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116TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 116–378

REMOVING THE DEADLINE FOR THE RATIFICATION OF THE EQUAL RIGHTS AMENDMENT

JANUARY 16, 2020.—Referred to the House Calendar and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.J. Res. 79]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 79) removing the deadline for the ratification of the equal rights amendment, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution as amended do pass.

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The amendment is as follows:

Strike all that follows after the resolving clause and insert the following:

99–006

That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States.

Purpose and Summary

H.J. Res. 79 is a bipartisan joint resolution that would eliminate the deadline for the ratification of the Equal Rights Amendment (ERA) to the United States Constitution. The original deadline set by the House of Representatives and the Senate for ratification of the ERA was March 22, 1979. In 1978, the House and Senate extended that deadline to June 30, 1982.[1] H.J. Res. 79, introduced by Rep. Jackie Speier (D–CA) and co-sponsored by 224 other Members, states that "notwithstanding any time limit contained in" the previous deadline passed by Congress for ratification of the ERA, the ERA "shall be valid to all intents and purposes . . . whenever ratified by the legislatures of three-fourths of the several States." Senator Ben Cardin (D–MD) has introduced an identical bipartisan resolution in the Senate, S.J. Res. 6.

Background and Need for Legislation

History of the Equal Rights Amendment

Advocates for gender equality have supported a constitutional amendment guaranteeing equal treatment under the law for almost one hundred years. Alice Paul, a leader of the National Woman's Party, proposed the first such amendment in 1923, soon after the ratification of the Nineteenth Amendment (guaranteeing women's suffrage).[2] Paul's amendment, introduced in both Houses of the 68th Congress, stated: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[3] It also authorized Congress to "enforce this article by appropriate legislation."[4]

The Judiciary Committees of the House and Senate held hearings on the Paul amendment as early as 1929, and the amendment was reported out of those Committees on several occasions.[5] In 1943, the Senate Judiciary Committee favorably reported a version of the amendment that stated: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."[6] By 1944, both the Republican and Democratic parties added endorsements of the ERA to their platforms.[7]

The House, however, took no substantial action on the ERA until 1970. That year, Rep. Martha Griffiths (D–MI) filed a discharge petition in the House to bring the ERA to the floor. The discharge pe-

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[1] *See* H.J. Res. 638, 95th Cong. (1978).
[2] Thomas H. Neale, Cong. Res. Serv., *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 1 (July 2018) ("2018 CRS Report").
[3] Leslie W. Gladstone, Cong. Res. Serv., *The Proposed Equal Rights Amendment* 5 (Mar. 1982) ("1982 CRS Report").
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] 2018 CRS Report at 11.

tition was adopted, and the ERA passed the House by a wide margin.[8] The Senate Judiciary Committee also held several days of hearings in 1970 on its version of the ERA, but it failed to gain sufficient votes that year.[9]

On October 12, 1971, the House voted by a 354 to 24 margin, to approve H.J. Res. 208, which stated:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein)*, That
>
> The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years of its submission by the Congress:
>
> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.
>
> "Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Section 3. This amendment shall take effect two years after the date of ratification." [10]

On March 22, 1972, the Senate passed the above-quoted version of the ERA by a vote of 84 to 8.[11]

By the end of 1977, a total of 35 out of a required 38 States had ratified the ERA.[12] As Congress approached the seven-year deadline for ratification set in the preamble to the ERA, it considered and enacted a joint resolution, H.J. Res. 638, extending the deadline through June 30, 1982.[13] As discussed further below, this Committee's report accompanying H.J. Res. 638 (the "1978 Committee Report") explained Congress's bases and authority to extend the ratification deadline.[14] No additional States ratified the ERA in the time between Congress's enactment of the extension and the expiration of the new deadline. Additionally, between 1973 and 1979, five States enacted measures purporting to rescind their prior ratifications.[15]

Contemporary Ratification Efforts

After the ERA's ratification deadline expired in 1982, a number of measures were proposed in Congress that would have restarted the entire ERA ratification process. Legal perspectives on this matter, however, shifted with the ratification of the Twenty-Seventh Amendment in 1992. That amendment, which prohibits any alterations in the salaries of Members of Congress between election periods, had been introduced by James Madison in 1789 and quickly

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[8] *Id.*
[9] 2018 CRS Report at 11–12.
[10] *Id.* at 13 (quoting H.J. Res. 208, 92d Cong. (1971)).
[11] *Id.* at 12.
[12] 2018 CRS Report at 14.
[13] H.J. Res. 638, 95th Cong. (1978).
[14] *See* H. Rep. No. 95–1405 (1978) ("1978 Committee Report").
[15] 2018 CRS Report at 14. Those states were Nebraska, Tennessee, Idaho, Kentucky, and South Dakota. *Id.*

approved in the House and Senate.[16] The so-called "Madison Amendment" did not contain any self-imposed deadline for ratification and fell into obscurity. Little action occurred for nearly two centuries, until a movement to ratify it spread in the 1980's. Dozens of State legislatures ratified the amendment, and it received the requisite votes from 38 States in 1992.[17] The Archivist of the United States certified the Twenty-Seventh Amendment as having been ratified shortly thereafter.[18] To avoid doubts as to whether the amendment had been properly ratified, the House and Senate subsequently adopted resolutions stating that the amendment was ratified by a sufficient number of States and was now "part of the Constitution."[19]

The ratification of the Twenty-Seventh Amendment provided support for the proposition that the ERA can be ratified based on its prior approvals in the House and Senate and based on the prior ratifications by 35 States, so long as the deadline for ratification is extended and three more State legislatures ratify it.[20] Beginning in the 112th Congress, Representatives and Senators have introduced joint resolutions similar to H.J. Res. 79 that would rescind the prior ratification deadline and allow the earlier-proposed ERA to become "valid to all intents and purposes . . . whenever ratified" by the legislatures of three-fourths of the several States.[21]

In 2017, Nevada became the first State in decades to ratify the ERA. Illinois followed in 2018, bringing the total number of ratifying States to 37 (including those that had purported to rescind their ratifications).[22] An effort to ratify the ERA was narrowly defeated in Virginia last year. It is likely that the Virginia legislature will once again attempt to ratify the ERA in 2020.

Continuing Need for the ERA

In many respects, the courts have already constitutionalized women's equality under the law through interpretations of the Fourteenth Amendment's Equal Protection Clause. As Justice Ruth Bader Ginsburg explained in her 1996 opinion for the Supreme Court in *United States* v. *Virginia*, the Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[23] Justice Ginsburg herself led many of these litigation efforts—beginning with a 1971 case, *Reed* v. *Reed*, in which the Court struck down a law that gave males a preference over females in applying to administer a deceased family member's estate.[24]

Although the Supreme Court has not "equat[ed] gender classifications, for all purposes, to classifications based on race or na-

[16] *Id.* at 20–21.
[17] *Id.* at 21.
[18] *Id.* at 21–22.
[19] H. Con. Res. 320, 102d Cong. (1992); S. Con. Res. 120, 102d Cong. (1992).
[20] *See, e.g.,* Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,* 3 Wm. & Mary J. Women & L. 113 (1997).
[21] *E.g.,* H.J. Res. 47, 112th Cong. (2011); S.J. Res. 39, 112th Cong. (2012).
[22] 2018 CRS Report at 5–6.
[23] 518 U.S. 515, 532 (1996).
[24] 404 U.S. 71 (1971).

tional origin," it has "carefully inspected official action that closes a door or denies opportunity to women (or to men)."[25] Any policy that differentiates between the sexes must be based on an "exceedingly persuasive" justification.[26] Indeed, Justice Ginsburg has said that "[t]here is no practical difference between what has evolved and the ERA."[27] Many scholars agree.[28]

Nonetheless, advocates and scholars continue to argue that ratification of the ERA would have significant value. As one scholar recently explained:

> The current ERA movement is primarily concerned with the difficulties that women continue to face in the United States, despite the fact that the Equal Protection Clause of the Constitution has been interpreted to prohibit sex discrimination, and many statutes also prohibit sex discrimination. These problems include pay inequity, violence against women, employers' failures to accommodate pregnancy, and the general lack of public support for childrearing, which negatively affects working mothers. The movement is also concerned with women's underrepresentation in positions of political and economic power. ERA proponents argue that putting sex equality into the text of our Constitution, in the form of the ERA, would have a positive impact on all these fronts.[29]

Justice Ginsburg has also spoken of the symbolic value of ratifying the ERA—as well as the ability of the ERA to provide more lasting guarantees than statutory protections or even Supreme Court precedent interpreting other parts of the Constitution. When asked in a 2014 interview what amendment she would most like to add to the Constitution, she answered:

> If I could choose an amendment to add to this Constitution, it would be the Equal Rights Amendment . . . . It means that women are people equal in stature before the law. That's a fundamental constitutional principle. I think we have achieved that through legislation, but legislation could be repealed, it can be altered. I mentioned Title VII of the Civil Rights Act, and the first one was the Equal Pay Act. But that principle belongs in our Constitution and is in every constitution written since the Second World War. So I would like my granddaughters, when they pick up the Constitution, to see that that notion, that women and men are persons of equal stature, I'd like them to see that that is a basic principle of our society.[30]

In a hearing before the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties (the "Subcommittee on the Constitution"), one of the witnesses, scholar and

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[25] *Virginia*, 518 U.S. at 532.

[26] *Id.* at 533.

[27] Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. Times (Oct. 5, 1997).

[28] *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 Cal. L. Rev. 1323, 1333–34 (2006) (collecting similar statements).

[29] Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 Yale J. L. & Feminism 391, 398 (2017).

[30] *Id.* at 397 (quoting *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C–SPAN (Apr. 17, 2014)).

practitioner Kathleen M. Sullivan, also spoke about the symbolic nature of ratifying the ERA:

> Given the vital role the U.S. Constitution has played in inspiring and informing the written constitutions of other nations, it is a national embarrassment that the other democratic nations of the world are so far ahead of ours in providing for sex equality in their constitutions . . . . The ratification of the amendment by a 38th State will complete the process and bring our Constitution at last into line with the constitutions of all our peer nations. Congress should facilitate the most expeditious path possible to this long-overdue result.[31]

Ms. Sullivan further explained how the protections offered to women under the Equal Protection Clause are not a substitute for ratification of the ERA:

> [T]he judicial interpretation of the Equal Protection Clause is no substitute for an amendment to the Constitution formally enshrining equality on the basis of sex as one of our enduring and foundational principles. To be sure, the Supreme Court has since the 1970s read into the Fourteenth Amendment's Equal Protection Clause (and its equivalent protections under the Fifth Amendment's Due Process Clause) the interpretation that the States and federal government may not discriminate on the basis of sex without a close fit to an important justification. It was not always thus; before the 1970s, the Supreme Court had upheld against constitutional challenge state laws excluding women from jury service, admission to the bar as lawyers and even employment as bartenders. . . . This Nation should proclaim its fidelity to a principle of sex equality that will endure for the ages to come, and not turn on the vicissitudes of Supreme Court appointments and decision-making.[32]

Some ERA proponents further contend that the ERA could serve as a constitutional foundation to support legislation in areas such as accommodations for pregnant workers, paid parental leave, childcare, and workplace flexibility laws.[33] Because the ERA would empower Congress to enforce its provisions through legislation, it could provide a basis for Congress to engage in affirmative efforts to support gender equality both at home and in the workplace. Additionally, under some theories, the ERA could provide a basis for plaintiffs to challenge laws or policies that have a disparate impact on women,[34] or to support efforts to create gender balance in certain contexts.[35] Additionally, the ERA's prohibition against discrimination "on account of sex" could be interpreted to prohibit discrimination on the basis of sexual orientation or gender identity.

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[31] *The Equal Rights Amendment: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. (Apr. 30, 2019) (written testimony of Kathleen M. Sullivan at 2–3) ("Sullivan Testimony").

[32] *Id.* at 3–4.

[33] Suk, *supra* note 28, at 429–34.

[34] *Id.* at 394 & n.47.

[35] *Id.* at 435–36.

Congress's Authority to Extend the Ratification Deadline

In the course of considering H.J. Res. 638 during the 95th Congress, this Committee thoroughly addressed and affirmed Congress's authority to extend the deadline for ratifying the ERA.[36] To aid its analysis, the Committee reviewed "existing judicial, congressional, and historical precedents" and "consulted a number of constitutional scholars."[37] In addition, the Committee took into account a legal opinion offered by the Office of Legal Counsel (OLC) in the Department of Justice, which was issued in response to a request for the Department's views.[38] Witnesses testifying before the Subcommittee on the Constitution during the current Congress addressed these issues as well. The Committee fully concurs in the treatment of these matters in the 1978 Committee Report and summarizes them here.

> Article V of the Constitution provides in relevant part: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which . . . 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 of three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]"

In a 1921 case, *Dillon* v. *Gloss*, the Supreme Court affirmed that Congress had the authority to set a deadline for ratifying the Eighteenth Amendment (regarding prohibition of alcohol).[39] The Court described the power to set such a deadline as "an incident of [Congress's] power to designate the mode of ratification."[40]

Although the Court in *Dillon* expressed a view that setting a deadline may make sense as a policy matter,[41] it held in a subsequent case, *Coleman* v. *Miller*, that courts have no place creating an implied deadline when Congress has decided not to set one.[42] Rather, the Court determined that the decision to set a ratification deadline rests with Congress alone, based on "the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since submission of the amendment."[43] The Court held that those questions are "*essentially political and not justiciable*" by the courts.[44] In short, Congress "has the final determination of the question whether by lapse of time its proposal of [an] amendment ha[s] lost its vitality prior to the required ratifications."[45]

Based on this case law and the plain text of Article V, Ms. Sullivan explained in her testimony:

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[36] *See* 1978 Committee Report at 4–12.
[37] *Id.* at 5.
[38] *Id.* That opinion ("1977 OLC Opinion") has not been independently published but is available at pp. 7–27 in *Equal Rights Amendment Extension: Hearings Before the Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 95th Cong. (1977 and 1978) ("H.J. Res. 638 Hearings").
[39] 256 U.S. 368 (1921).
[40] *Id.* at 376.
[41] *See id.* at 375.
[42] 307 U.S. 433 (1939).
[43] *Id.* at 454.
[44] *Id.* (emphasis added).
[45] *Id.* at 456.

> Congress indisputably has the power to clear away any deadline that might be perceived as standing in the way of ratification of the ERA by the next and thirty-eighth State. The 1972 or 1979 Congress has no constitutional authority to bind later Congresses to their decisions that the deadline for ratification would elapse in 1979 or 1982. . . .
>
> To see why this is so, consider first the text of Article V . . . Article V places no time limits on the States' ratification process. Nothing in Article V says that ratification must be synchronous, contemporaneous, or bounded within any particular time frame. To the contrary, Article V says simply that "an amendment is valid 'when ratified.' There is no further step." [46]

Under *Coleman*, Congress arguably has its own independent constitutional obligation to assess the reasonableness of any time limit it sets even if that question is not justiciable in any court.[47] In making this assessment, the Committee notes that other amendments such as the Twenty-Seventh Amendment have been adopted with no time limit. Unlike the Eighteenth Amendment at issue in *Dillon*, which related to the particular and narrow social policy of prohibition, the ERA stands for a broad and fundamental principle: namely, government institutions may not discriminate on the basis of sex. The Committee finds no less need to affirm that principle today than in 1972 or 1978—and it finds no reason to believe that such a principle will lose its vitality in the years to come.[48]

Sufficiency of a Simple Majority Vote

Additionally, the 1978 Committee Report explained why Congress can change its ratification deadline for the ERA by a simple majority vote in both Houses rather than requiring two-thirds supermajorities. As the Report noted, "[t]he Constitution is quite explicit about those few instances in which the extraordinary procedure of supermajority vote is required." [49] One such instance, of course, is Article V—which requires two-thirds votes in both Houses to propose a constitutional amendment. But nothing in Article V states that provisions relating to the "mode of ratification" for an amendment—i.e., any procedural mechanisms that Congress may adopt for the ratification process—must be passed by two-thirds supermajorities as well.

Critically, the 1978 Committee Report further noted that the ERA's original ratification deadline was not in the text of the proposed amendment itself. Rather, the seven-year deadline was in the "proposing clause" of the ERA, meaning it was contained in the introductory language in H.J. Res. 208, which proposed the amendment.[50] The Committee noted that this feature distinguishes the

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[46] Sullivan Testimony at 7 (quoting Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 796, 398 (1983) (alterations omitted)).

[47] *See Coleman*, 307 U.S. at 452–54; 1978 Committee Report at 10–11.

[48] *Cf.* 1978 Committee Report at 11 ("At most, we need only examine the current political, legal, and economic situation and determine whether the amendment is still vital, whether the need for the amendment still exists and whether it still represents an appropriate solution to the problems it was originally designed to solve. Nothing the committee or subcommittee heard in its hearings and debates indicated other than an affirmative response to those questions.").

[49] *Id.* at 6.

[50] *See id.* at 7; H.J. Res. 208, 92d Cong. (1972).

ERA from the deadline at issue in *Dillon*, which was written into the text of the Eighteenth Amendment itself.[51] As OLC explained in its opinion, a subsequent Congress could "act to extend the seven-year limitation period placed by the 92d Congress in the proposing clause of the ERA. The 92d Congress had the power to make the seven-year limit a part of the substantive amendment by placing the limit within the text of the ERA itself. The fact remains that it did not do so."[52]

Ultimately, H.J. Res. 638, which extended the ratification deadline, passed by simple majorities in the House and Senate.[53] As *Jefferson's Manual* notes, the House voted to table a privileged resolution asserting that a two-thirds votes was required, and thereby "determined . . . that only a majority vote was required on such a measure."[54] Given this established precedent, it is clear that only a simple majority is required to effectuate H.J. Res. 79.

President's Signature Not Required

Although President Carter performed the ceremonial act of signing H.J. Res. 638 after its passage in Congress, no such signature by the President is required. As OLC's 1977 opinion stated, such a resolution "need not be presented to the President for his approval. It has long been established that the President has no role to play in the [constitutional] amendment process."[55] President Carter himself noted that his signature was not necessary and was done instead for its symbolic effect. In his signing statement, he remarked,

> As is well known, *the Constitution does not require that the President sign a resolution concerning an amendment to the Constitution of the United States*. But I particularly wanted to add my signature to those of the Speaker of the House and to the President pro tem of the Senate, to again demonstrate as strongly as I possibly can my full support for the ratification of the Equal Rights Amendment.[56]

The Committee likewise confirmed that "the President has no role in originally proposing the mode of ratification" for a constitutional amendment, and that "[i]t is no more necessary for the President to be involved subsequently."[57]

Effect of Purported Rescissions by the States

The 1978 Committee Report also addressed in detail whether States' subsequent efforts to rescind their ratifications of the ERA

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[51] 1978 Committee Report at 7; *see* U.S. Const. amend. XVIII § 3. The 1978 Committee Report explains some of the history regarding ratification deadlines, noting that the Eighteenth Amendment was the first to contain such a provision, evidently because some Members of Congress were concerned about a large number of unratified amendments that remained pending. 1978 Committee Report at 7–8. Afterward, seven-year deadlines appear to have been added to proposed constitutional amendments "as a matter of custom and because the 7-year limit in the 18th Amendment had received the stamp of approval of the Supreme Court in *Dillon* v. *Gloss*." *Id*. at 8. Starting with the Twenty-Third Amendment, Congress moved these deadlines to the "proposing clause" "to avoid 'cluttering up' the Constitution with language that had no bearing on the substance of the amendment itself." *Id*. at 8–9.

[52] H.J. Res. 638 Hearings at 13 (1977 OLC Opinion); *see also* 1978 Report at 9.

[53] *See* 2018 CRS Report at 15.

[54] *Jefferson's Manual* § 192, at 83–84.

[55] H.J. Res. 638 Hearings at 14 (1977 OLC Opinion).

[56] "Equal Rights Amendment: Remarks on Signing H.J. Res. 638" (Oct. 20, 1978), in *Public Papers of the Presidents of the United States: Jimmy Carter, 1978*, at 1800–01 (1979).

[57] 1978 Committee Report at 16.

should be given any legal effect. As noted previously, five States have enacted measures purporting to rescind their ratifications. In *Coleman*, the Supreme Court determined that "the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress."[58] It follows as a matter of logic that any question about the efficacy of a State's ratification in light of a *subsequent* effort to rescind that ratification is equally within Congress's ultimate authority.

The 1978 Committee Report noted that the constitutional scholars who testified before the Committee "generally agreed that the decision as to whether rescissions are to be counted is a decision solely for the Congress sitting at the time the 38th State has ratified [the ERA], as part of [Congress's] decision as to whether an amendment has been validly ratified."[59] The Committee agreed with these scholars that "the decision most properly belongs to a subsequent Congress to determine the efficacy of any attempted withdrawals of ratifications" of the ERA.[60] The Committee during the present Congress concurs with that view. As such, the validity of any purported rescissions should be determined by the Congress sitting at the time in which the issue is squarely presented—that is, once a 38th State has ratified the ERA, the Congress then in session should determine whether prior purported rescissions are valid.

The Minority's and the Justice Department's Procedural Objections Are Unavailing

During the hearing before the Subcommittee on the Constitution, the Minority's witness, Professor Elizabeth Price Foley, offered several arguments against Congress's authority to remove the ERA's ratification deadline. First, relying on the Supreme Court's decision in *Dillon*, Professor Foley contended that "because Congress's power to specify a ratification deadline emanates from its power under Article V, not Article I, any alteration of a ratification deadline must occur via Article V's supermajoritarian process (two-thirds of both houses of Congress)."[61] Although Congress's authority to set a deadline is indisputably an "incident of its power to designate the mode of ratification" under Article V,[62] it does not follow that Congress is bound by Article V's supermajority rule for every step it takes as part of the ratification process. The text of Article V only requires a two-thirds vote to "*propose* Amendments to this Constitution"—not to take all other steps incidental to that process. It can scarcely be disputed, for example, that a two-thirds vote is not required for either House of Congress to take various procedural measures before formally proposing an amendment, or to amend the draft text before the amendment is voted upon.[63] Furthermore, as explained above, the House's determination in 1978

[58] 307 U.S. at 450.
[59] 1978 Committee Report at 13.
[60] *Id.*
[61] *Equal Rights Amendment: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. (Apr. 30, 2019) (written testimony of Professor Elizabeth Price Foley at 5) ("Foley Testimony").
[62] *Dillon*, 256 U.S. at 376.
[63] *See Jefferson's Manual* § 192, at 83 ("The requirement of the two-thirds vote applies to the vote on final passage and not to amendments or prior stages" (internal citations omitted)).

that only a majority vote was needed to extend the ERA's deadline is now itself an established precedent.

Second, Professor Foley contended that the Supreme Court in *Dillon* declined to adopt a "substance/procedure dichotomy, whereby Congress can alter a specified ratification deadline, so long as the original ratification deadline was contained in the preamble rather than the text of the proposed amendment itself."[64] But *Dillon* concerned a situation in which the deadline was written into the text of the amendment itself. And although *Dillon* suggested that Article V carries "a fair implication" that ratification must occur in a "sufficiently contemporaneous" manner,[65] the Court in *Coleman* made clear that Congress alone has the authority to set any ratification deadlines, or to set none at all.[66]

Professor Foley also pointed to a federal district court's decision in *Idaho* v. *Freeman*.[67] In that case, decided in 1981, the Idaho legislature sought a declaratory judgment that its ratification of the ERA was not valid because Congress had exceeded its authority when it extended the ERA's ratification deadline, and because the State subsequently adopted a measure purporting to rescind its ratification. The court ruled for Idaho on both points. Once the 1982 ratification deadline for the ERA expired, however, the Supreme Court vacated the court's decision as moot.[68] Thus, as Professor Foley acknowledged, *Freeman* "has no precedential value."[69]

In any event, the Committee finds *Freeman*'s reasoning unpersuasive. As an initial matter, the district court ignored *Coleman*'s clear holding that both issues in the case—Congress's authority with respect to ratification deadlines and its treatment of rescissions of ratifications—are political questions not amenable to resolution by the courts.[70] Furthermore, the court's conclusion that extensions are impermissible flowed more from its own policy view against potentially disrupting the States' expectations than from any analysis of the text of Article V or precedent. In the course of holding in *Dillon* that Congress may permissibly set ratification deadlines, the Supreme Court had observed that a deadline can be fixed "so that all may know what it is and speculation on what is

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[64] Foley Testimony at 5.

[65] *Dillon*, 256 U.S. at 375.

[66] *Coleman*, 307 U.S. at 454.

[67] 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom. Nat'l Org. for Women* v. *Idaho*, 459 U.S. 809 (1982).

[68] *Nat'l Org. for Women*, 459 U.S. 809.

[69] Foley Testimony at 6.

[70] The court in *Freeman* relied upon the observation by a three-judge district court in *Dyer* v. *Blair*, 390 F. Supp. 1291, 1299 (N.D. Ill. 1975), that "a majority of the Court [in *Coleman*] refused to accept" the position that "Congress has sole and complete power *over the entire amending process*" (emphasis added); *see Freeman*, 529 F. Supp. at 1125. It is true that four Justices concurred separately in *Coleman* to state this categorical view of Congress's "exclusive power to control submission of constitutional amendments." *Coleman*, 307 U.S. at 457 (Black, J., concurring) (joined by Justices Roberts, Frankfurter, and Douglas); *see also id.* at 458 ("To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree."). But Chief Justice Hughes's controlling opinion for the Court made clear that—at the least—"the question, what is a reasonable time [for ratification], lies within the congressional province." *Id.* at 454. Additionally, Chief Justice Hughes's controlling opinion stated that "the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments." *Id.* at 450; *see also id.* at 458–59 (Black, J., concurring) (noting that the controlling opinion "declares that Congress has the exclusive power to decide the 'political questions' of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position."

a reasonable time may be avoided."[71] From that, the court in *Freeman* took the view that setting a ratification deadline "is intended to infuse certainty into an area which is inherently vague"—and that, in accordance with that purpose, a congressional deadline "once made and proposed to the states cannot be altered."[72] But the fact that Congress may choose to set a particular time frame for ratification—and that there may be good reason to do so—simply does not dictate the *legal* conclusion that it "cannot" alter that deadline later.

Professor Foley likewise couched her views in policy terms, arguing that an extension of a ratification deadline "upsets settled expectations of the States" and that Congress should not be entitled to "rewrite th[e] rules" simply because it failed to obtain its desired result.[73] When the Committee acted to extend the ERA's ratification deadline in 1978, however, it noted there was no evidence that any of the 35 States that had by then ratified the ERA had done so in reliance on the notion that the amendment would be deemed void if it was not ratified within seven years.[74] In addition, the States that more recently ratified the ERA plainly did so in reliance on the notion that Congress *can* extend the ratification deadline. At bottom, although the decision to change a ratification deadline set by a prior Congress should not be taken lightly, the present Congress must be free to make its own judgment about whether a proposed amendment has "lost its vitality through lapse of time."[75] The Committee concludes that the ERA remains vital today.

The Committee is also unpersuaded by a recent OLC opinion that effectively reversed the Department of Justice's prior position and asserted that Congress cannot now remove the ERA's ratification deadline.[76] Despite having concluded in 1977 that Congress possessed the authority to extend the ERA's ratification deadline, the Department now claims that Article V of the Constitution "does not authorize Congress to adjust the terms of an amendment previously proposed to the States."[77] The Department has offered no support for this conclusion from the text of Article V. To the contrary, as the Department acknowledged in its prior opinion, "[t]here is nothing in the text of Art. V which would bar subsequent Congresses from taking action with respect to the details of the ratification process as distinguished from the substantive amendment itself while the amendment is being considered by the States."[78]

Lacking any arguments from the text of Article V, the Department's new opinion instead poses a series of questions that could purportedly be presented if Congress has the power to extend the deadline. Those questions, however, are strawmen. For example, the Department wonders whether Congress could also modify "a substantive provision within a pending amendment."[79] The answer is clearly no: as the Department previously made clear, there is an

[71] 256 U.S. at 376.
[72] 529 F. Supp. at 1152.
[73] Foley Testimony at 6.
[74] *See* 1978 Committee Report at 16; H.J. Res. 638 Hearings at 26 (1977 OLC Opinion).
[75] *Coleman*, 307 U.S. at 451.
[76] *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C._(slip opinion) (Jan. 6, 2020) ("2020 OLC Opinion").
[77] 2020 OLC Opinion at 28.
[78] H.J. Res. 638 Hearings at 13 (1977 OLC Opinion).
[79] 2020 OLC Opinion at 28.

obvious distinction between changing the procedural terms governing ratification of a proposed amendment and changing the terms of an amendment itself. Indeed, as the Department acknowledges, its prior 1977 opinion proposed answers to each of the questions offered in its new opinion.[80]

Finally, the Committee is unpersuaded by the Department's sweeping new suggestion that Congress can play no role in the ratification process—including determining whether a sufficient number of States has ratified an amendment—once it has proposed an amendment to the States.[81] The controlling opinion of the Supreme Court in *Coleman* plainly contemplates such a role.[82] Furthermore, as the Court noted in *Coleman*, Congress has previously acted as the arbiter for determining whether ratification of a constitutional amendment was valid, including with respect to the Fourteenth Amendment.[83] The Department's suggestion is also particularly troubling in light of its apparent view that the *Executive Branch* has the authority to refuse to certify the adoption of a constitutional amendment based on its own views about the amendment's validity. That view finds no support in Article V, which assigns *no role whatsoever* to the Executive Branch.

The Minority's Policy Objections to the ERA Are Unavailing

During the hearing of the Subcommittee on the Constitution and the markup by the Committee, Subcommittee Ranking Member Mike Johnson (R–LA) also raised policy objections to the ERA itself. First among them, he contended that the ERA would lead courts to strike down any restrictions on abortion, including restrictions on State funding for abortion.[84] The Supreme Court, however, has long rooted its jurisprudence on abortion in the constitutional right to privacy—which exists independently of any legal claims regarding gender equality.[85] The ERA stands for the far broader and more basic principle of equality of the sexes. Nevertheless, Chairman Nadler also expressed full agreement with the proposition that "the right to full equality includes the right of each woman and man to make their own decisions about their reproductive choices."[86]

Subcommittee Ranking Member Johnson also expressed a concern that the ERA would result in the "required sex integration of single-sex organizations" and the elimination of institutions such as fraternities and sororities.[87] The Supreme Court's jurisprudence regarding gender equality, however, has never suggested that single-sex institutions are categorically impermissible. In *United States* v. *Virginia*, the Court concluded that Virginia's all-male

[80] 2020 OLC Opinion at 28–29.

[81] *See id.* at 29–33.

[82] *Coleman*, 307 U.S. at 454 (if no deadline has been set for ratification, the question whether an amendment has been ratified within a reasonable period of time should "be regarded as an open one for the consideration of Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment").

[83] *Id.* at 448–50; *see also* 1978 Committee Report at 13–14.

[84] Tr. at 8–10, *The Equal Rights Amendment: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. (2019) (unofficial transcript) ("2019 Hearing Transcript").

[85] *See generally Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992); *Roe* v. *Wade*, 410 U.S. 113 (1973).

[86] Tr. at 25–26, *Markup of H.J. Res. 79, Removing the Deadline for the Ratification of the Equal Rights Amendment*, 116th Cong. (Nov. 13, 2019) (unofficial transcript).

[87] 2019 Hearing Transcript at 11–12.

military academy had to admit women only after concluding that Virginia did not offer any qualitatively similar opportunities for women and that the State had indeed systematically excluded women from its educational institutions.[88] The Court also acknowledged that "[s]ingle-sex education affords pedagogical benefits to at least some students" and that "diversity among public educational institutions can serve the public good."[89] Critically, the Court further made clear that "[s]ex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people."[90] The Court likely would interpret the ERA with similar considerations in mind.

Hearing

For the purposes of section 103(i) of H. Res. 6 for the 116th Congress, the Committee held the following hearing to consider H.J. Res. 79: "Hearing on the Equal Rights Amendment," Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, April 30, 2019. The Committee heard testimony from: the Honorable Carolyn B. Maloney, Representative from the 12th Congressional District; the Honorable Jackie Speier, Representative from California's 14th Congressional District; Kathleen M. Sullivan, a partner at the law firm Quinn Emanuel Urquhart & Sullivan, LLP; Senator Pat Spearman, Co-Majority Whip and Nevada State Senator; Elizabeth Price Foley, Professor of Law at Florida International University College of Law; and Patricia Arquette, an actor and advocate.

Committee Consideration

On November 13, 2019, the Committee met in open session and ordered the resolution, H.J. Res. 79, favorably reported as an amendment in the nature of a substitute, by a rollcall vote of 21 to 11, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.J. Res. 79:

1. Motion to report H.J. Res. 79, as amended, favorably, was agreed to by a rollcall vote of 21 to 11.

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[88] *Virginia*, 518 U.S. at 536–40, 547–49.
[89] *Id.* at 535.
[90] *Id.* at 533–34 (internal citations, quotations, and brackets omitted).

Roll Call No.

Date: 11/13/19

COMMITTEE ON THE JUDICIARY

House of Representatives
116th Congress

Final Passage on H.J. Res. 79

☐ PASSED

☐ FAILED

	AYES	NOS	PRES.	
Jerrold Nadler (NY-10)	✓			
Zoe Lofgren (CA-19)	✓			
Sheila Jackson Lee (TX-18)	✓			
Steve Cohen (TN-09)	✓			
Hank Johnson (GA-04)	✓			
Ted Deutch (FL-02)				
Karen Bass (CA-37)	✓			
Cedric Richmond (LA-02)	✓			
Hakeem Jeffries (NY-08)	✓			
David Cicilline (RI-01)	✓			
Eric Swalwell (CA-15)				
Ted Lieu (CA-33)	✓			
Jamie Raskin (MD-08)	✓			
Pramila Jayapal (WA-07)	✓			
Val Demings (FL-10)				
Lou Correa (CA-46)	✓			
Mary Gay Scanlon (PA-05)	✓			
Sylvia Garcia (TX-29)	✓			
Joseph Neguse (CO-02)	✓			
Lucy McBath (GA-06)	✓			
Greg Stanton (AZ-09)	✓			
Madeleine Dean (PA-04)	✓			
Debbie Mucarsel-Powell (FL-26)	✓			
Veronica Escobar (TX-16)	✓			
	AYES	NOS	PRES	
Doug Collins (GA-27)		✓		
James F. Sensenbrenner (WI-05)				
Steve Chabot (OH-01)				
Louie Gohmert (TX-01)		✓		
Jim Jordan (OH-04)				
Ken Buck (CO-04)				
John Ratcliffe (TX-04)				
Martha Roby (AL-02)		✓		
Matt Gaetz (FL-01)				
Mike Johnson (LA-04)		✓		
Andy Biggs (AZ-05)		✓		
Tom McClintock (CA-04)		✓		
Debbie Lesko (AZ-08)		✓		
Guy Reschenthaler (PA-14)		✓		
Ben Cline (VA-06)		✓		
Kelly Armstrong (ND-AL)		✓		
Greg Steube (FL-17)		✓		
	AYES	NOS	PRES.	
TOTAL	21	11		

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.J. Res. 79, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 19, 2019.

Hon. JERROLD NADLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 79, a joint resolution removing the deadline for the ratification of the equal rights amendment.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.J. Res. 79, a joint resolution removing the deadline for the ratification of the equal rights amendment

As ordered reported by the House Committee on the Judiciary on November 13, 2019

By Fiscal Year, Millions of Dollars	2020	2020-2024	2020-2029
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	0	0

		Mandate Effects	
Statutory pay-as-you-go procedures apply?	No		
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

In 1972, the 92nd Congress passed H.J. Res. 208, which proposed an amendment to the Constitution providing that equality of rights under the law shall not be denied or abridged by the federal government or by states on the basis of sex (known as the equal rights amendment). That resolution contained a seven-year deadline—later extended to 1982—by which three-quarters of the states could vote to ratify the amendment.

H.J. Res. 79 would permanently reopen the ratification process for the amendment by eliminating the deadline. By itself, CBO estimates that the resolution would have no effect on the federal budget. If the states approve the proposed amendment, it could potentially affect the federal budget; however, CBO has not analyzed those effects.

The CBO staff contact for this estimate is Jon Sperl. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.J. Res. 79 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalogue of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.J. Res. 79 would remove the deadline for ratification of the Equal Rights Amendment to the Constitution, as revised by 95th Congress in H.J. Res. 638.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.J. Res. 79 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

H.J. Res. 79 contains only one section. The resolution provides that the Senate and House of Representatives resolve that notwithstanding any time limit for ratification contained in the preamble to the House joint resolution containing the Equal Rights Amendment that Congress passed in 1972, the ERA "shall be valid to all intents and purposes as part of the United States Constitution" when the requisite three-fourths of State legislatures have ratified the Amendment.

DISSENTING VIEWS

The so-called "Equal Rights Amendment" ("ERA") failed to be ratified by three-quarters of the States under the deadline set by Congress, and explicitly relied upon by the States during the state ratification debates. That deadline expired in 1979, and Congress lacks any power to retroactively revive a failed constitutional amendment.

In 1982 the U.S. Supreme Court recognized the demise of the ERA when it declared moot a district court ruling that the purported 1978 deadline extension was unconstitutional. In 1983, the Democratic leadership of the U.S. House of Representatives, acting on the same understanding that the 1972 ERA was dead, started the entire process of ERA approval all over again. But that new ERA failed to achieve the required two-thirds margin on the floor of the House on November 15, 1983. Even current Supreme Court Justice Ruth Bader Ginsburg, a supporter of the ERA since the beginning, said just a few months ago that "I hope someday . . . we'll be starting over again [on the ERA] collecting the necessary states to ratify it." [1]

But now, in defiance of historical reality and the clear acceptance of the situation by all the relevant participants in the original debate, the Democrats are bringing forward a resolution that denies the obvious. Now that Democrats control the Virginia state legislature, the proponents of this joint resolution want to convince their base that if passed by both houses of Congress—by simple majority votes—and the state of Virginia alone passes a resolution to allegedly "ratify" the 1972 ERA, it would become part of the Constitution. But Congress doesn't have the constitutional authority to retroactively revive a failed constitutional amendment.

The U.S. Supreme Court and the past Democratic leadership of the U.S. House of Representatives recognized that the 1972 ERA was irrevocably dead. But the current leadership on this committee wants to keep this falsehood alive for purely political purposes.

Supporters of the language of the 1972 ERA have only one constitutional option, and that is to start the whole process over again and make their case to current voters nationwide. They would have to obtain the required two-thirds vote in each house of Congress, and then win ratification individually from 38 states. They are likely to face considerable difficulty if they insist on the language of the 1972 ERA resolution, however, because it's now well understood that the language of the 1972 ERA would be used to prevent state voters from enacting any limits on abortion, up to the moment of birth. Just in the last few years, an increasing number of leading pro-abortion advocates have openly argued that the lan-

[1] Available at https://abovethelaw.com/2019/09/ruth-bader-ginsburg-on-the-one-thing-thats-missing-from-the-constitution/.

guage of the 1972 ERA would require unlimited abortions, with no restrictions whatsoever, nationwide, regardless of the view of voters. To take just a single example, in a national alert sent out on March 13, 2019, NARAL Pro-Choice America stated flatly "the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws . . .".[2]

The bipartisan Hyde Amendment prohibits the use of federal funds for abortions except in cases of rape, incest, or when the life of the mother is endangered. The Supreme Court upheld the Hyde Amendment's abortion funding restrictions as constitutional in *Harris* v. *McRae*. But the People's right to protect the unborn would be eliminated under the ERA.

Back in the early 1980s, Representative Sensenbrenner requested that Congress' independent research arm, the Congressional Research Service, provide the committee with its own evaluation of the question. As he said at the 1983 markup of the ERA: "The executive summary of the CRS report says that under strict scrutiny the pregnancy classification [in the Hyde Amendment] would probably be regarded to be a sex classification under the ERA," meaning that under the ERA, restrictions on abortion would be struck down.

Today, with the benefit of more recent history, we can see that the concerns of Representative Sensenbrenner in 1983 were justified. Five years later, in 1988, the Colorado Supreme Court held that Colorado's ERA, in its state constitution, prohibits discrimination on the basis of pregnancy. Ten years later, in 1998, the Supreme Court of New Mexico took the next step and relied on New Mexico's state-level ERA to strike down a state regulation restricting state funding of abortions for Medicaid-eligible women. In *New Mexico Right to Choose/NARAL* v. *Johnson*, the unanimous court found as follows:

> Neither the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this Court from affording greater protection of the rights of Medicaid-eligible women under our state constitution in this instance . . . Article II, Section 18 of the New Mexico Constitution guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person" . . . We construe the intent of this amendment as providing something beyond that already afforded by the general language of the Equal Protection Clause . . .

Of course women should be protected from discrimination based solely on their sex, as is the law today. The Supreme Court has significantly ratcheted up the standard the government must meet in order to discriminate based on sex since the 1980s.

For example, in *U.S.* v. *Virginia*, the Court stated that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." The Court also stated, "The burden of justification is demanding and it rests entirely on the State." As Justice Rehnquist noted in his concurrence in that case, the Court had in effect made the gov-

[2] Available at https://www.prochoiceamerica.org/campaign/era_yes/.

ernment's burden much more difficult than it had been previously. Justice Scalia, in dissent, pointed out that the standard governing review of the government's actions that discriminate based on sex that had previously been in place was "a standard that lies between the extremes of rational basis review and strict scrutiny. We have denominated this standard 'intermediate scrutiny' and under it have inquired whether the statutory classification is substantially related to an important governmental objective." Yet in *U.S.* v. *Virginia*, Justice Scalia pointed out that the majority in that case had "execute[d] a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for . . . decades," and replaced it with an even higher standard, which is the law today.

The majority opinion in *U.S.* v. *Virginia*, it should be noted, was written by Justice Ruth Bader Ginsburg. In the 1970s, Justice Ginsburg was intimately involved in the preparation of a 1977 report published by the United States Commission on Civil Rights that specifically supported the federal ERA, along with the ramifications of its adoption, which would go far beyond what is required under the Equal Protection Clause. Those ramifications include the elimination of the terms "fraternity and sorority chapters" and the required sex-integration of the Boy Scouts and the Girl Scouts, among many other things most Americans today would object to.[3]

Even worse, at the Constitution Subcommittee hearing on the ERA earlier this year, Ranking Member Mike Johnson asked all the witnesses invited by the Democrats the following question. "Let me ask Ms. [Kathleen Sullivan], Dr. [Pat] Spearman, and Ms. [Patricia] Arquette . . . Some people are arguing in the Supreme Court this term as we all know that the word 'sex' in the federal civil rights laws includes self-professed 'gender identity.' Is it your understanding that the term 'sex' in the ERA includes self-professed 'gender identity'?"

Ms. Sullivan, the top legal expert invited by the Democrats, responded that "I think the proper textual reading of the term 'on account of sex' *does include* discrimination on the basis of sexual orientation or transgender identity." Ranking Member Johnson then asked Dr. Spearman if she agreed with that, and she replied "Yes, I do." And then Ms. Arquette said it would be argued in court, but that she'd like it to include gender identity.[4]

As a result, we know the intent of the ERA's most prominent supporters is to enshrine the infinitely fluid concept of "gender identity" not only into federal statutory law—recall our debate on H.R. 5—but also into the Constitution itself, with H.J. Res. 79. As was amply discussed during the debate on H.R. 5, the result would be to require doctors to perform treatments and surgeries on minors that render them permanently infertile without parental involvement, the requiring of biological men to invade the private spaces of women, and the domination of biological males in female sports. And in so doing, the Equal Rights Amendment would—iron-

[3] Available at https://www2.law.umaryland.edu/marshall/usccr/documents/cr12se9.pdf.
[4] Available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=1814.

ically and tragically—completely erase women's protections under the law.

On January 6, 2020, the Justice Department's Office of Legal Counsel issued an opinion, binding within the entire executive branch, taking note of H.J. Res. 79 and stating the current Congress "may not revise the terms under which two-thirds of both Houses proposed the [1972] ERA Resolution and which thirty-five state legislatures initially ratified it."[5] The National Archives, which certifies the ratification of amendments to the U.S. Constitution, subsequently issued a press release stating "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.' (OLC Opinion, at p. 2.) Accordingly, the OLC opinion goes on to state that 'the ERA's adoption could not be certified under 1 U.S.C. § 106b.' (OLC Opinion, at p. 37.) . . . NARA [the National Archives and Records Administration] defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order."[6]

H.J. Res. 79 is anti-life and patently unconstitutional.

Signed,

DOUG COLLINS,
Ranking Member.

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[5] Available at https://www.justice.gov/olc/file/1232501/download.
[6] Available at https://www.archives.gov/press/press-releases-4.