Hearing before the Senate Committee on the Judiciary

"The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in our Constitution"

February 28, 2023

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Ms. Kathleen Sullivan

1. **How would Congress's power to enforce the Equal Rights Amendment under Section 2 compare to Congress's power to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment?** Section 2 of the Equal Rights Amendment would clarify and expand the power of Congress to "enforce" the prohibition of discrimination on account of sex by "appropriate legislation." While Section 5 of the Fourteenth Amendment similarly gives Congress the power to enforce the Equal Protection Clause by appropriate legislation, the Supreme Court has interpreted that power very restrictively when it comes to women's rights. For example, the Court held that Congress had exceeded its Section 5 powers by enacting civil remedies against gender-based violence. Section 2 of the ERA would give Congress new opportunities to enact appropriate legislation unencumbered by such precedent.

2. **What kinds of laws might Congress be able to pass pursuant to the Equal Rights Amendment?** Congress might exercise its Section 2 powers in many ways to enforce the equality of men and women under the law. In the area of law enforcement, Congress might pass laws reinforcing protections against domestic violence, rape and bodily mutilation. In the area of health care, Congress might pass laws enhancing the provision of prenatal care, child care and family leave. And in the area of employment, Congress might pass laws ensuring more equal pay for equal work.

3. **Which Supreme Court decisions, if any, would be called into question if the Equal Rights Amendment were added to the Constitution in 2023?** The ERA would enshrine in our Constitution many of the same principles of sex equality the Supreme Court has already recognized in cases since the 1970s that interpret the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of the Fifth Amendment Due Process Clause to largely bar governmental discrimination based on sex. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996). But the ERA would do so in a way that could not be overturned by the shifting votes of future judicial majorities. The ERA is needed now more than ever because the current Supreme Court has adopted an approach that looks to the law as it was in 1789 or 1868 when existing amendments were adopted. But women did not enjoy equality of rights under the law in 1789 or 1868, when we could still be denied the right to vote, see *Minor v. Happersett*, 88 U.S. 162 (1874), or the right to practice law, see *Bradwell v. Illinois*, 83 U.S. 130 (1872). The ERA would ensure that those days are gone not just for now but for the ages to come.

Questions for the Record
Senator John N. Kennedy

Responses of Ms. Kathleen Sullivan

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?** The ERA would not erode the protections Title IX provides. Title IX is one of numerous federal statutes by which Congress has prohibited the denial of equal opportunity on account of sex. The ERA would enshrine such equality as a foundational principle in our Constitution, making such equality more rather than less secure.

   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? Courts in the future will resolve such questions, whether under existing Equal Protection law and existing Title IX regulations *or* under the ERA. Such judicial consideration will not foreclose considerations of science and fairness, including the interest of fairness in athletic competition.

   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 nation or State with an ERA in its constitution has ever required universal unisex bathrooms. Prohibiting discrimination on account of sex would not foreclose judicial consideration of countervailing interests in personal privacy.

   d. **If the ERA is ratified, would women be required to register for Selective Service with the U.S. military**? Courts in the future might interpret either the ERA or the existing equal protection guarantee of the Fifth Amendment to prohibit a male-only draft. The Supreme Court previously upheld the male-only draft on the ground that women service members were excluded from combat and thus not similarly situated to draft-eligible men. See *Rostker v. Goldberg*, 453 U.S. 57 (1981). With women now eligible for combat positions, that justification may be subject to reconsideration. Any such decision would consider the expert views of our Nation's military leaders. Notably, while the vast majority of the Nations of the world have an ERA in their written constitutions, less than a handful have a gender-neutral military conscription or universal service system.

   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? The ERA, like existing guarantees of sex equality under current judicial interpretation of the Fifth and Fourteenth Amendments, bars government from treating men and women

unequally. Such equality guarantees do not require public entities to provide any particular medical procedure.

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?** *Dobbs* held that the implicit right to privacy recognized in *Roe v. Wade* does not protect the right to abortion. The right to privacy and the right to equality are two different things, so the ERA would not affect the legal status of the *Dobbs* ruling.

    a. **Could the ERA, if ratified, be a constitutional source of the right to abortion?** While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future. Whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.

    b. **Would any law that places restrictions on abortion survive scrutiny under the ERA?** The ERA does not enact any standard of scrutiny. While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future. Whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.

    c. **If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?** The Supreme Court has previously rejected challenges that would have required the government to fund abortion under Medicaid. See *Harris v. McRae*, 448 U.S. 297 (1980). Any argument for changing this precedent, whether under existing equal protection guarantees *or* the ERA, would be resolved case by case, taking into account a host of factors including what other medically indicated or necessary procedures are publicly funded and what grounds are given for refusing to extend funded coverage.

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 Ms. Kathleen Sullivan

1. **Is the original 7-year deadline enforceable? Why or why not?** The original 7-year deadline was mooted when Congress lawfully enacted a 3-year extension to the initial 7-year deadline. Congress is of course free to set forth a target date for ratification by the States. But when Congress sets a target date in the *preamble* to the proposing resolution, as it did with the ERA, that deadline is merely advisory. Unlike a deadline in the *text* of a proposed amendment that is sent out to the States for an up-or-down vote, a preambular deadline is not binding on the States, is not judicially enforceable against the States, and may be changed by subsequent sessions of Congress by simple majority vote.

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?** Congress's 3-year extension of the original ERA ratification deadline by simple majority vote was valid, and so would be an extension or repeal of that extended deadline today. Congress is free to set forth a target date for ratification and is likewise free to later extend or repeal that date by simple majority vote so long as the date appears in the *preamble* of the proposing resolution and does not appear in the *text* of the amendment as sent to the States for an up-or-down vote. But such a preambular deadline is not binding on the States, is not judicially enforceable against the States, and may be changed by subsequent sessions of Congress by simple majority vote.

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?** Yes, the votes of States that ratified after the extended congressional target date passed should count toward the tally for the ERA. The text of Article V of the Constitution sets forth no limitation on the time by which ratification must take place. The Twenty-Seventh Amendment, for example, was ratified 203 years after the First Congress proposed it. Moreover, the structure of Article V gives Congress and the States co-equal power in the constitutional amendment process. Congress therefore may not assert primacy over the ratifying States without violating basic principles of originalism, textualism and federalism.

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?** Yes, the votes of States that ratified the ERA and then purported to rescind their support should count toward the tally for the ERA. No court has ever recognized any State's attempted rescission of a constitutional amendment, and Congress has rejected every

attempted rescission, including several States' attempt to rescind their votes to ratify the Fourteenth Amendment. And with good reason, for Article V speaks only of ratification and is silent on rescission. Basic principles of originalism and textualism therefore support counting ratifications but not rescissions in an amendment ratification tally.

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?** Recognizing the ERA as a part of our Constitution would enshrine the principle that, in our Nation, men and women are equal under the law. Over 160 nations and over half our States already enshrine this principle in their written constitutions. Constitutionalizing women's equality means that unelected judges could no longer take that basic right away in the future, as would now be possible under judge-made interpretations of the Equal Protection Clause. Section 2 of the ERA would also give Congress the power to "enforce" equality on account of sex "by appropriate legislation" that would be subject to democratic discussion and debate.

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?** The ERA does not enact any standard of scrutiny. "Strict" and "intermediate" standards of scrutiny are judge-made constructs under the existing Fifth and Fourteenth Amendment equality guarantees. The Framers of those Amendments did not enact any "standard of scrutiny," and neither would Congress in recognizing the ratification of the ERA. Because the ERA requires equality between men and women under our laws, it follows that, where laws are intended to benefit women by taking steps toward equality with men, for example by remedying past discrimination against women, those laws would be constitutional under the ERA.

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?** *Dobbs* held that the implicit right to privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973), does not protect the right to abortion. The right to privacy and the right to equality are two different things, so the ERA would have no impact on the legal status of the *Dobbs* ruling. While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future, and if so, whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.