

Testimony of Kathleen M. Sullivan
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on the Equal Rights Amendment
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Chairman Nadler and Members of the Subcommittee:

Thank you for the honor of allowing me to testify in support of the Equal Rights Amendment (“ERA”), which would add to our Constitution the guarantee that “[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex” and provide that Congress shall have the power to enforce the amendment “by appropriate legislation.” The U.S. Constitution, the world’s oldest written constitution, is also the only major written constitution in the world that lacks a provision declaring the equality of the sexes. That is a national embarrassment to the world’s leading democracy. And we stand within just one State’s ratification from correcting it. Both Houses of Congress promulgated the amendment in 1972 by more than the two-thirds vote required by Article V. And 37 States have now ratified the amendment, 35 States in the 1970s plus Nevada in 2017 and Illinois in 2018. Upon the ratification of the amendment by just one more State, the amendment will be eligible to be added to the Constitution without further action on the part of Congress or the States.

I would like to focus today on three points. *First*, the United States is now an outlier among all the major industrial democracies of the world in failing to have an express guarantee in its written constitution that men and women are equal under the law, a situation that our Nation should remedy as soon as possible. *Second*, the ERA should be enacted as an express constitutional provision notwithstanding existing judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment (and the implied equal protection guarantee of the Fifth Amendment Due Process Clause) as providing significant equality between the sexes. *Third*, the Congress has the

power to eliminate the deadlines it previously set for ratification of the ERA by 1979 and later 1982, and thus deadline-elimination proposals like H.J. Res. 38 are entirely proper and constitutional.

First, there is not a single other major democracy in the world with a written constitution that lacks a sex-equality provision as does the U.S. Constitution. The French Constitution provides that “the law guarantees to the woman, in all spheres, rights equal to those of the man.” The German Constitution provides that “men and women have equal rights” and that “nobody shall be prejudiced or favored because of their sex.” The Constitution of India provides that “the State shall not discriminate against any citizen on grounds only of ... sex.” And every written constitution promulgated since World War II contains such a provision. The Constitution of Canada, for example, provides that “every individual is equal before and under the law and has the right to the equal benefit and equal protection of the law without discrimination based on ... sex.” And the South African Constitution bars discrimination “against anyone on ... grounds including...gender, sex [or] pregnancy.” See K. Sullivan *Constitutionalizing Women’s Equality*, 90 Calif. L. Rev. 735, 735 (2002). Some peer nations’ constitutions not only prohibit discrimination on the basis of sex but also provide that government shall affirmatively promote equality between the sexes. See J. Suk, *An Equal Rights Amendment for the Twenty-First Century*, 28 Yale J. Law & Feminism 381, 399-407 (2017).

Given the vital role the U.S. Constitution has played in inspiring and informing the written constitutions of other nations, it is a national embarrassment that the other democratic nations of the world are so far ahead of ours in providing for sex equality in their constitutions. Congress has been debating closing this loophole for a century (since 1923) and did its part to close it a half-century ago (1972) by passing the ERA with overwhelming bipartisan support and sending it to

the States for ratification. The ratification of the amendment by a 38th State will complete the process and bring our Constitution at last into line with the constitutions of all our peer nations. Congress should facilitate the most expeditious path possible to this long-overdue result.

Second, the judicial interpretation of the Equal Protection Clause is no substitute for an amendment to the Constitution formally enshrining equality on the basis of sex as one of our enduring and foundational principles. To be sure, the Supreme Court has since the 1970s read into the Fourteenth Amendment's Equal Protection Clause (and its equivalent protections under the Fifth Amendment's Due Process Clause) the interpretation that the States and federal government may not discriminate on the basis of sex without a close fit to an important justification. It was not always thus; before the 1970s, the Supreme Court had upheld against constitutional challenge state laws excluding women from jury service, admission to the bar as lawyers and even employment as bartenders. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Goesaert v. Cleary*, 335 U.S. 464 (1948). The Court had also upheld the exclusion of women from voting, *Minor v. Happersett*, 88 U.S. 162 (1874), an inequality that our Nation did not redress until the 1920 ratification of the Nineteenth Amendment to the Constitution, which provides that "the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." But the Nineteenth Amendment's protection against sex discrimination was never extended beyond the sphere of voting.

Starting in the 1970s, the Court began to find sex discrimination presumptively irrational in violation of equal protection, striking down, for example, preferences for men over women as estate administrators, *Reed v. Reed*, 404 U.S. 71 (1971); wives over husbands in access to military service members' housing and medical benefits, *Frontiero v. Richardson*, 411 U.S. 677 (1973); and widowed mothers over widowed fathers in access to social security survivor benefits,

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). After Justice Sandra Day O'Connor joined the Court as the first woman associate justice in the Nation's history, the Court continued this trend by invalidating the exclusion of men from a Mississippi state university nursing school. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). And after Justice Ruth Bader Ginsburg joined the Court as only its second woman justice in our history, having herself litigated so many of the early and pioneering victories for sex equality as a young lawyer for the ACLU, she authored the opinion of the Court in *United States v. Virginia*, 518 U.S. 515 (1996), which held that Virginia could not exclude young women from its all-male Virginia Military Institute, even if it provided a separate but decidedly unequal military school for female cadets.

Even though these landmark decisions were achieved by brilliant advocacy and had momentous importance in helping to dislodge entrenched sex discrimination from our Nation's state and federal laws, they lack the strength, endurance, and efficacy of an express constitutional amendment. To begin with, Supreme Court decisions are necessarily the product of transient and shifting judicial majorities, and thus are dependent on the Court's makeup through the political process of presidential nomination and Senate confirmation at any given time. We the People speak through our Constitution with more permanence than any Court majority through its decisions, as was made clear at least four times in our history when we enacted constitutional amendments for the express purpose of overruling Supreme Court rulings: the Fourteenth Amendment (privileges of national citizenship), Sixteenth Amendment (income tax), Nineteenth Amendment (women's right to vote) and Twenty-Fourth (poll taxes). This Nation should proclaim its fidelity to a principle of sex equality that will endure for the ages to come, and not turn on the vicissitudes of Supreme Court appointments and decision-making.

Moreover, a specific constitutional guarantee of sex equality provides clearer guidance to the state and federal governments and to the Court that sex discrimination in particular is an impermissible form of inequality. If the Equal Protection Clause is construed as simply a ban on all arbitrary and irrational discrimination, then it might cover any form of discrimination, whether on the basis of sex, hair color or astrological sign. But by announcing that sex discrimination in particular has no place in our polity, the ERA would make clear that sex discrimination has not been just an idiosyncratic and occasional instance of irrationality, like animus toward red-heads or Scorpios, but rather a persistent and pervasive practice that has systematically undervalued women's worth and capabilities, and systematically distributed the burdens and benefits of public life unequally, based on stigmatizing stereotypes and overbroad generalizations about the proper roles of men and women.

Finally, the Equal Protection Clause is in fact not just an ahistorical prohibition on all arbitrary discrimination; it is part of a pivotal constitutional moment, comprising the enactment and ratification of the Thirteenth, Fourteenth and Fifteenth Amendments, in which the Nation declared an end to slavery and invidious discrimination on the basis of race. The Thirteenth Amendment abolished slavery; the Fifteenth Amendment prohibited voting discrimination based on race; the Fourteenth Amendment overturned the odious *Dred Scott* decision and conferred national citizenship on the newly freed slaves. Women were decidedly not the original intended beneficiaries of these amendments. To the contrary, section 2 of the Fourteenth Amendment, to the horror of contemporary women's suffragists who had themselves fought for the abolition of slavery, introduced the word "male" into the Constitution for the first time, providing for the apportionment of congressional votes among States by population but penalizing States that limited the vote of "male" inhabitants under the age of twenty-one.

There is thus some historical tension in rooting equality on the basis of sex in the foundational amendment, the Fourteenth Amendment, providing for equality on the basis of race. The histories of race discrimination and sex discrimination in our Nation bear many resemblances to one another—they both reflect the systematic devaluation of individual worth, embodied in law, on the basis of prejudice and stereotyping toward group characteristics. Women, like African-Americans, have been subject to formal disadvantages with respect to many legal rights, including voting, jury service, occupational licenses and property ownership, to name a few. But the two histories have important differences too. For example, many exclusions of women reflected a tradition of romantic paternalism that placed women on a pedestal—although the “pedestal” all too often could become a “cage.” *Frontiero*, 411 U.S. at 684 (plurality opinion). But no one ever confused an auction block where human beings were bought and sold with a pedestal. Thus the interpretation of the Equal Protection Clause has often had to grapple with the ways in which the history of sex discrimination is like but not exactly like the history of discrimination on the basis of race. *See Sullivan, supra*, 90 Cal. L. Rev. at 742-46.

For all of these reasons—the enduring and permanent force of a constitutional amendment, the desirability of clarifying that sex discrimination in particular is presumptively irrational, and the recognition that sex discrimination has a distinctive place in the Nation’s history apart from the history of slavery and race discrimination—a constitutional amendment is clearly superior to reliance solely on the Supreme Court’s interpretation of the Equal Protection Clause. Moreover, the second clause of the ERA clarifies that Congress has the power to enforce the amendment by enacting federal laws prohibiting sex discrimination that has gone unaddressed by the States—a new source of potentially powerful congressional authority against state lapses in protection against domestic violence, sexual assault, and unequal employment practices.

Third, the Congress indisputably has the power to clear away any deadline that might be perceived as standing in the way of ratification of the ERA by the next and thirty-eighth State. The 1972 or 1979 Congress has no constitutional authority to bind later Congresses to their decisions that the deadline for ratification would elapse in 1979 or 1982—especially as the deadlines were imposed by joint resolution rather than in the text of the proposed amendment. Contrary to any prior deadlines, therefore, it makes no difference that 35 States ratified in the 1970s while Nevada and Illinois brought the tally to 37 in just the past two years.

To see why this is so, consider first the text of Article V, which provides that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States.” Article V places no time limits on the States’ ratification process. Nothing in Article V says that ratification must be synchronous, contemporaneous, or bounded within any particular time frame. To the contrary, Article V says simply that “[an amendment is valid ‘when ratified.’ There is no further step.” W. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983).

Moreover, our constitutional history confirms as much. Consider the Twenty-Seventh Amendment, which is now embodied in our Constitution’s text as the law of the land. That amendment, which provides that Congress may not raise salaries for Senators and Representatives “until an election of Representatives shall have intervened,” was proposed by the First Congress in 1789 as part of the original Bill of Rights authored by founding father James Madison. But this Amendment, often called the “Madison Amendment,” was not ratified until over two hundred years later, after it was revived among the States for ratification in 1982 and ultimately adopted in

1992 when Michigan became the thirty-eighth State to vote to ratify. See T. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, Congressional Research Service Report 20-23 (July 18, 2018). The Twenty-Seventh Amendment confirms that Article V places no time limits on the ratification process and that Congress's twentieth-century practice of setting ratification deadlines has no foundation in the original text of the Constitution.

Finally, in addition to constitutional text and history, our constitutional structure supports the conclusion that the States may ratify the ERA at the time of their choosing rather than under any artificial deadline imposed by Congress. Our Constitution embodies a principle of federalism in which We the People conferred certain enumerated powers on the Federal Government while reserving all other pre-existing powers to the States. As Justice Kennedy once wrote, "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). The reserved powers of the States under this dual sovereignty are reflected in the Tenth and Eleventh Amendments as well as the structure of the Constitution as a whole. Article V is a provision of the Constitution that clearly delineates separate and independent roles for Congress and the States in the Amendment process. Consistent with those distinct roles and the structural principles of federalism, Congress should view itself as lacking the constitutional authority to fetter the ratification process of the States, and certainly as having the authority to lift its own self-imposed obstacles to that process.

For all these reasons, the deadline-elimination proposal in H.J. Res. 38 is proper and constitutional, and merits swift markup and adoption by the House.

Thank you very much for allowing me to share this remarks with the Subcommittee.