Written Statement
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Hearing on the Equal Rights Amendment

Committee on the Judiciary
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Chairman Nadler, Ranking Member Collins, and members of the Committee, thank you for the opportunity to discuss the procedures for ratification of the Equal Rights Amendment ("ERA"). I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. Background on Ratification of the Equal Rights Amendment

An Equal Rights Amendment was first proposed in 1921 but did not receive approval of the requisite two-thirds supermajority of the House and Senate until March 22, 1972. The text of the proposed amendment reads as follows:

> **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by 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.[1]

The Joint Resolution proposing the ERA contained a preamble limiting the allowed period of ratification to seven years:

> 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 from the date of its submission by the Congress*.[2]

The seven-year ratification period expired on March 22, 1979. At that time, only 35 of the required 38 States (three-quarters of the fifty States) had ratified the ERA.

In 1978, sensing that the ERA was about to fail, the 95th Congress purported to "extend" the ERA's ratification deadline by approximately three years (to June 30, 1992), by passing a joint resolution by simple majorities, signed by then-President Carter.[3] No additional States ratified the ERA during this purported extension period.

Two States have purported to "ratify" the ERA after both the original 1979 ratification deadline and the purported extension in 1982. Specifically, Nevada purported to ratify the ERA in 2017,

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[1] H.J. Res. 208, 86 Stat. 1523 (1972).

[2] *Id.* (emphasis added).

[3] H.J. Res. 638, 95th Cong., 2d Sess. (1978).

and Illinois purported to do so in 2018. In addition, four States purported to rescind their ratifications, prior to the original 1979 deadline: Idaho, Kentucky, Nebraska, and Tennessee.

A fifth State, South Dakota, originally approved the ERA in 1973 but voted on March 1, 1979—21 days before the original ratification deadline—to "sunset" its ratification, declaring it "null and void" in explicit protest of Congress's unilateral three-year extension of the ERA's ratification deadline by simple majorities. Specifically, the South Dakota legislature declared, "Congress ex post facto has sought unilaterally to alter the terms and conditions in such a way as to materially affect the congressionally established time period for ratification . . . ."[4] It stated that the "purpose for establishing a clear time period for consideration of ratification by the states is to permit consideration of the substantive amendment by a reasonably contemporaneous group of legislatures" and that allowing Congress to alter the originally specified ratification deadline, by simple majority vote, will "inhibit state legislatures from acting promptly on any proposed amendment for fear of transferring the power to amend the Constitution of the United States to a small minority of the several states, and, perhaps, even a small minority of several generations . . . ." [5] South Dakota also explained that allowing Congress to unilaterally alter a previously imposed ratification deadline created a "perpetual possibility of a sudden change in the Constitution of the United States due to a shift of opinion in a small number of states."[6]

II. Can Congress Unilaterally Alter a Ratification Deadline It Originally Proposed?

As South Dakota's rescission of the ERA indicates, serious concerns are raised if Congress attempts, ex post facto, unilaterally to alter an explicit deadline for ratification of a constitutional amendment. These concerns are amplified when such ex post alteration of an express ratification deadline occurs via simple majorities of the House and Senate.

There are presently 27 amendments to the Constitution. Most of the amendments were ratified within three years of their initial proposal by Congress. For example, the first ten amendments—the Bill of Rights—were ratified within two years, 81 days. The Eleventh Amendment (sovereign immunity) was ratified in less than one year. The Twelfth Amendment (presidential/vice presidential selection) was ratified in a little over six months. Indeed, other than the Twenty-Seventh Amendment—the so-called "Madison Amendment"—the longest ratification period was the Twenty-Second Amendment (presidential term limits), which took three years, 340 days.

The outlier amendment, the Twenty-Seventh Amendment, was one of James Madison's original twelve proposed amendments, requiring an intervening election before any congressional pay raise can take effect. The Madison Amendment contained no express ratification deadline and was thought moribund until ratified by the Wyoming legislature in 1978. In May 1992, Michigan and New Jersey pushed the Madison Amendment over the three-quarters goal line, becoming the 38th and 39th states to ratify it.

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[4] 125 Cong. Rec. 4862 (Mar. 13, 1979).

[5] *Id.*

[66] *Id.*

The Madison Amendment is like every other proposed constitutional amendment prior to the Eighteenth Amendment proposed in 1917—namely, it contained *no express ratification deadline*. Like the Madison Amendment, there are four additional "older" constitutional amendments—with no ratification deadline—still technically pending for ratification: (1) another "Madison Amendment," which would regulate House apportionment;[7] (2) an amendment that would strip U.S. citizenship from anyone accepting a title of nobility or emolument from a foreign power;[8] (3) the "Corwin Amendment," which would prohibit the federal government from banning slavery;[9] and (4) the Child Labor Amendment, which would give Congress the power to regulate child labor.[10]

Every amendment proposed by Congress since 1917 (beginning with the Eighteenth Amendment) has contained an express seven-year ratification deadline. The first use of a ratification deadline came with the Eighteenth Amendment (Prohibition), which was proposed in December 1917 and ratified by the requisite three-quarters of the States within thirteen months, in January 1919. Section three of the Eighteenth Amendment expressly stated, "This article shall be inoperable unless it shall have been ratified . . . within seven years from the date of the submission hereof to the States by the Congress."[11] Similarly, Amendments Twenty through Twenty-Two contain express seven-year ratification deadlines in their text.

For Amendments Twenty-Three through Twenty-Six, however, "Congress determined that inclusion of the time limit within [the amendment's] body 'cluttered up' the proposal" and consequently, Congress "placed the limit in the preamble or authorizing resolution, rather than in the body of the amendment itself."[12]

The salient legal question is whether Congress, having specified a ratification deadline, can then alter this deadline and, if so, how? The closest Supreme Court precedent is *Dillon v. Gloss*, 256 U.S. 358 (1921), in which Dillon challenged his conviction under federal prohibition law on the basis that the Eighteenth Amendment (authorizing Prohibition) was invalid because it contained a temporal ratification limitation (seven years). Dillon argued that constitutional amendments, to be valid, had to be "open-ended," time-wise, for ratification. The Supreme Court, in a unanimous opinion, rejected Mr. Dillon's argument, concluding that a congressionally-imposed ratification

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[7] This second "Madison Amendment" has been ratified by eleven States. With Eleven state ratifications, the Apportionment Amendment was only one State shy of the three-quarters threshold for ratification in 1791. With the addition of more States, of course, the threshold for its ratification has climbed to 38 States, and it is 27 States shy at present.

[8] This amendment was proposed in 1810 and has been ratified by twelve States.

[9] The Corwin Amendment was proposed in 1861 and has been ratified by five States. Two States have purported to rescind the Corwin Amendment. Ohio rescinded it in 1864; Maryland rescinded it in 2014.

[10] The Child Labor Amendment was proposed in 1924 and has been ratified by 28 States.

[11] U.S. Const. amend. XVIII.

[12] Thomas H. Neale, Cong. Research Serv., R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 13-14, (July 18, 2018). Another post-1917 constitutional amendment—granting D.C. statehood—contained a seven-year ratification deadline in the text of the proposed amendment itself. As of the D.C. Statehood deadline of August 21, 1985, sixteen States had ratified it.

deadline was proper as an "incident of its power to designate the mode of ratification" under Article V. *Id*. at 376. It stated, "We do not find anything in the article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary." *Id*. at 374.

The Supreme Court reasoned that the Article V process of proposal and ratification constitute a "single endeavor" for which large separation of time is undesirable; 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 agreed with the conclusion of Judge Jameson's treatise, in which he stated that "an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that if not ratified early while that sentiment may be fairly supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." *Id*. (citing and quoting Jameson on Constitutional Conventions (4th ed.) § 585)).

The *Dillon* Court accordingly held, "We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id*. at 375. Further, "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation of 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." *Id*. at 376.

Dillon's logic is that Congress has power, under Article V, to specify a reasonable time for ratification, to quell speculation and *ad infinitum* ratification by generations long removed from the events prompting a constitutional amendment's proposal. This rationale suggests two things. First, 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), not via the simple majority process for ordinary legislation. Under this logic, the three-year extension of the original ratification deadline for the ERA, enacted by a majoritarian joint resolution of the 95th Congress, was constitutionally improper.

Second, *Dillon*'s rationale suggests that there is no 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. Such an argument was made and rejected in *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), in which supporters of the ERA contended that because the ERA's seven-year ratification deadline was contained in the preamble rather than its text, Congress was free to alter the ratification deadline at will, since doing so would "not change the essential nature of the amendment" itself but was merely a "matter of detail" over which Congress has authority per *Dillon*. *Freeman*, 529 F. Supp. at 1151.

The district court's decision in *Freeman* was ultimately vacated by the Supreme Court because the second (extended) ratification deadline had expired by the time the Supreme Court convened

to hear the case, so it has no precedential value. But as the only case to analyze whether a substance/procedure dichotomy exists, its logic is nonetheless still valuable. Specifically, the *Freeman* court reasoned that the Supreme Court in *Dillon* endorsed congressional authority to establish a ratification deadline as part of its Article V power to establish a mode of ratification because it would "infuse certainty into an area which is inherently vague," *Freeman,* 529 F. Supp. at 1152. It concluded that "in order to fulfill the purposes for fixing a time limitation for ratification as outlined in *Dillon*—'so that all may know and speculation . . . be avoided'—the congressional determination of a reasonable period once made and proposed to the states cannot be altered. If Congress determines that a particular amendment requires ongoing assessment as to its viability or monitoring of the time period, it can do so, not be defeating the certainty implied by the *Dillon* case, but by not setting a timer period at the outset . . . ." *Id*. Moreover, as part of Congress's Article V power to set the mode of constitutional amendment ratification, the *Freeman* court reasoned that Congress could not change the specified date of ratification "any ore 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.

Congress's choice to insert a ratification deadline into a proposed amendment's text (as in the Eighteenth, Twentieth, Twenty-First and Twenty-Second Amendments) or in its preamble (as in the Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Sixth Amendments) should make no difference. Either way, Congress has exercised its Article V power, by supermajoritarian process, to specify a mode of ratification. When Congress specifies the mode of ratification, States justifiably rely on Congress's specification. A congressionally specified time period for ratification—whether in the text or preamble—signals to States that time is of the essence, that they had better act within the specified period if they wish to assent to the proposed amendment. If Congress, through the ordinary, majoritarian legislative process, attempts to extend a ratification deadline, the extension should be of no legal effect.

An ex post ratification extension upsets settled expectations of the States, and claims for Congress a power it has not been given—namely, the power to *perpetually alter the terms* upon which it proposes constitutional amendments. Allowing alteration of an original ratification deadline—particularly by simple majoritarian legislative process—is disrespectful of States' role in the constitutional amendment process, allowing Congress to keep extending its proposal anytime it is politically "upset" that an amendment did not receive the requisite approval of three-quarters of the States by the self-imposed deadline it set. While Congress can "set the rules," so to speak, on the mode of ratification, its authority does not extend to rewrite those rules—particularly not by simple majoritarian processes—whenever it wants. Having already specified a seven-year ratification deadline in the original ERA proposal—and purporting to extend the deadline for three additional years—allowing Congress a third (or fourth, fifth, or hundredth) bite at the ratification apple would radically alter (and undermine) the supermajoritarian framework of Article V.

Nothing in the Twenty-Seventh Amendment is to the contrary. While the Madison Amendment was ratified over 202 years after its original proposal, it contained no ratification deadline.

Congress is not required to impose a ratification deadline when it establishes a mode for ratification, and indeed for much of our history (until the proposal of the Eighteenth Amendment in 1917), Congress did not specify a ratification deadline. There may well be situations where, in Congress's judgment, specification of a ratification deadline is not desirable. If Congress wants to re-propose an Equal Rights Amendment without a ratification deadline, it can certainly do so, provided the proposal receives the necessary two-thirds supermajority specified by Article V.

III. Can States Rescind Their Ratification of Constitutional Amendments?

It is unclear if States may rescind their ratification of constitutional amendments. The closest Supreme Court precedent—although arguably addressing a qualitatively different issue—is *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, a group of Kansas legislators sought a writ of mandamus to halt their State's ratification of the Child Labor Amendment. The Child Labor Amendment was proposed by Congress in 1924; it contained no ratification deadline. In 1925, Kansas rejected the Amendment but 12 years later, in 1937, the Kansas legislature narrowly ratified it, with twenty of forty Kansas State Senators voting to support it. The State Senate's tie vote was broken by the Lieutenant Governor. The state legislative-plaintiffs challenged the amendment's ratification on two grounds: (1) the Lieutenant Governor had no authority to break the tie on a constitutional amendment; and (2) the amendment's ratification, 13 years after its original proposal by Congress, was not within a "reasonable time," as required by *Dillon*.

A majority of the *Coleman* Court (six Justices) held that what is "reasonable time" for ratification is a non-justiciable political question, belonging solely to Congress. *Coleman*, 307 U.S. at 454. It reaffirmed, however, that pursuant to *Dillon*, Congress may specify a time period for ratification. *Id*. at 452. Because Congress had not specified a time limit for ratification of the Child Labor Amendment, however, the *Coleman* Court believed that an open-ended judicial inquiry into whether Kansas had ratified the amendment within a "reasonable" time (13 years) would be inappropriate. Thus, Congress alone has the power to specify a "reasonable" time period for ratification and if it fails to do so, the courts will not impose one. In the *Coleman* majority's words, there "were cogent reasons for the decision in *Dillon v. Gloss* . . . that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has *not exercised that power*, the Court should take it upon itself the responsibility of deciding what constitutes a reasonable time . . . . That question was not involved in *Dillon v. Gloss* . . . and, in accordance with familiar principle, what was there said must be read in the light of the point decided." *Id*. at 452-53 (emphasis added).

Coleman thus did not overrule *Dillon* and indeed, it reaffirmed its core holding that Congress has the power to specify a ratification period to prevent confusion and established rules, and thus expectations, regarding the mode of ratification. Some argue that a separate, four-Justice plurality opinion in *Coleman*, penned by Justice Black, is more persuasive than Coleman's more limited majority opinion. It is well settled, of course, that majority opinions have precedential effect and plurality concurrences do not.

Proponents of the "three State strategy" to ratify the ERA prefer Justice Black's plurality concurrence precisely because it is broader in scope, asserting that *all* questions relating to ratification of constitutional amendments are non-justiciable under the political question

doctrine. Indeed, Justice Black's plurality expressed disapproval of *Dillon*, arguing that it should be overruled. *Coleman*, 307 U.S. at 459 (Black, J., concurring). Unfortunately for these proponents, *Dillon* has not been overruled; it is still binding Supreme Court precedent and indeed, it was unanimous. While Black's broad concurrence garnered four votes of the Court, three additional Justices in the *Coleman* majority—Chief Justice Hughes and Justices Reed and Stone—did not join Black's plurality. In addition, two more Justices—Butler and McReynolds—dissented, asserting that pursuant to *Dillon*, the Court should address the merits of whether Kansas's ratification occurred within a reasonable time. *Id*. at 470-47 (Butler, J., dissenting). In total, therefore, a majority of the *Coleman* Court—five Justices (Hughes, Reed, Stone, Butler and McReynolds)—reaffirmed *Dillon* and its core notion that pursuant to Article V, Congress may specify a (judicially enforceable) ratification deadline.

Because *Coleman* held that whether ratification occurs within a "reasonable time" (when no deadline is specified by Congress) is a non-justiciable political question, some believe it supports the proposition that a State's purported rescission of a constitutional amendment is likewise non-justiciable. Certainly, the Black concurrence supports this view. But it is a stretch to read *Coleman*'s majority opinion so broadly: After all, *Coleman* did not involve a ratification-then-rescission situation, but the opposite one of rejection-then-ratification. Because Article V speaks solely of "ratification," but not rejection or rescission, the Kansas legislature's rejection of the Child Labor Amendment in 1925 was a legal nullity. By contrast, when a State *first ratifies, then rejects/rescinds* a constitutional amendment, the legal question is arguably different, since the question is whether the later rescission has any effect on the earlier ratification.

Presumably, a rescission occurring after the requisite three-quarters threshold has been reached would be null and void. Once having been certified by the U.S. Archivist as a valid part of the Constitution, no State can legally rescind. But what happens if a State rescinds its ratification *before* the necessary three-quarters threshold has been met? Again, this is an interesting question, but there is no clear answer at present. It is therefore unclear whether the five States' rescissions of the ERA would, if litigated, be considered legally valid.

Some historical rescission precedents exist, but there has been no definitive resolution by courts of the validity of rescissions. The Fourteenth Amendment, for example, was proposed by Congress after the Civil War in 1866. 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 requirement. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two (Union) states had ratified the Fourteenth Amendments and it was a valid part of the Constitution. Cong. Globe, 40th Cong., 2d Sess. 453 (1868). Immediately thereafter, Ohio (a Union State) voted to rescind its ratification, followed one month later by New Jersey (another Union State). Worried that the Amendment may not be validly ratified, Congress passed a law conditioning former Confederate States representation in Congress on their States' ratification of the Fourteenth Amendment.[13] Several former Confederate States then took quick action to ratify the Amendment, reversing their earlier rejection thereof. The U.S. Secretary of State, William Seward, then certified that the Fourteenth

[13] 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867).

Amendment had been duly ratified, but expressed a 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, Georgia ratified the Fourteenth Amendment and Seward issued another, unequivocal certification of the Amendment's ratification. 15 Stat. 708-11 (1868). The history of the Fourteenth Amendment's ratification, therefore, provides no meaningful evidence as to whether a State's rescission of ratification is legally effective. Secretary of State Seward was explicitly equivocal as to whether the rescission of Ohio and New Jersey was effective. Ultimately, however, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions and remove any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment arguably bolsters the view that rescissions are effective. New York rescinded its earlier ratifications of the anti-slavery Amendment. Congressional resolutions proclaiming adoption of the Fifteenth Amendment included New York but did not receive congressional majorities. While the Secretary of State certified the Amendment's ratification, listing New York among the ratifying States, it noted New York's rescission and more importantly, the certification was not filed until enough States had ratified that New York's ratification was not necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869).

Despite the equivocal history and lack of judicial precedent, there are persuasive reasons for acknowledging the validity of a State's rescission. 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 rescission must matter. To ignore a timely rescission is to ignore reality in favor of some desired outcome—favoring ends over means.

Such an outcome-oriented approach is particularly pernicious in the context of constitutional amendments, which, by definition, involve deeply important issues. Denying States' an ability to change their minds, in a timely fashion (i.e., prior to reaching the three-quarters threshold), would create societal schisms and deepen political resentments that would tear at the fabric of the republic. When Congress proposes a constitutional amendment for State ratification, States must be free to accept or reject the proposal until such time as the necessary societal consensus—three-quarters—is achieved. Until such three-quarters acceptance occurs, however, States should be free to change their minds, particularly when Congress does not specify a ratification period, and the passage of time may alter societal needs and values. What was desirable to a State in 1870 or 1970 may no longer be desirable in 2019, or 2370. But even when there is a relatively short ratification deadline specified by Congress (e.g., seven years), political winds may change relatively quickly, and there is no logical reason why States should be irreversibly locked into a position on an amendment until broad, unequivocal societal consensus has been reached.

Allowing for rescission admittedly could lengthen the time for ratification of some constitutional amendments or prevent the ratification of others. But as history has shown, all constitutional amendments—except the Madison Amendment—have been swiftly ratified, in fewer than four years. Such swift, broad societal consensus gives confidence in the Constitution and the rule of law generally. When proposed constitutional amendments experience belabored, difficult ratification processes—necessitating so-called "extensions" and disregard of States' timely rescissions—this is a clear signal that societal consensus has not been achieved. Rather than defying this clear signal, Congress should heed it.