

**Three cases, five courts, 23 judges and justices:
Federal judges of every stripe have scorned legal theories
intended to resuscitate the Equal Rights Amendment**

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Judge Rudolph Contreras, a federal district judge appointed by President Obama, ruled on March 5, 2021 that the Equal Rights Amendment resolution approved by Congress in 1972 contained a constitutionally valid ratification deadline that expired decades ago, and that “ratifications” by Nevada, Illinois, and Virginia in 2017-2020 were without legal effect. This seemed a very newsworthy development, given the extent of the media coverage that we saw surrounding the Virginia’s “ratification” in January 2020, which many journalists readily accepted as the final ratification needed to put the ERA over the three-fourths finish line (nowadays, 38 states) set forth in Article V of the Constitution.

Yet, the judge's ruling received little immediate coverage in the mainstream press. I saw nothing about it that day or the next in the *Washington Post*, the *New York Times*, or the *Wall Street Journal*, or on the major TV networks. Many “elite” journalists reflexively look leftward for signals on developments that may be important. I suspect that they received no prodding from that direction to cover Judge Contreras’ ruling, which was disruptive to the narrative that organizations and politicians on the Left have been peddling with increasingly vigor: That after a hundred years of struggle, 49 years after the Congress sent the ERA out to the state legislatures, the ERA is on the brink (they say) of becoming part of the Constitution.

Few journalists or media personalities have been much disposed to looking very hard at the ramshackle structure of legal improbabilities on which that narrative rests, or the inconvenient truths that it omits.

The ERA cannot become part of the Constitution unless the federal courts embrace or acquiesce in not just in one of the following dubious propositions, but in all of them: *That Congress has a right to retroactively change the terms of a constitutional amendment resolution, a half-century after most states acted on it; that Congress can do such a thing by simple majority votes, even though Article V requires two-thirds votes; that no state that once consents to any proposed amendment can ever change its mind and rescind its ratification, ever before a congressionally dictated deadline and before 38 states have ratified; that no such ratification ever truly expires, even if the ratifying body says that it expired; and that no constitutional amendment submission structured in the usual fashion can ever truly die.*

On March 17, 2021, the U.S. House of Representatives narrowly passed (222-204) a joint resolution (H.J. Res. 17) that purports to “remove” the ratification deadline that Congress included in the 1972 ERA deadline -- a deadline that expired March 22, 1979. This measure is expected to come the floor of the U.S. Senate during the months ahead, where a filibuster is likely to ensue.

Here is one of the inconvenient truths that ERA proponents hope does not come into sharp focus: Since the 1979 deadline passed, they have six times approached federal courts seeking to gain any shred of judicial support for the legal theories supporting their contention that the ERA remains a viable proposal. On each such occasion, they have utterly failed.

The record shows that the bumper-sticker assertions of the ERA-is-alive crowd disintegrate like wet cardboard under sustained judicial scrutiny, whatever the political affiliations of the judge.

By my count, as of June 30, 2021, 23 federal judges on five courts have been offered opportunities to vote whether to consider, or have spoken on the merits of, key elements of the ERA-is-alive theories – 14 judges appointed by Republican presidents, 9 by Democratic presidents. The judges who reached the merits rejected outright or set aside the substantive legal claims on which the ERA-is-alive movement is premised. Those who disposed of cases on purely procedural grounds did so despite the contrary pleadings of ERA advocates.

If the controversy concerned something other than the ERA, the media would probably regard such a one-sided pattern of judicial actions, by judges of diverse judicial backgrounds and philosophies, as evidence that the constantly

losing side was on weak legal footing – maybe even just making stuff up. But so far, that has not happened with respect to the ERA.

The ERA Resolution (H.J. Res. 208) approved by the 92nd Congress, sent to the states on March 22, 1972, contained a 7-year ratification deadline in its Proposing Clause. The Proposing Clause is not a mere “preamble,” but an element of every constitutional amendment submitted by Congress to the states, required by the structure of Article V itself. The Supreme Court, in a unanimous 1921 decision in *Dillon v Gloss*, said that Congress’s Proposing Clause (“mode of ratification”) power *includes* the power to set a binding ratification deadline, although Congress is not *required* to do so.

In his March 5 ruling, Judge Contreras dismissed a claim by Virginia, Nevada, and Illinois, that their legislative actions in 2017-2020 had caused the ERA to achieve the 38 ratifications required to become part of the Constitution. After a year of proceedings in the case styled *Virginia v. Ferriero*, Judge Contreras held that “the ERA’s deadline barred Plaintiff’s late-coming ratifications.”

Responding to the claim by the three pro-ERA states that the Archivist of the United States (the official charged by law with receiving state ratification documents), David Ferriero, was obligated to certify the ERA as part of the Constitution, Judge Contreras said that the Archivist had merely recognized that there was “an obvious and direct contradiction between the Plaintiffs’ claimed ratifications and a deadline that Congress had imposed pursuant to its Article V ‘power to designate the mode of ratification.’” To suggest that the Archivist is obligated to certify an amendment that had failed to meet constitutional requirements would be “absurd,” the judge said.

In his ruling, Judge Contreras five times cited holdings by federal district Judge Marion Callister, who handed down the first judicial ruling on the ERA ratification issues in 1981, in a case styled *Idaho v. Freeman*. Judge Callister had been appointed by Republican President Gerald Ford. The case was brought by a group of Idaho legislators, among others, who objected to a measure approved (by simple majority votes) in Congress in 1978, purporting to extend the ERA ratification deadline from March 22, 1979 to June 30, 1982. Moreover, Idaho was also among four states that had rescinded their ratifications prior to the 1979 deadline, and the legislators sought a court order preventing the Administrator of General Services (who was at that time tasked with receiving ratification papers) from counting Idaho among the ratifying states.

The National Organization for Women (NOW) also became a party to parallel litigation, arguing that the deadline extension was constitutional and that rescissions are never permissible.

Judge Callister held that the 1978 deadline extension was unconstitutional. While Congress was not obligated to set a deadline for ratification, once it had done so "it was not at liberty to change it" after submission of the proposed amendment to the states, Judge Callister ruled. Moreover, even if Congress did possess the power to change a deadline after submission, it would require a two-thirds vote in each house of Congress to do so, since a two-thirds vote is required whenever Congress exercises its powers under Article V, Judge Callister held. Since the 1978 extension resolution had been approved by less than two-thirds margins, it was doubly unconstitutional under Judge Callister's holdings.

In addition, Judge Callister upheld the Idaho claim that its legislative rescission effectively removed it from the count of ratifying states. Callister ruled that states may rescind prior ratifications up until the point that a proposed amendment reaches the required threshold of three-quarters of the states, at which point it immediately becomes part of the Constitution. In addition to nullifying Idaho's ratification, "The same is true for any other state which has properly certified its action of rescission to the Administrator," Judge Callister said.

The *Washington Post* characterized the ruling as "the single most staggering defeat for ERA since it was placed before the states in 1972." (12-24-81) The *New York Times* editorialized that Judge Callister "has issued judgments enough to kill the Equal Rights Amendment two or three times over," accused him of "unfair meddling," and called for "Supreme Court correction...reversal has to be swift." (12-30-81)

ERA supporters appealed to the 9th Circuit Court of Appeals, but also sought immediate review by the U.S. Supreme Court. The Supreme Court agreed to review the matter (granted pre-judgment certiorari) and stayed the holding of the district court. But the purportedly extended deadline came and went on June 30, 1982, with no new states having ratified. Thus, the final ratification total was 35 states-- or only 30, if the pre-deadline rescissions by Idaho and four other state legislatures were valid.

The Acting Solicitor General of the U.S. then submitted a memo, noting that the ERA had "failed of adoption" no matter whether the 1978 deadline extension was constitutional or not, and no matter whether the five rescissions were valid or

not. Therefore, he argued, the entire matter should be deemed moot. The Supreme Court took explicit note of the Acting Solicitor General's filing, declared the case moot, and vacated Judge Callister's decision. This does not mean the Callister holdings were reversed, but rather, that the ruling not to be regarded as having precedential weight; it had not been reviewed in adversarial proceedings in a higher court. That does not mean, however, that Judge Callister's thorough decision does not have persuasive value. Judge Contreras apparently saw merit in at least some of Judge Callister's analysis, since he cited the ruling five times.

Judge Contreras noted, "the Supreme Court's vacatur of the decision in *Idaho v. Freeman*... appeared to tacitly acknowledge that the ERA's ratification deadline was effective... To reach that conclusion, the Court must have assumed that the ERA's deadline barred further ratifications -- as the respondents [the pro-ERA side] warned a mootness ruling would imply."

Essentially the same conclusion was stated in the January 6, 2020 opinion of the Office of Legal Counsel of the Justice Department, which cited an N.O.W. filing from 1982 that said "Even an unexplained ruling that this case is moot would necessarily signal implicit acceptance of the [Acting Solicitor General's] position..."

Likewise, Professor Michael Stokes Paulsen, a recognized authority on the constitutional amendment process, wrote in 2019, "The Supreme Court's disposition of the [Idaho] case on mootness grounds logically entails the predicate conclusion that the proposed Equal Rights Amendment had failed of ratification and was no longer legally capable of being ratified."

At the time the Supreme Court took this action in October 1982, implicitly recognizing the demise of the ERA, it was composed of seven justices appointed by Republican presidents (including the liberal justices Brennan and Stevens), and two justices appointed by Democratic presidents (including the often-conservative Justice White). Not a single dissent was noted to the Court's order.

That should have been the end of the 1972 ERA. But starting in 1993, some ERA proponents began operating on a new premise, often referred to as the "three-state theory." In a nutshell, the premise was that deadlines did not really matter, either because they were unconstitutional, or because any Congress had the power to retroactively nullify them.

On Jan. 7, 2020, a federal lawsuit was filed by a well-known pro-ERA group called “Equal Means Equal,” in federal district court in Massachusetts, styled *Equal Means Equal v. Ferriero*. The case was assigned to federal Judge Denise J. Casper, an appointee of President Obama. Equal Means Equal counsel Wendy Murphy argued that the ERA's ratification deadline was unconstitutional, as it appeared in the Proposing Clause (which she oddly claimed was “an extra-textual statute”), and that therefore the ERA would become part of the Constitution as soon as the Virginia legislature adopted its “ratification” resolution, which was expected to occur within weeks. Murphy urged Judge Casper to undertake a series of proactive actions to ensure that the Archivist accepted the anticipated Virginia “ratification” and certified ERA as part of the Constitution, lest “a federal judge in Alabama rules that the ERA is not valid” -- which, she argued, would block various legal benefits that Murphy asserted would flow to her clients and other women from adoption of the ERA.

After briefing and oral argument, on August 6, 2020, Judge Casper dismissed the case, ruling that the group and its members did not have legal standing to bring their claims (although she implied that states might have standing to pursue such issues). Equal Means Equal appealed to the First Circuit Court of Appeals, but also, in early September 2020, filed an “urgent” cert petition at the US. Supreme Court. The cert petition argued that the matter “is of such imperative public importance that deviation from normal appellate practice and an immediate determination from this Court is warranted.” The petition further asserted, “Review is warranted not only because the ERA is the most important and fundamental of all women’s rights, but also because everyone in America has a right and need to know whether it is now the Twenty-Eighth Amendment to the Constitution.”

On October 7, 2020, the president of Equal Means Equal, Kamala Lopez, sent out an alert stating, “We recently found out that SCOTUS will decide on October 9, 2020, in conference, if it will include our historic case among the few it agrees to hear this year. Only the votes of four Justices are needed for the Supreme Court to accept the case. Hopefully, Chief Justice Roberts will be that fourth vote.”

In other words, despite the then very recent death of Justice Ruth Bader Ginsburg, the group believed that three justices were likely to vote to accept their case (presumably Justices Sotomayor, Kagan, and Breyer), and thought that Chief Justice Roberts might provide the needed fourth vote.

The Supreme Court did indeed consider the Equal Means Equal cert petition on October 9, 2020-- and, in a list of orders by the Court on Oct. 13, 2020, denied the petition. It is common for such orders to note the names of justices in dissent (i.e., who voted to take a case), but not a single Supreme Court justice was recorded as wanting to consider Equal Means Equal's plea to decide whether the ERA was part of the Constitution. The Supreme Court at that time was made up of five justices appointed by Republican presidents, and three appointed by Democratic presidents.

Equal Means Equal attorney Wendy Murphy then pursued a conventional appeal of Judge Casper's ruling, to the U.S. Court of Appeals for the First Circuit. On June 29, 2021, a three-judge First Circuit panel unanimously upheld Judge Casper's dismissal of the case for lack of standing. The ruling was written by Chief Judge Jeffrey Howard, who was appointed by President George W. Bush; he was joined by Judges Sandra Lynch, appointed by President Clinton, and David Barron, appointed by President Obama. This ruling brought to 23 the number of federal judges and justices who, by action or inaction, have rejected or turned their backs on the legal claims of the ERA-is-alive movement.

Justice Ginsburg's death on September 18, 2020 meant that she was not present to vote on the Equal Means Equal cert petition in the ERA case. However, she publicly expressed herself twice on the ERA-is-alive campaign, in September 2019, and again in February 2020.

"I was a proponent of the Equal Rights Amendment," Ginsburg said on September 12, 2019. "I hope someday it will be put back in the political hopper and we'll be starting over again, collecting the necessary states to ratify it." Justice Ginsburg said this, of course, knowing full well that many of her fellow ERA advocates were invested in the notion that the 1972 ERA could be resurrected.

Ginsburg returned to the subject on February 10, 2020 – just three days before the U.S. House of Representatives was scheduled to take up an ERA "deadline removal" measure, H.J. Res. 79.

"I would like to see a new beginning," she said. "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'?"

(With those last two sentences, Justice Ginsburg went even beyond the legal positions argued in the January 2020 legal opinion from the Justice Department's Office of Legal Counsel, which did not reach the issue of whether a state may ever rescind its ratification.)

Certainly, there will be further federal litigation about the status of the ERA. In *Virginia v. Ferriero*, on May 3, 2021, the attorneys general of Virginia, Nevada, and Illinois filed an appeal of Judge Contreras' ruling at the U.S. Court of Appeals for the District of Columbia, where it may be heard in late 2021.

Linda Coberly, an attorney who heads the legal task force for the ERA Coalition, said in a March 9, 2021 piece on Msmagazine.com that there would be new lawsuits, by unspecified plaintiffs in unspecified jurisdictions, starting in January 2022, "on the two-year anniversary of Virginia's ratification, when the ERA's protections go into effect." It seems that hope springs eternal among devotees of the ERA-is-alive cult.

But their prospects for success seem increasingly remote, given the cool reception received to date – three cases, five courts (counting the Supreme Court as one court, although it was approached twice, 38 years apart), 23 judges, all casting votes or issuing rulings opposite to the ERA advocates' pleas.

Why, then, do ERA advocates not turn to the option that Justice Ginsburg twice advised: Start over? I submit that it is because the ERA advocates know that their proposed constitutional text cannot come close to garnering the degree of political consensus required to amend the Constitution, under the Framers' design incorporated into Article V. In a March 10, 2021 editorial endorsing the pending congressional "deadline removal" measure, the editorial board of the *Los Angeles Times* said it out loud: "There is a bill [H.J. Res. 28] that would restart the entire ratification process, but that would be a giant step backward at a time when most state legislatures are controlled by a party opposed to constitutionally guaranteeing equal rights."

Despite the tendentious language employed by the editorial board members, they are not wrong in intuiting that many of the 30 state legislatures that ratified that ERA during the first year after its submission on March 22, 1972 (22 of them before the Supreme Court declared abortion legal in January 1973) are not likely to embrace amendment text that NOW says will invalidate "hundreds" of abortion-limiting laws, and NARAL says will "require judges to strike down anti-abortion laws."

To adherents of the ERA-never-dies movement, it makes perfect sense to disenfranchise the current generation of state legislators, while claiming ownership of the long-expired actions of their predecessors of a half-century ago. The same mindset deludes them into believing that the current Congress can time-travel to 1972 to revise the legislative compromise that produced the two-thirds votes for the ERA Resolution – even though not a single member of the 92nd Congress remains in Congress today.

It appears that the federal judges must continue to school these people for yet awhile longer that it does not work that way.

Author's Note: I have excluded from this analysis procedural litigation that flowed from the *Idaho v. Freeman* case. The National Organization for Women petitioned to be admitted to the litigation as intervenors. That motion was denied by Judge Callister, but later granted by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit.

NOW also engaged in various judicial proceedings intended to remove Judge Callister from the *Idaho v. Freeman* case, in which they were unsuccessful. These proceedings did not really involve judicial review of the legal theories behind claims that the ERA remained alive after the March 22, 1979 deadline, nor did the proceedings require votes by judges on whether they wanted to consider those issues.

Likewise, I have excluded all proceedings involving *Alabama v. Ferriero*, filed in December 2019 by three attorneys general (Alabama, Louisiana, and Tennessee) who asserted that the ERA is long expired. Although a pro-ERA group made a motion to intervene in the case, the anti-ERA attorneys and the Department of Justice quickly reached agreement that the ERA had expired in 1979. That automatically brought at rapid end to the case, on terms favorable to the anti-ERA side, but before the judge could rule on any substantive issues.