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We the People Say No:
The Democratic Demise of the ERA

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The proposed 1972 Equal Rights Amendment (ERA) to the U.S. Constitution reads, "*Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex*." Behind the simple words of the proposed amendment lie a series of dangerous impacts that, once unmasked, stood in the way of its ratification. For example, all attempts to amend the 24-word core of the ERA in the U.S. House of Representatives to exempt women from "compulsory military service" and to preserve other laws "which reasonably promote the health and safety of the people," failed. Similarly, efforts also failed to amend the ERA in the Senate to require fathers to support their children; preserve traditional rights of mothers, wives and widows; affirm the privacy rights of men and women; and keep laws punishing sexual offenses as crimes.
Congress passed the original, unamended ERA which was then sent to the states on March 22, 1972 to become, in the words of the ERA resolution, "part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress." The House had voted 354-24 for the ERA, and the Senate voted 84-8. Both votes exceeded the minimum two-thirds approval in Congress required by the U.S. Constitution. Thirty states ratified the ERA within a year of its Congressional passage (38 states are required for ratification).

Phyllis Schlafly's Roadblock

Along came Phyllis Schlafly and her "Eagles," an alliance of women who convinced a critical mass of state lawmakers of a variety of harmful effects of the ERA: that it would subject women to the military draft and front-line combat; abolish laws limiting or prohibiting abortion; mandate tax-subsidized abortions; establish "same-sex" marriage; end the tax-exempt status of churches with male-only clergy; abolish single-sex schools and sports teams; mandate unisex prison cells, rooms in hospitals, nursing homes and school dormitories; and eradicate workplace and other legal protections for women.
Despite the ERA's initial success, Mrs. Schlafly's grassroots efforts were so effective that the ERA was ratified by only five states in the following six years, and five other states (Nebraska, Tennessee, Idaho, Kentucky, and South Dakota) rescinded their prior ratifications, making it practically impossible the ERA would pass before the seven-year deadline.

In 1977, ERA supporters responded to Schlafly's roadblock by proposing the radical idea that Congress could simply "extend" the ERA's ratification deadline by seven additional years, with only majority support. Congress eventually extended the ratification deadline to June 30, 1982 (roughly 39 months). This unprecedented extension passed before the original seven-year deadline had expired, and by a simple majority vote, not

two-thirds as was required under the Constitution for all proposed amendments. Not one additional state ratified the ERA within this extended ratification time period.

Recognizing their failure to secure the requisite number of states, ERA proponents have reintroduced the ERA into Congress in 1983 and many times since then. The "extension" was challenged in federal district court with a decision on December 23, 1981 in *Idaho v. Freeman,* that the extension itself was unconstitutional and the state ERA rescissions were constitutional. The deadline date for the extension came and went on June 30, 1982, and the Supreme Court subsequently held that the issues involving ratification were therefore moot and the lower court should dismiss the complaint of the National Organization of Women (NOW).

That the case is moot is evident from two points.

First, Lawrence Wallace, Acting Solicitor General, prepared a July 1982 memo for the Administrator of the General Services Administration (GSA), noting that, the ERA extension period had expired, no state had submitted additional ratifications after the original expiration date had expired, nor has Congress passed another extension. "Consequently, the Amendment has failed of adoption no matter what the resolution of the legal issues presented here, and the Administrator informs us that he will not certify to Congress that the Amendment has been adopted.

> "…It is therefore respectfully submitted that the judgment of the district court should be vacated and the cases remanded with instructions to dismiss the complaint as moot." (*NOW v. Idaho*, Nos. 81-1312 and 81-1313)

Second, on October 4, 1982, the Supreme Court accepted the suggestion of mootness in the memo to the GSA Administrator, "the judgment of the United States District Court for the District of Idaho is vacated and the cases are remanded to that court with instructions to dismiss the complaints as moot."

Constitutional "Never, Never Land"

Hope revived for ERA advocates with the 1992 ratification of the Congressional Pay Amendment proposed by Congressman James Madison in the First Congress with other "Amendments" that became the Bill of Rights. ERA proponents overlooked the obvious: the Congressional Pay Amendment never included a ratification deadline, while the ERA had two deadlines and both had expired. Congressman Don Edwards (D-Calif.), who had

previously chaired the ERA Judiciary Subcommittee, said during House debate on the Congressional Pay Amendment:

> " … The House may decide today to make an exception to the principle of contemporaneous consensus that has been a guiding constitutional principle for most of this century. *But it should be clear that this is an exception, not a precedent."* [Congressional Record, May 19, 1992, p. H11780]

Nevertheless, the Pay Amendment "ratification" was all ERA advocates needed to once again try to breathe new life into the long-expired effort to ratify the ERA. In 1994, Congressman Robert Andrews (D-NJ) introduced H.Res. 432, with 52 co-sponsors, requiring:

> "That, when the legislatures of an additional 3 States ratify the Equal Rights Amendment, the House of Representatives shall take any legislative action necessary to verify the ratification of the Equal Rights Amendment as a part of the Constitution."

Critical observers who wondered how three states can possibly equal the 38 states necessary to ratify a Constitutional Amendment found their answer in a 1997 *William and Mary Journal of Women and the Law article,* where ERA proponents lodged their hopes for ratification of the ERA in extended argument that the time limit for ratification proposed by Congress was not in the text of the actual amendment but in the proposing clause for the Amendment. This fact, the authors wrote, meant that the idea of contemporaneous consensus on the need for an amendment could be dispensed with by a subsequent majority vote of Congress. This idea neatly ignores the fact that the ERA's history proved that there was declining support for the ERA the longer it was debated in either the Congress or the states.

Under this fevered "thinking," since 35 states had "ratified" the original ERA, the revived ERA therefore would only need three more states for its supposed "ratification." Nor could any of the five states rescinding their prior approvals (Idaho, Kentucky, Nebraska, Tennessee, and South Dakota) within the original seven-year ratification period be subtracted from the state ratification total since "rescissions" were deemed "illegal." In other words, state action after the deadline only counted if it helped achieve the cause of ratification.

ERA supporters then proceeded to count as legal the late "ratifications" in Nevada (2017), Illinois (2018) and Virginia (2020), claiming they had achieved the 38 states needed to ratify the ERA.

On January 27, 2020, Virginia's General Assembly added its fraudulent ERA "ratification" to the other fraudulent "ratifications" of Illinois and Nevada. On February 27, 2020, the U.S. House of Representatives continued the fraud by passing Democratic Congresswoman Jackie Speier's H. J. Res 79, which purported to remove the seven-year ratification time limit approved by Congress in 1972. It passed by a vote of 232 to 183 with 227 Democrats and five Republicans voting Yea, and 182 Republicans and one Independent voting Nay. Republicans mostly opposed passage because of the ERA "potentially paving the way for laxer abortion laws."

The ERA resolution died as it was not taken up by the Senate, then under Republican control. H. J. Res. 79 was intended to "legalize" the "ratifications" by Nevada, Illinois, and Virginia after the fact. However, the National Archives and Records Administration (NARA) had asked the Justice Department's Office of Legal Counsel for an opinion on the matter. On January 8, 2020, the NARA stated:

> "In its January 6, 2020, opinion, the Office of Legal Counsel (OLC) has 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.' … the OLC opinion goes on to state that 'the ERA's adoption could not be certified …'
>
> "NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order."

Virginia, Illinois and Nevada filed suit demanding the Archivist certify the ERA as part of the U.S. Constitution. Alabama, Louisiana and Tennessee filed suit asserting that the ERA had expired. Federal District Court Judge Rudolph Contreras, an Obama appointee, stated the three pro-ERA states did not have standing to sue to compel the Archivist to declare the ERA "ratified." On the substantive questions he ruled:

> " … the Archivist has no duty to publish and certify the ERA. Section 106b permits him to consider whether a state's ratification complies with a congressionally imposed ratification deadline. And a ratification deadline in a proposing resolution's introduction is just as effective as one in the text of a proposed amendment. Plaintiffs' ratifications came after both the original and extended deadlines that

> Congress attached to the ERA, so the Archivist is not bound to record them as valid. Accordingly, Plaintiffs' request for mandamus is denied.
>
> "… the Court does not reach the question of whether states can validly rescind prior ratifications. Nor does the Court make any statement on whether Congress's (sic) extension of the ERA deadline was constitutional. It does not need to. If the extension was unconstitutional, then the original deadline bars ratification; if the extension was constitutional, then the extended deadline has passed too." [*Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021)]

A federal Appeals court in Boston refused on January 4 of this year a request by a pro-ERA group, "Equal Means Equal," to rehear the case to compel the National Archivist to certify the ERA as ratified.

ERA proponents also have to deal with the fact that after 50 years of controversy, support for the "pure" ERA has eroded. In March 2021 North Dakota's legislature passed HCR 4010 affirming that North Dakota's 1975 ratification for the ERA terminated on March 22, 1979, the original ratification date. And as of this writing, the West Virginia Senate passed SCR 44, which, "clarifies the 1972 ratification … of the proposed 1972 Equal Rights amendment to the Constitution of the United States only was valid through March 22, 1979."

Further, on February 18, 2022 Virginia withdrew as a plaintiff from its case with Illinois and Nevada against the Archivist of the United States by action of Jason Miyares, Attorney General of Virginia, who stated, "After careful review of the filings and pertinent precedents, Virginia is now of the view that the district court correctly held that mandamus relief does not lie against the Archivist in this suit."

At this point all pro-ERA "ratification" efforts consist of legal challenges from Illinois and Nevada to secure judicial support for the two states' "ratifications." Also, legislation to "remove" the initial seven-year time limit for ERA ratification continues to be reintroduced. If such a Joint Resolution passes the House and Senate, purporting to remove the time limit from the 1972 Equal Rights Amendment, the matter will again be challenged in Court with likely the very same ruling.

Proponents remain free to propose again the same or a revised ERA. What they cannot do is resurrect an amendment, that by the very terms of the Congress that proposed

it, has been rejected. If it were otherwise, there would be no way to conclude that any proposed amendment could be formally and finally rejected by the American people.

Robert Marshall was a member of the Virginia General Assembly from 1992 to 2018. He is the author of "Reclaiming the Republic: How Christian and other Conservatives Can Win Back America." Email him at robertgbobmarshall@gmail.com.