Questions for the Record

From: Senator Lee

To: Professor Elizabeth Price Foley, Florida International University College of Law

Re: Senate Judiciary Committee Hearing: "The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution" held on February 28, 2023

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1. Article V of the Constitution was designed to require significant and substantial agreement from all parts of this great nation before altering the Constitution. It directs that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution."

- **Do two thirds of both Houses currently "deem it necessary" to propose this amendment?**

No. Congress's role under Article V of the Constitution is to "propose" Amendments by a two-thirds supermajority of both houses or, alternatively, to "call a Convention for proposing Amendments" if two-thirds of the States' legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court's decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline "as an incident to its power to designate the mode of ratification" of the proposed amendment. *Id*. at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA's deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court The court held that Congress could not change its initially-specified ratification date "any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at*

liberty to change it." *Id*. at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA's original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress's Article V power to propose amendments includes the power to propose a "Mode of Ratification," which may include a ratification deadline. *Id*. at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress's Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. In *Dillion v. Gloss*, 256 U.S. 368, 375-76 (1921), the Court indicated that under Article V, ratification by the States needed to be "sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period." Do we now have, or have we ever had, such consensus about the ERA across the nation with two-thirds of the states ratifying the resolution at relatively the same time?

Congress is not required to specify a ratification deadline when it proposes amendments, but as *Dillon* held, it may constitutionally do so. As the *Dillon* Court explained, "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." *Dillon*, 256 U.S. at 376.

Dillon also reasoned that the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id*. at 375. It accordingly held " that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id*.

In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court reaffirmed that Congress may specify a ratification deadline, stating that it may do so "either in the proposed amendment or in the resolution of submission." *Id.* at 452. The Court observed, however, that "it does not follow that, whenever Congress has not exercised that power [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications." *Id.* at 452-53 (emphasis added). Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided "[n]o limitation of time for ratification" in either the text or preamble, and the *Coleman* Court refused to police the "reasonableness" of Kansas's ratification thirteen years after the amendment's proposal by Congress. *Coleman*, in other words, disagreed with *Dillon*'s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State's ratification of a constitutional amendment on grounds that it is untimely.

Nonetheless, under the reasoning of both *Dillon* and *Coleman*, it is clear that Congress may choose to specify a ratification deadline that will be judicially enforceable.

3. If Congress were to ignore the requirements of Article V and the interpretation of those requirements as handed down by the Court, how would that impact the integrity of our Constitution and the amendment ratification process?

When Congress chooses to specify a ratification deadline (as it did with the ERA), it reflects a policy choice of ensuring that ratification is not *ad infinitum* and thus unambiguously reflects a broad societal consensus. An amendment lacking a ratification deadline that is consequently ratified is over a period of hundreds (or even theoretically thousands) of years—as is the case, for example, with the Twenty-Seventh Amendment—does not reflect broad societal consensus in the same palpable way as an amendment ratified within a seven-year period. The "society" ratifying an amendment in 1791 is not the same "society" ratifying it in 1991 or 2091. The longer the time for ratification, in other words, the less likely the amendment reflects the sort of broad societal consensus that lends legitimacy in the eyes of the people. If the amendment is controversial, in particular, a long period of ratification is potentially destabilizing.

If a later Congress may simply "recognize" or "proclaim" that a State's ratification occurring *after* the deadline is valid, this would allow Congress to alter, for any reason, any aspect of the initially-selected "Mode of Ratification," including not only the ratification deadline but also the choice of ratification by State legislatures versus State conventions.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a "Mode of Ratification" as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the "Mode of Ratification' contained in the proposal received from Congress.

Allowing future Congresses to alter the mode of ratification after an amendment has been proposed for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a "perpetual modifier" of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to "propose" constitutional amendments (including their "Mode of Ratification") by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress's power over amendments has ended.

4. If the 1974 ERA resolution were adopted into the Constitution, what standard of review would the Court likely apply to cases under this amendment?

- **What would be the impact on women, programs designed for women, privacy protections for women, and opportunities reserved for women, if the Court were to apply a strict scrutiny or even a more absolutist standard of review?**

If the ERA is ratified, the Constitution would have an *express* provision stating, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This shift from the generic "equal protection" and "liberty" guarantees of the Fourteenth Amendment to a specific, express "equality of rights . . . on account of sex" guarantee would undoubtedly force courts to apply "strict scrutiny" to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, "strict in theory, fatal in fact," meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is "necessary" to achieve a "compelling" government interest and even more difficult, that the law is "narrowly tailored" to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

Specifically, a "compelling" government interest has jurisprudentially been limited to things such as national security or public health. In the instance of military draft, for example, even assuming arguendo that not drafting females would serve the interest of "national security" (which is highly doubtful in itself), excluding females entirely from the draft would most certainly not be "narrowly tailored" to serve that interest, as women could be drafted and serve in certain roles.

Similarly, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any "compelling" government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-based segregation of bathrooms would assert that "privacy" of each sex should be recognized as a

compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex's separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

Moreover, because the ERA would expressly enshrine that "equality of rights under the law shall not be denied or abridged . . . on account of sex," this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed above), but strict scrutiny for "liberty"-based challenges to abortion laws.

Specifically, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a "fundamental right" protected by the word "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that "fundamental rights" under that Clause are limited to rights that are "deeply rooted in [our' history and tradition" and "essential to our Nation's scheme of ordered liberty." *Id*. at 2246. If an asserted liberty is "deeply rooted" in our nation's history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id*. at 2246, 2283. The *Dobbs* Court concluded that "a right to abortion is not deeply rooted in our Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973." *Id*. at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion "like other health and welfare laws, [are] entitled to a strong presumption of validity" and subject only to rational basis review. *Id*. at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word "liberty" in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee, thus enshrining a textual, *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual

equality would undoubtedly elevate all laws implicating "sexual equality," including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), *see Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.

Questions for Elizabeth Price Foley
Hearing Entitled, *"The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution"*
Submitted March 7, 2023

QUESTIONS FROM SENATOR COTTON

1. **Article V of the Constitution requires a supermajority of Congress, rather than a simple majority, to propose a constitutional amendment to the states. Can Congress go back and change the terms of a proposed amendment with less than a supermajority?**

No. Congress's role under Article V of the Constitution is to "propose" Amendments by a two-thirds supermajority of both houses or, alternatively, to "call a Convention for proposing Amendments" if two-thirds of the States' legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court's decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline "as an incident to its power to designate the mode of ratification" of the proposed amendment. *Id*. at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA's deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court The court held that Congress could not change its initially-specified ratification date "any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it*." *Id*. at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA's original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress's Article V power to propose amendments includes the power to propose a "Mode of Ratification," which may include a ratification deadline. *Id*. at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress's Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. If Congress includes terms in a proposed amendment, such as a ratification deadline, are states entitled to rely on those terms when deciding whether to ratify the amendment?

Yes. History shows that States do rely on the terms specified by Congress in its resolution of proposal. With the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth (proposed in 1917) has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline in the proposal's preamble. "[S]tates have always followed Congress's direction without question—even the one time Congress called for ratification by [State] convention" in the Twenty-First Amendment (repeal of prohibition). *Ferriero*, 525 F. Supp.3d at 58. Moreover, there is "little doubt that the states were aware of the ERA's deadline," which was a political "compromise that helped Congress successfully proposed the ERA where previous attempts to pass a proposal had failed." *Id*. at 60.

Imagine for example that Congress proposes an amendment, with its preamble specifying a seven-year ratification deadline and ratification by State legislatures. Six years later, after over thirty State legislatures had ratified the proposed amendment, a Congress hostile to the proposed amendment enacts a joint resolution (by simple majoritarian process) purporting to "switch" the mode of ratification to state conventions. The seven-year ratification deadline then expires without reaching the three-fourths threshold. Seventy years later, a group rediscovers the amendment, thinking it useful for a purpose never contemplated when it was originally proposed. The group convinces Congress to pass a joint resolution (by simple majoritarian process) declaring that the amendment may once again be ratified only by State legislatures, not State conventions. Several State legislatures thereafter ratify the amendment, and the total number of ratifications—both via State legislatures and conventions—crosses the three-fourths threshold, seventy-five years after the amendment was initially proposed and sixty-eight years after the expiration of the seven-year ratification deadline. Proponents of the amendment then convince Congress to pass yet another joint resolution, declaring the amendment "ratified" despite the seven-year ratification deadline. Under the logic of current ERA proponents, the amendment is ratified because Congress has said so, and courts would lack power to adjudicate the propriety of any of the significant procedural alterations and irregularities that took place.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a "Mode of Ratification" as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the "Mode of

Ratification' contained in the proposal received from Congress. If those pushing the "three-State strategy" and S.J. Res. 4 are correct, Congress can tell States initially that ratification must occur according to one set of rules contained in the proposal, only to be told in another year (or decade or century) that those rules no longer apply. Allowing future Congresses to alter the mode of ratification *after an amendment has been proposed* for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a "perpetual modifier" of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to "propose" constitutional amendments (including their "Mode of Ratification") by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress's power over amendments has ended.

S.J. Res. 4 thus arrogates to Congress vast power to undermine Article V, due process, and States' ability to trust Congress as a good faith, stable partner in the amendment process.

3. As you mention in your testimony, Alexander Hamilton wrote in Federalist No. 85 that the states must be "united in the desire of a particular amendment" for it to be ratified and joined to the Constitution. What did he mean by that?

Article V requires that become part of the Constitution, any amendment proposed by Congress must be ratified by three-quarters of the States, a significant super-majority. The three-fourths hurdle thus ensures that States are, indeed, "united in the desire for a particular amendment," and thus, the proposed amendment is not controversial or politically divisive. If three-quarters of the States agree on a proposed amendment, there is comfort that the amendment is desired by a wide cross-section of society. After all, a constitutional amendment is not ordinary legislation; once ratified, an amendment becomes part of the fabric of our social charter, the Constitution. It is essential, therefore, that any constitutional amendment be the product of Article V's super-majoritarian process. Any attempt to bypass these super-majoritarian processes is dangerous to the stability of our social charter and the broad social consensus it inherently represents.

4. Why is it important that three-quarters of the states actually support ratification of a constitutional amendment at the same time?

Congress is not required to specify a ratification deadline when it proposes amendments, but as *Dillon* held, it may constitutionally do so. As the *Dillon* Court explained, "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." *Dillon*, 256 U.S. at 376.

Dillon also reasoned that the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id*. at 375. It accordingly held " that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id*.

In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court reaffirmed that Congress may specify a ratification deadline, stating that it may do so "either in the proposed amendment or in the resolution of submission." *Id*. at 452. The Court observed, however, that "it does not follow that, whenever Congress has not exercised that power [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications." *Id*. at 452-53 (emphasis added). Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided "[n]o limitation of time for ratification" in either the text or preamble, and the *Coleman* Court refused to police the "reasonableness" of Kansas's ratification thirteen years after the amendment's proposal by Congress. *Coleman*, in other words, disagreed with *Dillon*'s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State's ratification of a constitutional amendment on grounds that it is untimely.

Nonetheless, under the reasoning of both *Dillon* and *Coleman*, it is clear that Congress may choose to specify a ratification deadline that will be judicially enforceable. When Congress chooses to specify a ratification deadline (as it did with the ERA), it reflects a policy choice of ensuring that ratification is not *ad infinitum* and thus unambiguously reflects a broad societal consensus. An amendment lacking a ratification deadline that is consequently ratified is over a period of hundreds (or even theoretically thousands) of years—as is the case, for example, with the Twenty-Seventh Amendment—does not reflect broad societal consensus in the same palpable way as an amendment ratified within a seven-year period. The "society" ratifying an amendment in 1791 is not the same "society" ratifying it in 1991 or 2091. The longer the time for ratification, in other words, the less likely the amendment reflects the sort of broad societal consensus that lends legitimacy in the eyes of the people. If the amendment is controversial, in particular, a long period of ratification is potentially destabilizing.

5. Should it be difficult to amend the Constitution? Why or why not?

Yes. The super-majoritarian process required by Article V was a necessary compromise, allowing future generations to modify their social charter to reflect society's evolving needs, but without the ease of enacting ordinary legislation (i.e., majoritarian process), which would lead to constitutional instability. As James Madison stated in *Federalist No. 43*, Article V's super-majoritarian process "guards equally against that extreme facility which would render the

constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."

The super-majoritarian process ensures that any change to our social charter is broadly supported by the people, not the whims or passions of an extant, potentially fleeting majority. This is particularly important in a diverse, pluralistic society, where passions, prejudices and preferences differ from region to region. Super-majoritarianism in constitutional amendment ensures that while shifting, passion-driven majorities may occasionally capture Congress and enact ordinary legislation that is unpopular with a significant portion of the country, changes in the Constitution itself cannot be so easily made. Indeed, it is the super-majoritarian process of Article V that has given the highly diverse United States remarkable constitutional (and thus societal) stability for over 230 years.

Questions for the Record
Senator John N. Kennedy

1. **The text of the ERA reads, in part, that: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."**

    a. **Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?**

Yes. The most likely change would be a shift in the level of judicial scrutiny applied to ordinary laws that draw gender-based distinctions. Presently, the Supreme Court uses "intermediate scrutiny" for gender-based distinctions, implied from the concept of "equal protection" of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190 (1976). To satisfy intermediate scrutiny (and thus uphold any gender-based distinction), the government bears the burden of proving that the distinction serves an "important" government interest and that the law is "substantially related" to that important interest. *Id*. at 197. If the ERA was ratified, by contrast, the Constitution would have an *express* provision stating, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This shift from the generic "equal protection" guarantee of the Fourteenth Amendment to the specific "equality of rights . . . on account of sex" guarantee of the ERA would undoubtedly force courts to jettison intermediate scrutiny and apply instead "strict scrutiny" to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, "strict in theory, fatal in fact," meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is "necessary" to achieve a "compelling" government interest and even more difficult, that the law is "narrowly tailored" to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

Specifically, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any "compelling" government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-

based segregation of bathrooms would assert that "privacy" of each sex should be recognized as a compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex's separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

b. If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women's collegiate athletics?

Yes. See the answer to 1(a) above.

c. If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?

No. See the answer to 1(a) above.

d. If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?

Yes. See the answer to 1(a) above.

e. If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?

Yes. See the answer to 1(a) above.

2. If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* remains good law?

a. Could the ERA, if ratified, be a constitutional source of the right to abortion?

Yes. Because the ERA would expressly enshrine that "equality of rights under the law shall not be denied or abridged . . . on account of sex," this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed in question 1 above), but also strict scrutiny for "liberty"-based challenges to abortion laws.

Specifically, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a "fundamental right" protected by the word "liberty" in the Due Process Clauses of the Fifth and

Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that "fundamental rights" under that Clause are limited to rights that are "deeply rooted in [our' history and tradition" and "essential to our Nation's scheme of ordered liberty." *Id*. at 2246. If an asserted liberty is "deeply rooted" in our nation's history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id*. at 2246, 2283. The *Dobbs* Court concluded that "a right to abortion is not deeply rooted in our Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973." *Id*. at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion "like other health and welfare laws, [are] entitled to a strong presumption of validity" and subject only to rational basis review. *Id*. at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word "liberty" in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee enshrining a *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual equality would undoubtedly elevate all laws implicating "sexual equality," including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), *see Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.

b. Would any law that places restrictions on abortion survive scrutiny under the ERA?

Probably. Under *Roe*'s strict scrutiny regime, the Supreme Court recognized that laws reasonably designed to protect the health of the mother may be imposed *after* the first trimester. *Roe*, 410 U.S. at 164. It also recognized that post-fetal viability, the government's interest in "the potentiality of human life" becomes "compelling," thus allowing government to regulate and proscribe abortion after that point. *Id*.

c. If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?

Unlikely. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that the "spending power is of course not unlimited," *id*. at 207, and that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id*. at 208. *See also Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985) ("Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar.").

Despite this, however, the Supreme Court upheld the Hyde amendment against a substantive due process ("liberty") challenge in *Harris v. McRae*, 448 U.S. 297 (1980).

The *McRae* Court acknowledged that "if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution, [it] is presumptively unconstitutional." *Id*. at 312. Yet the Court rejected the argument that the Hyde Amendment impinged the "liberty" to abortion protected by the Due Process Clause as recognized in *Roe*, because "regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category." *Id*. at 316. Due process "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom [conferred by the clause]. To hold otherwise would mark a drastic change in our understanding of the Constitution." *Id*. at 317-18.

Thus, while enshrinement of an express constitutional guarantee of sexual equality will require strict scrutiny of all laws affecting such equality, including exercises of Congress's spending power, *McRae* indicates that the existence of a fundamental right does not imply a concomitant right to have the government *pay for* access to such right. Unless the Supreme Court changes its mind about *McRae*, the Hyde Amendment would continue to be a valid exercise of the spending power should the ERA be ratified.

Senator Thom Tillis
Questions for the Record
SJC Hearing, "The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution."

Questions for Professor Elizabeth Foley

1. **Is the original 7-year deadline enforceable? Why or why not?**

Yes. Congress's role under Article V of the Constitution is to "propose" Amendments by a two-thirds supermajority of both houses or, alternatively, to "call a Convention for proposing Amendments" if two-thirds of the States' legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court's decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline "as an incident to its power to designate the mode of ratification" of the proposed amendment. *Id*. at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA's deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court The court held that Congress could not change its initially-specified ratification date "any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it*." *Id*. at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA's original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress's Article V power to propose amendments includes the power to propose a "Mode of Ratification," which may include a ratification deadline. *Id*. at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress's Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. **Is the 3-year "extension" enforceable? Are extensions available for constitutional amendments at all? If so, can a simple majority of Congress extend the deadline for a constitutional amendment, or does an extension also require a two-thirds majority in order to be constitutionally sound?**

See the answer to question one above. The three-year extension is not enforceable per the rationale of the Supreme Court in *Dillon*. Extension are available if Congress effectively "re-proposes" the amendment via the super-majoritarian process of Article V.

3. **Should the votes of States after the deadline passed count towards the tally for the ERA? Is there a rational and/or reasonable justification for permitting states' votes to count towards ratification after the deadline has passed?**

No, because ratification deadlines are within Congress's Article V power, States are bound by any deadline specified by Congress in its joint resolution of proposal.

States have the power under Article V to ratify an amendment pursuant to the "Mode of Ratification' contained in the joint resolution proposal received from Congress. History shows that States rely on the terms specified by Congress in its proposal. With the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth (proposed in 1917) has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline in the proposal's preamble. "[S]tates have always followed Congress's direction without question—even the one time Congress called for ratification by [State] convention" in the Twenty-First Amendment (repeal of prohibition). *Ferriero*, 525 F. Supp.3d at 58. Moreover, there is "little doubt that the states were aware of the ERA's deadline," which was a political "compromise that helped Congress successfully proposed the ERA where previous attempts to pass a proposal had failed." *Id*. at 60.

4. **Should the votes of States that later rescinded their support count towards the tally for the ERA? Is there a rational and/or reasonable justification for counting States after the deadline, but not rescinding the votes of States that have voted to do so?**

There are no Supreme Court precedents addressing the legitimacy of amendment rescissions, so answering this question requires a degree of educated speculation. *Coleman* held that "the efficacy of ratifications by state legislatures, in the light of p*revious rejection or withdrawal*, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Coleman*, 307 U.S. at 450 (emphasis added). Thus, the Kansas legislature's ratification of the Child Labor Amendment, many years *after* its prior rejection thereof, was a non-justiciable political question. *Coleman* thus addressed the rejection-then-ratification scenario, not the opposite one of ratification-then-rescission. The "last word," so to speak, of the Kansas legislature was one of approval of the Child Labor Amendment, and the *Coleman* Court wisely refused to second-guess Kansas's most recent decision.

By contrast, when a State *first ratifies, then rescinds* its ratification of an amendment, the legal question is materially different, since the question is whether the later rescission should likewise be considered the non-justiciable "last word" of the State. Presumably (though there is no case law on this point), a rescission occurring *after* the requisite three-quarters threshold has been reached would be ineffective, as the amendment would already be "ratified" within the meaning of Article V. Similarly, a rescission occurring *after* a ratification deadline would presumably be

ineffective, as it would not comport with the "Mode of Ratification" specified in Congress's proposal.

The more difficult question, however, is ascertaining the effect of a rescission occurring *before* the three-fourths threshold has been met and *before* expiration of any ratification deadline. Unfortunately, there is no clear answer from case precedent but there are some historical precedents that may prove informative.

For example, the Fourteenth Amendment was proposed by Congress in 1866, after the Civil War. The Union States had all ratified the amendment by 1868 but the former Confederate States had not, except Tennessee. It was unclear, however, whether the former Confederate States "counted" in the denominator for calculating the three-fourths threshold. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two states had ratified the Fourteenth Amendment and it was a valid part of the Constitution. Cong. Globe, 40th Cong., 2d Sess. 453 (1868). Shortly thereafter, however, Ohio (a Union State) rescinded its ratification, followed one month later by New Jersey.

Worried that the rescissions by Ohio and New Jersey may be legally effective, Congress passed a law conditioning former Confederate States representation in Congress on their ratification of the Fourteenth Amendment. 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867). Several former Confederate States thereafter took quick action to ratify the Amendment, and Secretary of State William Seward then certified that the Fourteenth Amendment had been ratified, but nonetheless expressing reservation as to whether Ohio and New Jersey should be counted: "It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual . . . ." 15 Stat. 706-07. Seward cautiously stated that "if the resolutions of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States . . . then the aforesaid Amendment has been ratified . . . ." *Id*. Within a week of Seward's tentative certification, however, Georgia ratified the Fourteenth Amendment and Seward issued another, now unequivocal certification of the Amendment's ratification. 15 Stat. 708-11 (1868).

The history of the Fourteenth Amendment's ratification thus provides no clear precedent regarding the legal effect of a State's timely rescission. Secretary of State Seward was equivocal as to whether the rescission of Ohio and New Jersey was effective and shortly thereafter, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions, removing any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment is similarly equivocal. Although New York timely rescinded its earlier ratification, the Secretary of State certified the Amendment as duly ratified, listing New York among the ratifying States. The certification expressly noted New York's rescission but more importantly, it was *not filed* until enough States had ratified that New York's ratification was no longer necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869). As with the Fourteenth Amendment, the Fifteenth Amendment's history suggests that there was substantial concern that a timely rescission was legally meaningful.

Despite the equivocal history and lack of judicial precedent, however, there are persuasive reasons for acknowledging the validity of a State's rescission, provided it occurs within any congressionally-specified ratification deadline. Ratification of constitutional amendments is, by definition, made intentionally difficult by Article V. Both the two-thirds and three-fourths requirements of Article V are designed to ensure that the Constitution is not amended except by broad societal consensus—in the words of Alexander Hamilton in *Federalist No. 85*, the States must be "united in the desire of a particular amendment" to achieve ratification.

To ensure broad societal consensus, a State's timely rescission *should* matter, as it represents that sovereign's "last word" on acceptance of the proposed amendment. Particularly when Congress does *not* specify a ratification deadline, changes that occur after the passage of time—even centuries in the case of the Twenty-Seventh Amendment—may cause a State to change its mind about the desirability of a proposed amendment. If the three-fourths threshold has not been satisfied, a rescission should be considered legally effective, as the period for State decision-making—the ratification period—is still "live." Under this logic, the ERA rescissions by the four (or five) States that occurred *prior* to expiration of the original 1979 deadline would be effective.

5. **Putting aside all of these significant constitutional concerns, if the ERA were to be ratified, what would be the impact on our laws? How would treatment of women change under the law?**

The most likely change would be a shift in the level of judicial scrutiny applied to ordinary laws that draw gender-based distinctions. Presently, the Supreme Court uses "intermediate scrutiny" for gender-based distinctions, implied from the concept of "equal protection" of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190 (1976). To satisfy intermediate scrutiny (and thus uphold any gender-based distinction), the government bears the burden of proving that the distinction serves an "important" government interest and that the law is "substantially related" to that important interest. *Id*. at 197. If the ERA was ratified, by contrast, the Constitution would have an *express* provision stating, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This shift from the generic "equal protection" guarantee of the Fourteenth Amendment to the specific "equality of rights . . . on account of sex" guarantee of the ERA would undoubtedly force courts to jettison intermediate scrutiny and apply instead "strict scrutiny" to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, "strict in theory, fatal in fact," meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is "necessary" to achieve a "compelling" government interest and even more difficult, that the law is "narrowly tailored" to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will

likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

6. Under the current legal standard of intermediate scrutiny, our legal system is able to acknowledge differences based on sex in ways that are intended to benefit women. If the ERA were to be ratified, would laws intended to benefit women pass strict scrutiny? Why or why not?

No. As elaborated above, strict scrutiny is just that—exceedingly strict judicial scrutiny. The government must prove a "compelling" government interest, which has jurisprudentially been limited to things such as national security or public health. Even more significantly, the existence of a compelling interest will not save the law from invalidation, as the government must also prove that the law is "narrowly tailored" to serve that compelling interest, meaning that there are no less restrictive alternatives available. In the instance of military draft, for example, even assuming arguendo that not drafting females would serve the interest of "national security" (which is highly doubtful in itself), excluding females entirely from the draft would most certainly not be "narrowly tailored" to serve that interest.

Similarly, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any "compelling" government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-based segregation of bathrooms would assert that "privacy" of each sex should be recognized as a compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex's separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

7. Do you agree or disagree with the legal theory that the ERA could be used to either find or create abortion rights under the Constitution? Why or why not, and what would be the potential impact on the *Dobbs* ruling if the ERA were ratified? What would be the impact to state laws passed in light of the *Dobbs* ruling?

Yes, I agree. Because the ERA would expressly enshrine that "equality of rights under the law shall not be denied or abridged . . . on account of sex," this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed in question 6 above), but strict scrutiny for "liberty"-based challenges to abortion laws. Specifically, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a "fundamental right" protected by the word "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that "fundamental rights" under that Clause are limited to rights that are "deeply rooted in [our' history and tradition" and "essential to our Nation's scheme of ordered liberty." *Id*. at 2246. If an asserted

liberty is "deeply rooted" in our nation's history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id*. at 2246, 2283. The *Dobbs* Court concluded that "a right to abortion is not deeply rooted in our Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973." *Id*. at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion "like other health and welfare laws, [are] entitled to a strong presumption of validity" and subject only to rational basis review. *Id*. at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word "liberty" in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee, thus enshrining a textual, *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual equality would undoubtedly elevate all laws implicating "sexual equality," including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), *see Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.