

Federal Judges Scorn ERA-revival Legal Claims

Advocates seeking to resuscitate the 1972 Equal Rights Amendment are on a 42-year losing streak before federal judges of every stripe. So far, various ERA-revival legal claims have been presented to seven federal courts, and to a total of 30 federal judges and justices. The ERA-revival side has yet to get a single vote from a single judge on a single one of their hodge-podge of novel legal claims.

By Douglas Johnson

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Those who propagate the claim that the 1972 Equal Rights Amendment remains viable – or even that it has already been ratified – do their best to deflect attention away from a very inconvenient truth: Since the ERA’s ratification deadline passed more than four decades ago, they have approached seven different federal courts seeking to gain any shred of judicial support for their hodge podge of novel legal claims. They have suffered an unbroken 42-year losing streak before federal judges of every ideological and political stripe.

The ERA Resolution (H.J. Res. 208) approved by the 92nd Congress and sent to the states on March 22, 1972, contained a 7-year ratification deadline in its Proposing Clause, the product of a legislative compromise. All agree that the proposal failed to achieve ratification by that date. Not a single member of the 92nd Congress remains in Congress today.

Since 1981, pro-ERA litigants have presented seven federal courts with one or more legal theories under which the ERA remains viable. A total of 30 federal judges and justices have had an opportunity to act or vote to advance one or more of those claims. The ERA-revival litigants have yet to obtain a single affirmative

vote or action, from a single federal judge, on a single one of their essential legal claims.

Every judge who reached the merits of a key legal premise of the ERA-is-alive movement rejected the claim. Judges who disposed of cases on purely procedural grounds did so despite the strong contrary pleadings of ERA advocates.

Of the 30 judges, 16 were appointed by Republicans, 14 by Democrats.¹ Of the cases decided from 2021-2023, the federal judges ruling against the pro-ERA litigants were picked by Democratic presidents by a 10-2 ratio.

If the controversy concerned something other than the ERA, the mainstream news 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 very weak legal footing – maybe even just making stuff up as part of a long-running exercise in political performance art.

However, many ERA advocates rely on media sympathy in order to promulgate their misleading narrative of an ERA that is on the brink of becoming part of the Constitution—or that already is part of the Constitution, visible only to their enlightened eyes.

For example, Kate Kelly, an attorney-activist who has promoted the ERA as counsel to former Congresswoman Carolyn Maloney, as a PBS commentator, and in other capacities, said at a legal symposium at Washington & Lee University on October 28, 2022: “I would just say the number one thing is just actively talking about it 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...”

¹ U.S. District Judge Mary S. McElroy in Rhode Island, who dismissed an ERA-revival lawsuit in 2023, was appointed by President Trump in 2019, so she is counted in the tally as a Republican appointee. However, McElroy was originally nominated in 2015 by President Obama, but not confirmed, and her political history is Democratic. If she were counted as a Democratic pick, the tally would be an even 15 to 15. Counting McElroy as a Democrat, the judges who acted against pro-ERA litigants from 2021-2023 were 10-2 Democratic picks.

RULING BY THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA: A “GUT PUNCH” TO ERA-REVIVAL EFFORTS

Off the main political stage, in the halls of the Judicial Branch, the heaviest blow yet fell on February 28, 2023, when a panel of the U.S. Court of Appeals for the District of Columbia handed down a unanimous ruling in the case of *Illinois v. Ferriero* (originally, *Virginia v. Ferriero*), written by Judge Robert Wilkins (an appointee of President Obama), joined by Judges Neomi Rao (Trump) and Michelle Childs (Biden). (*Illinois v. Ferreiro*, 60 F.4th 704, 713 (D.C. Cir. 2023))

Bloomberg Law called the ruling “a major defeat for ERA advocates...a big loss.” Veteran congressional journalist Jamie Dupree wrote that the ruling was “Another legal defeat” on the ERA “which landed like a gut punch for Democrats.”

“The DC Circuit opinion is a reality check for those who believe that the ERA’s original time limit does not apply,” said Brian C. Kalt,² professor of constitutional law at Michigan State University.

The court rejected the urgings of the attorneys general of Illinois and Nevada that the court order the Archivist of the U.S. to certify (“publish”) the ERA as part of the U.S. Constitution. The court crushed one of the central legal claims of ERA resurrectionists: That the 7-year deadline that Congress included in the ERA Resolution in 1971-1972 was not binding because it was placed in what they call the “preamble,” properly called the Proposing Clause. Only a deadline placed in the actual text proposed to be added to the Constitution can be considered binding, the ERA revivalists have asserted.

The unanimous court of appeals panel first characterized this claim as “unpersuasive,” then delivered the *coup de grace* with the dry observation that “if that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative.”

The phrase “mode of ratification” refers to the requirement in Article V that Congress dictate, for each proposed constitutional amendment, whether the states are to ratify by state legislatures or by state conventions-- and Congress has

² Prof. Kalt is the author of *Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment* (Oxford University Press, 2019).

always, beginning with the First Congress, placed that binding instruction (among others) in the Proposing Clause.³ Thus, to believe that Proposing Clauses lack binding legal force is to believe that every constitutional amendment proposal in the history of the Republic has contained a grave legal defect—a proposition that no court will ever embrace.

The remedy sought by Illinois and Nevada in the lawsuit was a type of court order called *mandamus*, which is granted only when a ministerial official (basically, a government functionary) neglects to perform a duty “clearly and indisputably” required by law. The panel concluded its opinion with a statement that “the States have not clearly and indisputably shown that the Archivist has a duty to certify and publish the ERA or that Congress lacked the authority to place a time limit in the proposing clause of the ERA.” Some pro-ERA advocates have seized on the “clearly and indisputably” phrase, suggesting that it implies significant doubt about both matters, but in context there is no such implication; such phrases in the ruling are an artifact of the way that the states chose to frame their lawsuit. The court certainly made it clear that it saw no merit in the states’ key argument pertaining to the Proposing Clause.

The bottom line of the D.C. Circuit ruling was to affirm the most important holding of the lower court, and to sidestep a far less important procedural issue.

Judge Rudolph Contreras, a federal district judge appointed by President Obama, had ruled on March 5, 2021 that the states that sued to force the Archivist to certify the ERA lacked legal standing – that is, he held, they had suffered no concrete injury because of the Archivist’s inaction. However, and critically, Judge Contreras went on to issue an “alternative holding.” In the federal judicial system, an “alternative holding” is a second reason to reach the same conclusion (in this case, that the pro-ERA states lost). In the federal court system, an “alternative holding” is every bit as binding as the primary ruling.

Judge Contreras’ alternative holding--which he spent about 20 pages backing up -- was that Congress had power to adopt a binding ratification deadline, and that the deadline placed in the proposing clause of the 1972 ERA Resolution was fully binding. It was this “alternative holding” that the D.C. Circuit affirmed,

³ Congress has dictated use of the convention method only once, for the 21st Amendment, which repealed the 18th Amendment (Prohibition).

while taking no position on the standing issue. (See *Virginia v. Ferriero*, 525 F.Supp.3d 36, 40 (D.C. 2021))

A CLOSER LOOK AT THE RULINGS OF JUDGES CONTRERAS AND CALLISTER

As noted earlier, 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 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, 2021 ruling in the case later styled *Illinois v. Ferriero*, federal District Judge Rudolph 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.

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," Judge Contreras 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) became an intervenor 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 Judge Callister's 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." (December 30, 1981)

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 31, if the pre-deadline rescissions by Idaho and three other state legislatures were valid.⁴

⁴ While it is often stated that *five* states rescinded their ratifications before the deadline, the South Dakota legislature actually adopted on March 54, 1979, a

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 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 was 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 Judge Callister’s ruling five times.

Judge Contreras also noted that “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 a NOW 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

measure explicitly stating that its ratification would expire on the deadline—March 22, 1979. The South Dakota measure did not suggest that the state’s earlier ratification would be ineffectual if the required number of other states ratified before the deadline, and thus differed markedly from the actual rescission measures adopted earlier by the legislatures of Nebraska, Tennessee, Idaho, and Kentucky.

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.

(It should be noted that in its September 28, 2023 ruling in *Illinois v. Ferriero*, rejecting the urging of Illinois and Nevada that the court order the Archivist to certify the ERA, the U.S. Court of Appeals for the District of Columbia observed in passing, "It is not clear what, if any, precedential weight we should give to the [Supreme] Court's order dismissing the [1982] case on mootness grounds.")

EQUAL MEANS EQUAL V. FERRIERO

Starting in late 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 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 called "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 U.S. 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 they were counting Justices Sotomayor, Kagan, and Breyer), and thought that Chief Justice Roberts *might* provide the needed fourth vote to grant cert.

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 not uncommon for such orders to note the names of justices in dissent (i.e., those 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.

Equal Means Equal then petitioned the full First Circuit to review the panel’s decision (“petition for rehearing en banc”). This was grandstanding for the groundlings. The First Circuit has just six authorized judgeships (at that time filled by one judge appointed by a Republican president and five appointed by Democratic presidents). Since three of the six had *already voted* to dismiss the

lawsuit, it would have been *impossible* to get the four votes needed to overturn the panel's ruling, unless one of the original three flip flopped. Predictably, on January 4, 2022, the court announced that the petition for rehearing en banc was denied. None of the six judges entered a dissent.

ELIZABETH CADY STANTON TRUST V. NERONHA

On September 8, 2023, U.S. District Judge Mary S. McElroy in Rhode Island dismissed yet another lawsuit that asserted that the Equal Rights Amendment has been ratified. In *Elizabeth Cady Stanton Trust v. Neronha*, a pro-ERA group sued Rhode Island Attorney General Peter Neronha, asking that courts order him to take various actions based on the premise that the Equal Rights Amendment is part of the U.S. Constitution. Judge McElroy dismissed the case for lack of standing, relying in part on the earlier ruling by the U.S. Court of Appeals for the First Circuit in *Equal Means Equal v. Ferriero*, discussed above.

JUSTICE GINSBURG'S ADMONITIONS

Justice Ginsburg's death on September 18, 2020 meant that she was not present to vote on the 2020 cert petition filed by Equal Means Equal. 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) for the first time.

"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.)

CONGRESSIONAL RESOLUTIONS HAVE NO LEGAL BEARING ON WHETHER A CONSTITUTIONAL AMENDMENT HAS BEEN RATIFIED

Another element of ERA-revival theory holds that Congress has authority to determine whether a proposed constitutional amendment has been ratified or not. There is no case law supporting this theory, and there is much that weighs against it. However, the federal courts have not been forced to squarely address the question with regard to the ERA, since Congress has not agreed on any ERA-related measure since it passed the purported “deadline extension” resolution by majority votes in 1978 (later declared unconstitutional by the only federal court ever to review the matter on the merits).

On February 13, 2020 and again on March 17, 2021, the U.S. House of Representatives passed (by simple majority votes) joint resolutions that purported to retroactively “remove” the ratification deadline that Congress included in the 1972 ERA deadline -- a deadline that expired March 22, 1979. Both of those measures died at the end of the 116th and 117th congresses, respectively, without any action in the Senate.

After the 118th Congress convened in January 2023, members of both the U.S. Senate and the U.S. House of Representatives introduced new joint resolutions (S. J. Res. 4 and H.J. Res. 25) that purported to both “remove” the deadline *and* declare the 1972 ERA to be part of the U.S. Constitution. The measures were introduced, respectively, by Senator Ben Cardin (D-MD) and Rep. Ayanna Pressley (D-MA).

The Senate voted on S.J. Res. 4 on April 27, 2023. It failed on a 52-47 vote (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—seven votes short of the 60 required.

Republicans took majority control of the House in January 2023, so the House companion 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 that tool has no prospect for success in the 118th Congress.

In July 2023, Senator Kirsten Gillibrand (D-NY) and Rep. Cori Bush (D-MO) introduced yet another ERA-promoting measure, informally labeled “ERA Now,” that 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.⁵

Thus, the 118th Congress will end on January 3, 2025, without Congress having approved any measure expressing an opinion regarding the status of the 1972 ERA.

In any event, the constitutional role of Congress in the constitutional amendment processes ends when Congress submits a measure to the states.⁶ Although Congress in 1978 adopted (by simple majorities, not two-thirds votes) a joint resolution purporting to extend the ERA’s ratification deadline by 39 months, the only federal court to ever consider the matter ruled that this measure was unconstitutional in two different ways (*Idaho v. Freeman*, 1981).

On rare occasions, one or both houses of Congress have adopted measures expressing the opinion that one or another proposed amendment has been ratified, but these resolutions have no legal force. If an amendment became part of the Constitution, it was not because one or both houses of Congress said so, but because the amendment had actually been ratified by the required number of states.

In his March 5, 2021 ruling upholding the ERA’s ratification deadline, U.S. District Judge Rudolph Contreras’ discussed “congressional promulgation

⁵ Even when both houses agree on a concurrent resolution, [it does not have force of law, according to the U.S. Senate website](#).

⁶ On March 15, 2023, Senator Cindy Hyde-Smith (R-Ms.) introduced a resolution (Senate Resolution 107) citing court decisions and other authorities in support of its conclusions that the constitutional role of Congress over a proposed constitutional amendment ends when it submits that proposal to the states, and that Congress lacks authority to act on an expired constitutional amendment proposal. As of February 20, 2024, the measure had 20 co-sponsors.

theory...under which Congress has the power, after receiving ratifications from three-fourths of the states on a proposed amendment, to adopt or reject the amendment.” Judge Contreras observed that “Commentators have widely panned the theory as out of sync with the text of Article V, prior precedent, and historical practice. Indeed, Plaintiffs [i.e., VA, IL, NV] and the Archivist both denounce the theory.” [citations omitted] Judge Contreras also observed, “In addition, 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, Judge Contreras did not formally rule on the matter of congressional promulgation, since Congress has done nothing to affirm that the ERA has been ratified, and therefore the matter of the retrospective authority of Congress was not before him.

In testimony before the U.S. Senate Judiciary Committee on February 28, 2023, during a hearing about the Equal Rights Amendment, Senator Ben Cardin (D-Md.), the prime sponsor of S.J. Res. 4, said this:

The precedent for Congress to declare that a requisite number of states have ratified a constitutional amendment [is] the House and Senate did this in 1992 by the resolution affirming the validity of the 27th Amendment [the Congressional Pay Amendment]. So this is not the first time we see in a resolution the acknowledgment that the prerequisite number of states have ratified the constitutional amendment.

Senator Cardin’s claim does not agree with the documented historical record with respect to the Congressional Pay Amendment. In reality, in 1992 the Archivist of the U.S. sought legal guidance from the Justice Department’s Office of Legal Counsel (OLC) as to whether the Congressional Pay Amendment (which contained no deadline) was still viable, having been submitted to the states 203 years earlier. In a legal opinion dated May 13, 1992, the OLC advised the Archivist that the Congressional Pay Amendment (which contained no deadline) should be regarded as part of the Constitution as of the date of the 38th state ratification (no state had purported to rescind).⁷ The Archivist acted on that guidance and certified the Congressional Pay Amendment on May 18, 1992.

⁷ The Office of Legal Counsel provided a fuller analysis supporting its conclusion in a follow up opinion dated November 2, 1992.

It is true that joint resolutions were introduced in both the Senate and the House to affirm certification of the Congressional Pay Amendment – but, contrary to Senator Cardin’s February 28, 2023 testimony, *Congress did not adopt either of them*. The Senate adopted one concurrent resolution (S.Con.Res.120) affirming ratification, but the House of Representatives never acted on it.⁸ The House of Representatives instead adopted a different concurrent resolution (H.Con.Res. 320), but it was referred to the Senate Judiciary Committee and never acted on. Thus, “Congress” as an institution did not take any action with respect to the Congressional Pay Amendment. When the two houses attempt to address a certain matter but fail to reach agreement on a single proposal, it is what is known as “congressional inaction.”⁹

CONCLUSION

The Equal Rights Amendment in 2023 is the political equivalent of a hologram, a “3-D” theatrical projection. There are many who find it politically useful to pretend that this projection is real, and there are many in the audience, particularly in the press row, who seem very willing to be fooled. But when the bright lights of judicial scrutiny come on, the insubstantial character of the image becomes evident. It is only an illusion.

Author’s Note: I have excluded from this analysis tangential 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

⁸ On May 20, 1992, the Senate also adopted a Senate-only resolution, S. Res. 298, that affirmed belief that the Congressional Pay Amendment had been ratified. Simple resolutions do not require the approval of the second house nor the signature of the president, [but they do not have force of law, according to the U.S. Senate website](#).

⁹ Moreover, even when both houses agree on a concurrent resolution, [it does not have force of law, according to the U.S. Senate website](#).

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 (of 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 a rapid end to the case, on terms favorable to the anti-ERA side, but before the judge could rule on any substantive issues.

This article deals only with cases dealt with by *federal* courts. During 2023, lawsuits brought by the Elizabeth Cady Stanton Trust against state attorneys general in Michigan and New York, advancing claims that those attorneys general were negligent in not taking certain actions based on the notion that the ERA is part of the federal Constitution, were dismissed by state judges.