and only 35 had approved it before the 1979 deadline and a subsequent extension to 1982.

Since 2017, legislatures in Nevada and Illinois have ratified the ERA, and Virginia is poised to follow suit.

But five of the original 35 states have rescinded their ratifications: Idaho, Kentucky, Nebraska, Tennessee and South Dakota.

The 38-page opinion, which defines the position of the executive branch on legal issues, came as a result of an inquiry by

"The narrative that the ERA is on the verge of ratification is pure political theater."

Douglas D. Johnson, senior policy adviser to National Right to Life

the National Archivist, who administers the ratification process and was sued in December by the attorneys general of Alabama, Louisiana and South Dakota.

"The people had seven years to consider the ERA, and they rejected it," the attorneys general said in a statement accompanying their lawsuit. "To sneak it into the Constitution through this illegal process would undermine the very basis of our constitutional order."

Advocates contend that since the text of the amendment did not include a deadline, it is eligible for ratification indefinitely. Bills have been introduced in the House of Representatives to remove the deadline and to restart the ratification process.

Julie C. Suk, a professor at the City University of New York who is writing a book about the ERA, said the legal opinion does not stop Virginia or any state legislature from going forward, or prevent Congress from removing or revising the ERA deadline.

"Once you have 38 states ratifying plus action from Congress on the deadline, it's very clear that the amendment is effective, in my opinion," she said.

Nevertheless, ERA opponents declared victory, even as demonstrators on both sides of the issue tried to rally lawmakers in Richmond.

"The narrative that the ERA is on the verge of ratification is pure political theater," said Douglas D. Johnson, senior policy adviser to National Right to Life. "This is not a close call. . . . They really do have to start over."

The ERA Coalition said it "strongly disagrees" with the memo. "This OLC opinion is not

Washington Post
January 9, 2020

binding on Congress, the courts, or the states that have expressed their ongoing will to give women constitutional equality," it said in a statement.

"This is one opinion, one memo," said Karl Horning, coordinator for the VaRatifyERA campaign, who was outside the Virginia Capitol building. "The Constitution is enduring."

Several members of Congress who are trying to either extend or remove the deadline also pushed back at the opinion.

"If this opinion is meant to slow down the momentum toward women's equality, it will not be successful," said Rep. Carolyn B. Maloney (D-NY). "I do not believe that the OLC has the final word to dictate how Congress or the states proceed in amending the Constitution."

Virginia Attorney General Mark R. Herring (D) accused the Trump administration of opposing women's equality and called the lawsuit by the Republican attorneys general "repugnant."

"I think what you're going to see is a continued commitment to see this through," Herring said. "We are ready to anything we need to do."

patricia.sullivan@washpost.com

Because the ERA Resolution contained such a deadline, it was no longer before the state legislatures after that deadline, and had not been ratified, the opinion argued.

The OLC opinion also said that once Congress submits a constitutional amendment proposal to the states, the role of Congress has ended—it may not retroactively modify that proposal, including any deadline; the opinion rejected the legal rationale for the 1978 “deadline extension.” The opinion asserted that a post-deadline Congress could no more alter the *expired* deadline than now act to override a veto by President Carter.

Therefore, the OLC opinion concluded, the only constitutional course for ERA supporters was to re-start the entire process (as Democrats in Congress had tried but failed to achieve in 1983).

Two days after OLC issued the opinion, the National Archives and Records Administration (NARA), the agency headed by the Archivist, posted a statement: “NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.” That remains the NARA position to this day.

The “Fake-It-To-Make-It” Propaganda Campaign (2020 and ongoing)

Since January 2020, ERA revivalists have pressed forward on multiple fronts based on “deadline denial” claims that the 1972 ERA has been ratified and is part of the Constitution, requiring at most minor steps by Executive Branch and/or Legislative Branch actors in order to formalize its inclusion.

Many elected officeholders (Democrats, with few exceptions), seeing political advantage, have lent their weight to the misinformation-based narrative. To cite just one example, on November 16, 2021, House Speaker Nancy Pelosi (D-CA) said that the ERA was on “the cusp of being enshrined into the Constitution.”

This essentially demagogic approach to the constitutional amendment process was well illustrated in [an exhortation by Kate Kelly, an attorney-activist](#) and author prominent in the ERA-revival campaign, in remarks directed to other ERA-revivalists in the legal community, during an event sponsored by the Washington & Lee Law School on October 28, 2022. Kelly said:

I would just say the number one thing is just actively talking about it as though it exists. You say, in law school, for example, in a class, ‘What about the 28th Amendment?’... Act as though the Equal Rights Amendment exists. Act as though it is enforceable. Proceed to tell everyone you know that that is the case...

Yet even in January 2020, when the Virginia legislature adopted its pseudo-ratification, there were already multiple earlier ERA-related actions by the federal courts that undercut the claim that the 1972 ERA remained viable. Since then, in the judiciary—the branch of government charged “to say what the law is”—things have only gotten worse for the ERA revival movement.

After Archivist Ferriero declined to certify the ERA as part of the Constitution—properly following the guidance of the January 6, 2020 OLC opinion—he was sued by the attorneys general of Virginia, Nevada, and Illinois (the three so-called “late-ratifying” states). The case was assigned to federal district Judge Rudolph Contreras in the District of Columbia, an appointee of President Obama. Contreras subsequently allowed the Republican attorneys general of five “anti-ERA” states (Alabama, Louisiana, Nebraska, Tennessee, and

THE EQUAL RIGHTS AMENDMENT



"Congress set deadlines for ratifying the ERA that expired long ago. Plaintiffs' ratifications [those of Virginia, Nevada, and Illinois] came too late to count...Congress's power to set a ratification deadline comes directly from Article V [of the Constitution]...A contrary result would be absurd."

U.S. District Judge Rudolph Contreras (appointee of President Obama), ruling in *Virginia v. Ferriero*, March 5, 2021

South Dakota) to become "intervenor-defendants" in the case; these five states argued in support of the constitutional validity of both the deadline and the rescissions.

On March 5, 2021, Judge Contreras handed a major legal defeat to ERA-cannot-die movement. He [ruled](#) that even if the Archivist had certified the ERA, that action would not have determined the legal status of the ERA; that the ratification deadline was constitutionally valid; and

that the "ratifications" by the three states "came too late to count." He observed, twice, that it would have been "absurd" for the Archivist to disregard the deadline.

CNN politics

Federal judge says deadline to ratify ERA 'expired long ago' in setback to advocates' efforts



By Veronica Stracqualursi, CNN
Updated 2:55 PM ET, Sat March 6, 2021



A marcher holds a sign that says "ERA USA" during the Women's March in the borough of Manhattan in New York on January 18, 2020.

(CNN) — A federal district judge on Friday dealt a blow to advocates of the Equal Rights Amendment in ruling that the deadline to ratify the ERA "expired long ago" and three states' recent ratifications of the amendment arrived "too late to count."

"Congressional Promulgation"

The idea that Congress can decide *after the fact* whether or not a proposed constitutional amendment has achieved ratification is known as the "congressional promulgation theory." Judge Contreras observed in a footnote, "Commentators have widely panned the theory as out of sync with the text of Article V, prior precedent, and historical practice.... Indeed, Plaintiffs and the Archivist both denounce the theory." Contreras also wrote that "the

effect of a ratification deadline is not the kind of question that ought to vary from political moment to political moment...Yet leaving the efficacy of ratification deadlines up to the political branches would do just that."

However, since Congress had not taken any action to endorse the notion that the ERA had been ratified, Judge Contreras did not formally rule on whether Congress has anything to say about it.

The attorneys general of Illinois and Nevada appealed to the U.S. Court of Appeals for the District of Columbia (Virginia dropped out, with a newly elected attorney general announcing that Virginia's position was now that the Archivist had been correct not to ratify the ERA).

In one noteworthy exchange during the oral argument before the three-judge appeals panel, the very senior Justice Department lawyer arguing on behalf of the Archivist, Deputy Assistant Attorney General Sarah Harrington, was asked by Judge Robert Wilkins, "Why shouldn't the Archivist just certify and publish [the ERA], and let Congress decide whether the deadline should be enforced...?" Harrington replied: "The Constitution doesn't contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the states do what they're going to do." Harrington's answer could only be understood as dismissive of the "congressional promulgation" theory.

As discussed earlier, in its ruling issued on February 28, 2023, the unanimous three-judge panel ruled that Illinois and Nevada had not shown that the Archivist was wrong in holding that the ERA had not achieved



Judge Robert Wilkins: “Why shouldn’t the archivist just certify and publish [the ERA], and let Congress decide whether the deadline should be enforced...?”

Deputy Assistant Attorney General Sarah Harrington: “The Constitution doesn’t contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the states do what they’re going to do.”

-from the oral argument session in *Illinois v. Ferriero*, U.S. Court of Appeals for the District of Columbia, September 28, 2022

ratification. The panel demolished (on page 25) the states’ claim that the placement of the ratification in the Proposing Clause rendered it ineffectual. The panel did not have to address “congressional promulgation,” since Congress has not approved a measure dealing with the ERA since 1978. The Illinois and Nevada attorneys general did not seek review of the unanimous panel ruling by

the full U.S. Court of Appeals for the District of Columbia. Nor did they appeal to the U.S. Supreme Court.

The Campaign Against the Archivists (2019 and ongoing)

Even though Illinois and Nevada carried forward their lawsuit during 2020-2023, ERA revivalist leaders inside and outside of Congress spoke seldom about the federal courts. For the most part, in their public pronouncements, whether to journalists or others, they quickly glossed over or simply did not mention the adverse judgments of federal courts. They directed their pressure campaigns mainly towards officials within the Executive Branch—insisting that the Justice Department withdraw the 2020 OLC opinion and agree that the ERA had been ratified, demanding that the Archivist certify the ERA notwithstanding ongoing federal court proceedings, and calling on President Biden to order his subordinates to do these things.

However, the ERA revivalists failed to achieve any of those goals during 2020-2023.

The Biden Administration’s Justice Department did re-examine the 2020 OLC memo, a process that concluded with the issuance of [a short memorandum opinion on January 26, 2022](#). Assistant Attorney General for Legal Counsel Christopher Schroeder wrote that some of the issues addressed in the 2020 OLC opinion related to congressional powers “were closer and more difficult than the opinion suggested,” but he did not repudiate any of them, and he did not alter the core conclusions that the deadline was valid and that the ERA has not been ratified.

Schroeder also wrote that “Congress is entitled to take a different view,” which was understood to refer to a joint resolution pending in Congress that purported to retroactively remove the ERA’s ratification deadline. Since OLC guidance is binding only upon agencies of the Executive Branch, Schroeder’s observation that Congress was “entitled” to disagree merely stated a truism. Predictably, pro-ERA activists misrepresented Schroeder’s observation as a judgment that the “deadline removal” resolution, if adopted by Congress, would be legally effective. But Schroeder conspicuously reserved judgment on that constitutional question (and, as already quoted, a senior Justice Department lawyer later cast doubt on that premise in oral argument before the U.S. Court of Appeals for the District of Columbia on September 28, 2022).

Schroeder’s memorandum also indicated that upcoming court rulings “may soon determine or shed light upon” the constitutional status of the ERA, a position consistent with statements by Attorney General Merrick Garland (previously a federal court of appeals judge) and Schroeder during their Senate confirmation proceedings in 2021. It was more than a year later that a Democrat-dominated three-judge panel of the U.S. Court of Appeals for the District of Columbia issued its unanimous ruling on the status of the ERA—and it was another sharp blow to ERA revivalism, as described in the previous subsection.

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Schroeder's January 26, 2022 memorandum was a far cry from the answer that ERA activists in Congress and outside of Congress had been pressing for. At a media event the next day (January 27, 2022), Congresswoman Maloney—the then-chair of the House Oversight Committee, which has statutory oversight authority over the National Archives and Records Administration—[lashed out at Ferriero](#): “He’s the one holding it back. It’s a technicality...It’s ridiculous that he’s holding this up.” At the same press event, Rep. Jackie Speier (D-Calif.) said, “If the Archivist wants to go down in history for a good reason, he should certify it...Then it will be law...[In our minds, it is law.](#)”

Linda Coberly, head of the legal task force for the ERA Coalition, agreed that “the Archivist could go ahead and certify it today, and we need to continue the pressure to go ahead and do that.”

This political campaign intended to pressure a federal agency head to disregard federal court rulings drew not condemnation, but promotional amplification in such major media organs as the [New York Times](#), [NPR](#), [NBC News](#), and [The Atlantic](#).

“Even if you are a political junkie, there’s a good chance you didn’t realize that the United States Constitution grew 58 words longer this week,” wrote *NY Times* editorial board member Jesse Wegman in an essay titled, [“The ERA Is Now the Law of the Land. Isn’t It?”](#) Although the piece ran on for 2300 tendentious words, Wegman didn’t find room to mention that federal District Judge Contreras (the Obama appointee) had ruled that the ERA had not been ratified.

However, there were some exceptions to the general pattern of media amplification of misinformation—notably, 2200-word rebuke from the *Washington Post* Fact Checker, which in February 2022 awarded Congresswoman Maloney “Four Pinocchios” (the

maximum-deception rating) for her claims

about status of the ERA and the Archivist’s duties with respect to the ERA. The critique noted that “...two major court rulings have concluded that the ERA’s ratification deadline...expired, a position embraced by both the Trump and Biden Justice Departments.” ([“The ERA and the U.S. archivist: Anatomy of a false claim,”](#) February 9, 2022)

On February 24, 2022, NARA issued a new statement reiterating that neither its position nor that of the OLC had changed regarding the certification of the ERA. NARA explained that the 2020 OLC memo stated that the ERA “could not be certified,” and that the January 26, 2022 OLC memorandum “acknowledges and does not modify this conclusion.”



Press Statement in Response to Media Queries About the Equal Rights Amendment

Media Alert
Thursday, February 24, 2022

Washington, DC

In response to recent media reports that generated a large number of queries about the Equal Rights Amendment, we have issued the following statement to the media beginning in late January 2022:

In its January 6, 2020 opinion, the Office of Legal Counsel (OLC) concluded “that Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States.” (OLC 2020 Opinion, at p.2.) Accordingly, the 2020 OLC opinion goes on to state that “the ERA’s adoption could not be certified under 1 U.S.C. § 106b.” (OLC 2020 Opinion, at p.37.) OLC’s recently issued January 26, 2022 memorandum on the “Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment” [acknowledges and does not modify this conclusion.](#) That new memorandum also states (pp. 2-3) that “as a co-equal branch of government, Congress is entitled to take a different view of these complex and unsettled questions” and that therefore “the 2020 OLC Opinion is not an obstacle either to Congress’s ability to act with respect to ratification of the ERA or to judicial consideration of the pertinent questions.”



Judge M. Margaret McKeown: "Leaving aside whether any deadlines could be extended, what's your prognosis on when we will get an Equal Rights Amendment on the federal level?"

Justice Ruth Bader Ginsburg: "I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers — Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"

-February 10, 2020 remarks at Georgetown University Law Center

Ferriero, who was personally strongly pro-ERA, retired at the end of April 2022. In an exit interview on C-SPAN (May 1, 2022), [Ferriero explained](#), "I can tell you that Ruth Bader Ginsburg twice told me, in this building, we need to start over [on the Equal Rights Amendment]... the time limit has expired, so that's a constitutional question."

When Ferriero announced his retirement, Congresswoman Maloney told *The Atlantic's* Russell Berman that a commitment to certify the ERA "should be a litmus test for whoever is appointed" to replace Ferriero (February, 2022). But that turned out to be mere bluster. In August 3, 2022, President Biden nominated Dr. Colleen Shogan as Archivist. In testimony before the Senate Homeland Security & Governmental Affairs Committee on September 21, 2022, Senator Rob Portman (R-Ohio) asked Shogan, "If confirmed, would you continue to abide by the January 2020 OLC opinion, as your predecessor did?" [Shogan replied](#), "Yes, I would," adding, "I think who will decide the fate of the ERA is the federal judiciary and/or Congress."

For reasons not related to the ERA controversy, Shogan's nomination died without action by the full Senate at the end of the 117th Congress. On January 3, 2023, President Biden renominated Shogan, and she had a second confirmation hearing. In a written response to Senator Jim Lankford (R-OK) dated February 28, 2023, Shogan affirmed her predecessor's position that she would certify the ERA only if directed to do so by "a final court order." Shogan was confirmed as Archivist on May 10, 2023, by a vote of 52-45.



Senator James Lankford
Post-Hearing Questions for the Record
Submitted to Colleen J. Shogan

Nomination of Colleen J. Shogan to be Archivist of the United States, National Archives and Records Administration

February 28, 2023

On the Equal Rights Amendment:

You have previously stated that you agree with former Archivist David Ferriero that "NARA defers to DOJ on this issue [publication of the ERA] and will abide by the OLC opinion, unless otherwise directed by a final court order."

1. Is that still your position?

YES

2. What do you understand as the role of NARA, and the Archivist in particular, in the constitutional amendment process?

I understand it as a ministerial function.

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The day after Schroeder's memorandum was released, on January 27, 2022, President Biden issued a statement stating, "I am calling on Congress to act immediately to pass a resolution recognizing ratification of the ERA. As the recently published Office of Legal Counsel memorandum makes clear, there is nothing standing in Congress's way from doing so."



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 27, 2023
(Senate)

STATEMENT OF ADMINISTRATION POLICY

S.J. Res. 4 – A Joint Resolution removing the deadline for the ratification of the

Equal Rights Amendment

(Sen. Cardin, D-MD, and 52 cosponsors)

The Administration strongly supports Senate passage of S.J. Res. 4, a Joint Resolution that would declare the Equal Rights Amendment to be valid to all intents and purposes as part of the Constitution. As a recently published Office of Legal Counsel memorandum makes clear, there is nothing standing in Congress's way from passing such a resolution.

In the United States of America, no one's rights should be denied on account of their sex. It is long past time to definitively enshrine the principle of gender equality in the Constitution. Gender equality is not only a moral issue: the full participation of women and girls across all aspects of our society is essential to our economic prosperity, our security, and the health of our democracy.

On April 27, 2023, as the Senate prepared to conduct a procedural vote on a "deadline removal" resolution (S.J. Res. 4), the White House issued a Statement of Administration Policy that called on the Senate to adopt the measure. Yet the statement avoided asserting that the resolution would have any constitutional effect, noting only that it would "declare" that the ERA was part of the Constitution, and that Congress had the right to "declare" this.

Overt Attacks on Article V and on the Role of the Courts

The questions surrounding the constitutional status of the ERA are purely questions of law, and it is the role of the judiciary "to say what the law is." Yet many ERA advocates have been engaged in strenuous attempts to short-circuit judicial review of those constitutional questions, or even to assert that the federal courts do not have authority to decide whether the ERA has been ratified or is long expired.

For example, in an opinion piece published in the *Washington Post* on November 22, 2021, David Pozen and Thomas P. Schmidt of Columbia Law School asserted, "On many matters of constitutional law, the legal community has accepted that the Supreme Court enjoys the final word. Questions about whether an amendment has become part of the Constitution are an important exception. Congress, not the courts, is the primary arbiter of an amendment's validity."

Likewise, longtime pro-ERA activist-attorney Kate Kelly, while serving as counsel to Congresswoman Maloney, said on Twitter on January 16, 2022: "Running tally of roles given by Article V of the U.S. Constitution to the judiciary in the amending process: 0."

However, even the notion of making the text of the Constitution a plaything for shifting bare majorities in Congress is too moderate a remedy to suit some leading ERA advocates. One example is found in an essay by Julie C. Suk, published in *The New Republic* on December 5, 2022. Suk is professor of law at Fordham University and author of a popular advocacy-history book about the ERA, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (2020). In the essay, titled "[The Oft-Neglected Enemy of Democracy: Article V](#)," Suk argued for "a constitutional revolution – a new constitution written without following the amendment rules of the eighteenth-century Constitution we now live under." Only by such extra-constitutional means, Suk argued, could one achieve "a new constitution, fit to govern all of us in the twenty-first century." In the alternative, Suk said, "If this country is too big to reach agreement on that or other constitutional essentials, could healthier democracies emerge from peacefully negotiated secessions?"

ERA Revivalism in Congress: Legislative Failures and the “Messaging Exercise”

Even though ERA revivalists claim that the ERA “is already part of the Constitution,” they have also clamored for Congress to adopt a joint resolution that purportedly would retroactively remove the ratification deadline from the 1972 ERA resolution.

While under Democratic control on March 17, 2021, the U.S. House of Representatives passed a “deadline removal” resolution (H.J. Res. 17) on a vote of 222-204. It had the support of all 218 voting Democrats, but only four out of 208 voting Republicans. Longtime ERA analyst Douglas Johnson commented, “This was ERA’s poorest showing in the House in 50 years. The tally was 62 votes below the two-thirds margin that the Constitution requires when the House of Representatives actually exercises its powers under Article V, as opposed to engaging in cheap theatrical performances.” (See table, page 18.)

Although the Senate was under Democratic control in 2021-2022, Senate Majority Leader Chuck Schumer (D-NY) never forced a vote on H.J. Res. 17 before the 117th Congress ended on January 3, 2023, forcing ERA advocates to re-start the process.

In the new 118th Congress, Schumer did make a motion to bring to the floor a new measure purporting to retroactively nullify the deadline and make the ERA part of the Constitution, S.J. Res. 4, sponsored by Senator Ben Cardin (D-MD). It failed on a 52-47 vote on April 27, 2023 (60 votes required), with the support of all voting Democrats but only two Republican senators (Lisa Murkowski of Alaska and Susan Collins of Maine). If all senators had been present, the tally would have been 53-47 to advance the ERA-affirming measure.

In the House of Representatives, a companion measure (H.J. Res. 25) was introduced by Rep. Ayanna Pressley (D-MA). Not far into the second year of the 118th Congress, on February 13, 2024, the Pressley measure had been co-sponsored by 208 out of 212 House Democrats, but by only a single Republican (Rep. Brian Fitzpatrick, R-PA).

Since a Republican majority took control of the House in January 2023, the Pressley measure has no prospect of being sent from the House Judiciary Committee to the floor. In July 2023, Pressley filed a “discharge petition,” which would force a floor vote if signed by 218 of the 435 House members—but seven months later, it only had 204 signers. Not a single member of the majority (Republican) party is among the signers—a clear indication that the discharge petition will not succeed.

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Gillibrand and Bush Launch Insubstantial “ERA Now” Measure

In July, 2023, Senator Kirsten Gillibrand (D-NY) and Rep. Cori Bush (D-MO) introduced another ERA-promoting measure, informally labeled “ERA Now,” which has even less substance—a joint resolution (S.J.Res. 39, H.J. Res. 82) that would simply declare the “sense of Congress” that the ERA has been ratified and that the Archivist “should” publish it as part of the Constitution. A “sense of Congress” resolution, even if adopted by both houses, never has force of law on any subject.

Despite its gossamer nature, the Gillibrand-Bush measure served as justification for *New York Times* reporter Annie Karni to write a one-sided, 1400-word treatment that ran under the headline “Democrats Try a Novel Tactic to Revive the Equal Rights Amendment” (July 13, 2023). Karni did not mention any of the federal court decisions that shed light on the ERA’s status—not even the adverse D.C. Circuit ruling that had been handed down just five months earlier.

Senator Gillibrand was clearly pleased with the *Times*’ promotional piece, which she sent out on the social media platform X/Twitter, at the same time embracing essentially the same claim that had earned Congresswoman Maloney “Four Pinocchios” from the *Washington Post* Fact Checker 17 months earlier: “The Equal Rights Amendment has cleared every single constitutional hurdle towards becoming the 28th Amendment. It only needs one signature.” [That is, the signature of the Archivist.]

Senator Gillibrand said in one interview, “I don’t think the preamble is relevant and I think legal scholars will agree. That is why we are asking the president to tell the archivist that she may now sign and publish it as the 28th Amendment.” (*City and State NY*, August 8, 2023) Gillibrand did not mention that the claim about the “preamble” had been rejected by a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia on February 28, 2023.



As of February 13, 2024, Gillibrand’s resolution had 21 cosponsors and Bush’s 70, all Democrats.

There is currently no prospect that either the Cardin-Pressley measure or the Gillibrand-Bush measure will pass in either house of Congress during the remainder of the 118th Congress (which ends January 3, 2025). However, if during a future Congress Democrats held a wider majority in the Senate and controlled the House at the same time, there is a possibility that one of the ERA-affirming measures would win approval by both houses during the same Congress. Based on experience, many organs of the news media can be expected to embrace and amplify claims that such a retroactive action by Congress would be efficacious, despite the multiple constitutional implausibilities.

On March 23, 2023, the fashion publication *ELLE.com* ran a prominent feature about Congresswoman Cori Bush and the ERA, which included this passage: “As for why she’s pushing for the ERA now, at a time when Republicans control the U.S. House, Bush said, ‘It’s not a sprint, it’s a marathon.’ She added, ‘If we can start building now, then maybe in two years, when hopefully we are in the majority, we can be in a place where the

advocates, the activists, the folks that are most directly impacted, the legislators in Congress and on the state level and municipal levels, are all working together to get this done.”

In her July 13, 2023 article celebrating Senator Gillibrand’s “creative legal theory,” *New York Times* reporter Annie Karni wrote, “Even if the resolution proves to be no more than a messaging exercise, some proponents said it was still meaningful,” noting that “almost 80 percent of Americans supported adding the Equal Rights Amendment to the Constitution in a 2020 Pew Research poll.”

In other words, so long as the phrase “Equal Rights Amendment” is seen as politically useful for some who hold or seek federal office, don’t expect them to be too fastidious about the niceties of the constitutional amendment process.

Doublethink by Democrats on Rescissions

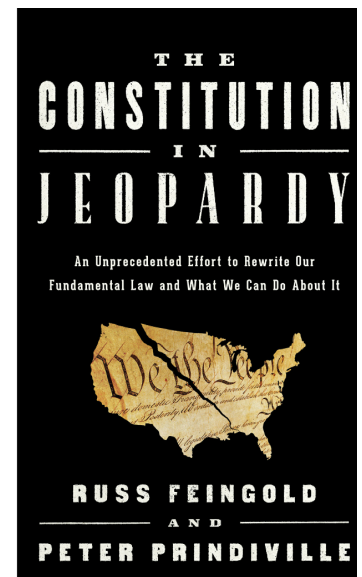
Four state legislatures (Nebraska, Tennessee, Idaho, and Kentucky) ratified the 1972 ERA, but then, before the ratification deadline of March 22, 1979, adopted new resolutions *rescinding* their previous ratifications. The South Dakota legislature did something different: On March 5, 1979, it adopted a resolution making it clear that its original ratification would expire on March 22, 1979, which arguably would have been the case anyway, but South Dakota sometimes appears on lists of “rescinding” states.

Nearly all Democratic state attorneys general have now explicitly argued in briefs submitted to federal courts in ERA-related litigation, or elsewhere, that Article V does not mention rescissions and therefore rescissions must be rejected as unconstitutional. All or nearly all current Democratic members of Congress have also rejected the constitutionality of rescissions, by cosponsoring and/or voting for resolutions that implicitly or explicitly disavow the rescissions on the ERA.

Yet, many of these same Democratic office holders—for example, prominent Congressman Jamie Raskin (MD), the ranking Democrat on the House Oversight Committee—have supported rescissions on other constitutional amendments, and/or have supported state legislatures’ rescissions of applications for a constitutional convention, which is the alternative method of amending the Constitution under Article V.

Activist-author Russ Feingold, in his 2022 book opposing an Article V constitutional convention (*The Constitution in Jeopardy*), celebrates rescissions as a tool for preventing the convening of an Article V constitutional convention. Yet in March 2022, Feingold sent a letter to then-Congresswoman Carolyn Maloney asserting that the state legislative rescissions on the ERA were constitutionally “invalid.”

[Feingold, a former U.S. senator, also said in the letter to Maloney that the ERA’s ratification deadline was constitutionally invalid. Yet when Feingold was himself the chairman of the Constitution Subcommittee of the U.S. Senate Judiciary Committee in 2009, he personally authored a proposed constitutional amendment (S.J. Res. 7, to require that Senate vacancies be filled by election) that contained a seven-year deadline in the Proposing Clause—identical in wording and placement to the ratification deadline found in the 1972 ERA. Feingold even chaired a hearing on the proposal, and shepherded it to approval by the full Senate Judiciary Committee, without ever altering the deadline formulation and placement that he now characterizes as unconstitutional.]



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Many Democrat-aligned interest groups have actively lobbied state legislatures to rescind their Article V applications for a constitutional convention, often successfully. In 2020, Ellen Nissenbaum, senior vice-president for government affairs for the Center on Budget and Policy Priorities, was among the activists who privately expressed concern about the contradiction. “We (working with other national and state groups) have been able to prevent a new Constitutional Convention ONLY by getting several states to rescind their previously approved BBA [balanced budget amendment] resolutions,” Nissenbaum wrote in a 2020 email to allies, which later leaked. “So if Democrats or ERA proponents argue...that ‘rescissions don’t count,’ they will hand a powerful argument to the right that will be used in court...and we could find ourselves on the way to a new Constitutional Convention.” Likewise, Democracy 21 President Fred Wertheimer wrote in a leaked memo that he agreed this was “a new and potentially serious problem...”

Longtime ERA analyst Douglas Johnson commented, “ERA revival activists have shown they will run roughshod over any norm or precedent that stands in their way, and all too many Democratic office holders have shown themselves to be utterly compliant. The doublethink of many Democratic activists and office holders about state legislative rescissions under Article V are one glaring example of an unprincipled approach to the constitutional amendment process.”

How Support for the Equal Rights Amendment in the U.S. House of Representatives Has Plunged Over a 52-Year Period

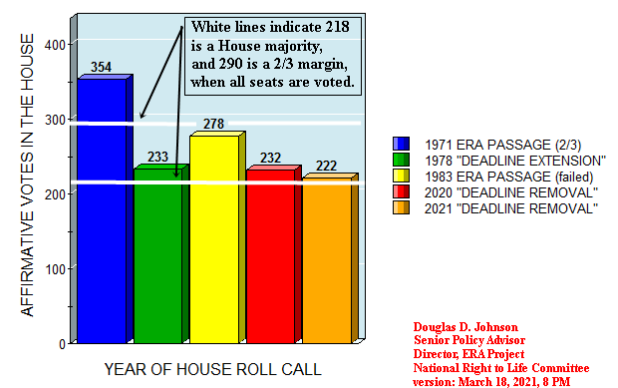
When Congress approved the Equal Rights Amendment resolution for submission to the states in 1971-1972, it did so by lopsided margins—but that occurred only after ERA sponsors reluctantly concluded that they must accept a ratification deadline in order to overcome opposition from ERA skeptics. (“Proponents eventually relented and inserted a seven-year time limit,” noted federal Judge Rudolph Contreras in his March 2021 ruling upholding the ratification deadline.)

Over a 52-year period, the U.S. House of Representatives has voted *five times* on ERA and directly related measures: The original ERA resolution in 1971; the “deadline extension” in 1978; a start-over ERA in 1983 (defeated on the House floor); and measures purporting to retroactively “remove” the ratification deadline in 2020 and 2021.

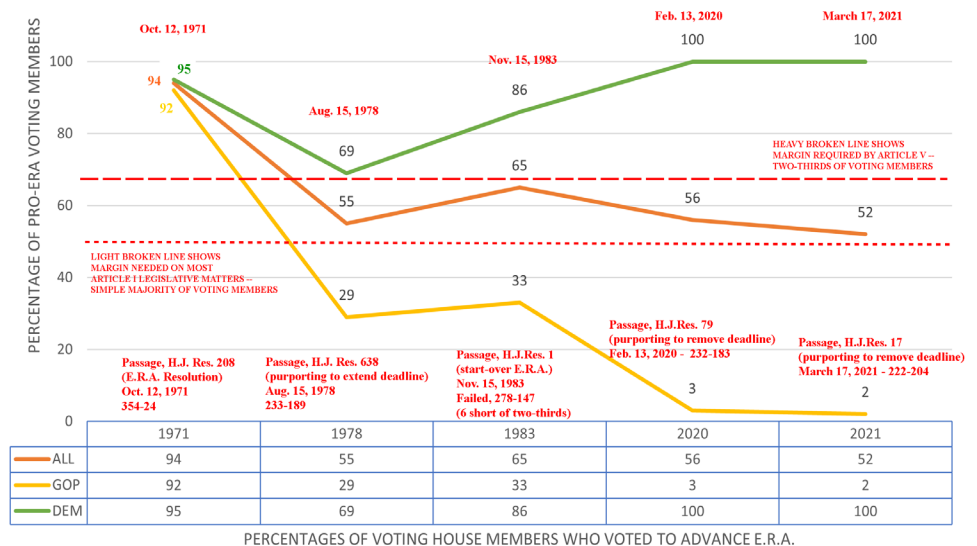
Analysis of these roll calls shows a precipitous drop off in overall support for the ERA in the House, from 94% of voting members in 1971 to only 52% in 2021. Support among Republican House members fell from 92% in 1971 to 2% in 2021.

The single biggest factor (although not the only factor) in this erosion in Republican support has been recognition that the 1972 ERA language would lend itself to use as a powerful pro-abortion legal weapon—an intended effect belatedly acknowledged and indeed now loudly proclaimed by pro-ERA activists.

Affirmative Votes for ERA Measures, U.S. House, 1971-2021



**50-YEAR ERA SUPPORT IN U.S. HOUSE
1971-2021 BY % OF VOTING MEMBERS**



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The ERA-Abortion Connection: The Mask Comes Off

National Right to Life has opposed the ERA for decades, recognizing that the ERA language proposed by Congress in 1972 could be construed to invalidate virtually all limitations on abortion, and to require government funding of abortion.

NRLC's consistent position was reiterated in a letter to U.S. senators dated April 24, 2023, which concluded, "National Right to Life will heavily weigh the vote on advancing S.J. Res. 4, a measure openly declared by its backers as intended in part to erect a constitutional barrier against any protections for unborn members of the human family." (The letter is reproduced on pages 22-23.)

In decades past, such pro-life objections were publicly rejected by most ERA advocates, who often derided assertions of an ERA-abortion link with such terms as "misleading," "scare tactic," and even "a big lie." As recently as 2019, the pro-ERA leader in the House of Representatives, Rep. Carolyn Maloney (D-NY), lectured Republicans at a hearing on the ERA, [stating](#), "The Equal Rights Amendment has absolutely nothing to do with abortion...saying so is divisive and a tool to try to defeat it. So please don't ever say that again." Likewise, on February 13, 2020, Speaker Nancy Pelosi said on the floor of the U.S. House of Representatives, "This [the ERA] has nothing to do with the abortion issue."

Some prominent ERA advocates now acknowledge that such denials were merely a strategic deception. Feminist journalist Barbara Rodriguez explored this history in an article titled, "[Key Equal Rights Amendment activists long avoided tying it to abortion](#)," that appeared on the *19thnews.org* on August 17, 2022. Excerpts:

"For a long time, it was kind of, 'Don't talk about that.' Or, 'That will just scare off the Republicans, or that will make people in Congress not support the ERA,'" said Ting Ting Cheng, director of the ERA Project at the Center for Gender and Sexuality Law at Columbia University.

[Activist-attorney Kate] Kelly said older ERA activists made a strategic decision to separate the amendment's impact on abortion. "These are pro-choice people. It was a strategic question," said Kelly. "They thought that connecting the two caused them to lose." [ERA Coalition President Zakiya] Thomas said she would agree with that assessment.

But even in 2019 and 2020, the Maloney and Pelosi statements quoted above were outdated as talking points for most prominent ERA advocates. Most pro-ERA and pro-abortion activists, attorneys, and [allied officeholders had already dropped the pretext](#) and were [openly proclaiming](#) that the ERA was needed precisely to reinforce and expand federal "abortion rights." Since the U.S. Supreme Court overturned *Roe v. Wade* in June 2022, such proclamations have only become louder and stronger.

A few examples:

- ERA Project, Columbia Law School (May 3, 2022) "The Equal Rights Amendment...would protect the right to abortion and the full range of reproductive healthcare and is more critically needed now than ever before."

- On March 4, 2022, the Columbia Law School ERA Project sponsored [a two-hour symposium panel](#) about grounding “reproductive rights” in the Equal Rights Amendment.
- The ACLU, in a letter to the U.S. House of Representatives (March 16, 2021): “The Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion... [it] could be an additional tool against further erosion of reproductive freedom...”



- The National Organization for Women, in a monograph circa 2015, making numerous sweeping claims about the hoped-for pro-abortion legal effects of the ERA—stating, for example, that “an ERA—properly interpreted—could negate the hundreds of laws that have been passed restricting access to abortion care ...”
- NARAL Pro-Choice America, in a national alert sent out on March 13, 2019, asserted that “the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws ...”
- The Associated Press on January 1, 2020 reported that Emily Martin, general counsel for the National Women’s Law Center, “affirmed that abortion access is a key issue for many ERA supporters; she said adding the amendment to the Constitution would enable courts to rule that restrictions on abortion ‘perpetuate gender inequality.’” Later that month, national AP reporter David Crary wrote, “Abortion-rights supporters are eager to nullify the [ERA ratification] deadline and get the amendment ratified so it could be used to overturn state laws restricting abortion.” (January 21, 2020).



“Emily Martin, general counsel for the National Women’s Law Center — which supports the ERA...affirmed that abortion access is a key issue for many ERA supporters; she said adding the amendment to the Constitution would enable courts to rule that restrictions on abortion ‘perpetuate gender inequality.’”

–“Lawmakers pledge ERA will pass in Virginia. Then what?,” by Sarah Rankin and David Crary, Associated Press, January 1, 2020

THE EQUAL RIGHTS AMENDMENT

- The Daily Beast (July 30, 2018) reported remarks by Jennifer Weiss-Wolf, vice president of the Brennan Center for Justice: “Both the basis of the privacy argument and even the technical, technological underpinnings of [Roe] always seemed likely to expire.” ... “Technology was always going to move us to a place where the trimester framework didn’t make sense.” She also said, “If you were rooted in an equality argument, those things would not matter.”
- Kate Kelly, an attorney-activist who worked for Congresswoman Carolyn Maloney in 2021, was asked on January 24, 2021 whether the ERA would “codify *Roe v. Wade*.” She answered, “My hope is that what we could get with the ERA is FAR BETTER than *Roe*.”
- Kate Kelly also wrote in an essay titled [“The Equal Rights Amendment Is a Comprehensive Fix That Can Save *Roe*”](#): “*Roe* is on the brink of failing. So what is the comprehensive fix that can save *Roe* and perhaps even expand access to abortion? The Equal Rights Amendment.” And: “Though some ERA advocates have shied away from making the connection between these issues in the past, they should be touted as the main reasons we still need the ERA today.” (published March 22, 2022)

In addition to such predictive statements, ERAs that have been added to various state constitutions, containing language nearly identical to the proposed federal ERA, have actually been used as powerful pro-abortion legal weapons. For example, the New Mexico Supreme Court in 1998 unanimously struck down a state law restricting public funding of elective abortions, solely on the basis of the state ERA, in a lawsuit brought by affiliates of Planned Parenthood and NARAL. ([New Mexico Right to Choose v. Johnson](#)). Moreover, on January 29, 2024, the Pennsylvania Supreme Court construed a state law limiting public funding of abortion to be a form of sex-based discrimination and therefore “presumptively unconstitutional” under the 1971 Pennsylvania Equal Rights Amendment, which contains language virtually identical to the 1972 federal ERA proposal. ([Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services](#)).

RESOURCES

Abundant additional documentation on the history of the Equal Rights Amendment and the [ERA-abortion connection](#) is available on the [National Right to Life website ERA page](#).

The X/Twitter account @ERANoShortcuts, although not NRLC-affiliated, is recommended for those who wish to track ERA-related developments in all three branches of the federal government, and in the news, “from an ERA-skeptical perspective.”

April 24, 2023

202-378-8863

Re: In opposition to S.J. Res. 4 (Cardin), purporting to retroactively “remove” the ratification deadline and pre-deadline rescissions for long-expired 1972 Equal Rights Amendment

Dear Senator:

The National Right to Life Committee (NRLC), the federation of state right-to-life organizations, urges you to vote against cloture on the motion to proceed to S.J. Res. 4 (Cardin), a measure purporting to retroactively revive the 1972 Equal Rights Amendment and insert it into the text of the U.S. Constitution – even though multiple federal court decisions have held that the ERA expired over 50 years ago. We understand the Senate may conduct a roll call on such a cloture motion on **Thursday, April 27**.

The language of the 1972 ERA would easily lend itself to use as a powerful pro-abortion legal weapon, potentially invalidating all laws or government policies that protect unborn members of the human family, at any stage of development, or that even indirectly impede access to abortion, including any limits on government funding of elective abortion. Leaders of prominent pro-abortion and pro-ERA advocacy groups now openly proclaim that they believe this is the only proper construction of the ERA. They now admit that decades of denial and deflection of pro-life concerns about the ERA were merely “[a strategic decision](#)” (i.e., a deception). The mask has now been [discarded](#). All senators who support *any* limits on abortion or *any* limits on government funding of elective abortion should take the pro-abortion advocacy groups at their current word as to how they intend to employ the vague 1972 ERA language, if it ever becomes part of the Constitution.

Moreover, S.J. Res. 4 is an attack on the integrity of the constitutional amendment process itself. Every senator who respects the rule of law should oppose it.

The 92nd Congress included a seven-year ratification deadline in the ERA Resolution. On March 5, 2021, federal District Judge Rudolph Contreras (an appointee of President Obama) [ruled](#) that Congress had the constitutional power to impose such a deadline, that it would have been “absurd” for the Archivist to disregard the deadline, and that legislative actions that occurred in Nevada (2017), Illinois (2018), and Virginia (2020) “came too late to count.”

On February 28, 2023, a unanimous panel of the U.S. Court of Appeals for the District of Columbia (Judges Wilkins, Childs, and Rao) rejected an appeal by Illinois and Nevada, urging the court to order the Archivist to certify the ERA as ratified. The unanimous panel demolished a key legal claim of the ERA revival scheme -- the pretense that the ERA’s ratification deadline was not binding because it was placed in the Proposing Clause of the 1972 ERA Resolution. (The court observed (p. 25), “[I]f that were the case, then the specification of the mode of ratification in every amendment in our nation’s history would also be inoperative.”) Contrary to spin by the pro-ERA lobby, the D.C. Circuit ruling contained not a word suggesting that Congress has any power to retroactively alter the status of the 1972 ERA, which was not an issue before the court.

As the *Washington Post* pointed out in [a February 9, 2022 fact check](#), over [the past 41 years](#), “Every time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican.” Since 1982, 29 federal judges have an opportunity to vote to validate or advance some element of the ERA-revivalists’ legal claims, but the ERA-revival litigants have yet to win a single vote, from a single judge, on a single component in their hodge-podge array of novel legal claims. Of the federal judges involved, 15 were appointed by Republican presidents and 14 by Democratic Presidents.

Defending Life in America Since 1968

THE EQUAL RIGHTS AMENDMENT

NATIONAL RIGHT TO LIFE IN OPPOSITION TO ERA “DEADLINE REMOVAL”

2

Some of the constitutional violations embedded in S.J.Res. 4 are critiqued in Senate Resolution 107, sponsored by Senator Hyde-Smith; we urge you to co-sponsor Senator Hyde-Smith’s helpful measure.

Article V does not allow Congress to engage in a “bait-and-switch.” As Judge Contreras observed in his 2021 ruling upholding the deadline, “Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.” The current Congress lacks power to retroactively edit that legislative compromise, while simultaneously claiming the congressional super-majorities and subsequent state ratifications that flowed from it.

Even if Congress somehow did hold power to execute a retroactive bait-and-switch on the deadline, the authors of S.J. Res. 4 have [formally declared the resolution to be an exercise of Congress’ Article V powers](#). That means *approval* would require a *two-thirds* vote. This is one of the two grounds on which the only federal court ever to review the purported 1978 “deadline extension” ruled that it was unconstitutional. (*Idaho v. Freeman*, 1981)

S.J. Res. 4 not only purports to retroactively remove the deadline, but also declares the ERA to be part of the Constitution, thereby implicitly disregarding pre-deadline *rescissions* by Nebraska, Tennessee, Idaho, and Kentucky. Yet the legislatures of the states represented by the prime sponsor, Senator Cardin, and by the Judiciary Committee Chairman, Senator Durbin, both notified the Archivist in recent years of formal actions rescinding their previous ratifications of the Corwin Amendment. Were those legislative actions (in 2014 and 2022, respectively) merely exercises in political theater, or did they have legal force?

Finally, no Congress has power to act on any measure after it has *expired*. The Senate cannot today take up and pass the ERA “deadline removal” measure passed by the House on March 17, 2021, because it has expired. The current Congress cannot override a veto by President G.H.W. Bush; his veto messages have expired. Certainly, Congress has the power to again submit the same proposed amendment text to the states, with or without a ratification deadline, but it must do so by the procedures spelled out in Article V, including the requirement for two-thirds approval by each house, and all within a single Congress. As the late Justice Ginsburg said on February 10, 2020:

I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers -- Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, "We've changed our minds"?

National Right to Life will heavily weigh the vote on advancing S.J. Res. 4, a measure openly declared by its backers as intended in part to erect a constitutional barrier against any protections for unborn members of the human family.

The recent history of judicial, executive, and legislative actions on the Equal Rights Amendment is documented in detail, with links to primary sources, in the [NRLC Special Report on the Equal Rights Amendment](#) (January 23, 2023). For further information, please contact us at (202) 378-8863, or via e-mail at djohnson@nrlc.org. Thank you for your consideration of NRLC’s position on this vital matter.

Respectfully submitted,



Senior Policy Advisor
Director, ERA Project



Jennifer Popik, J.D.
Legislative Director