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The Honorable Carolyn B. Maloney  
Chair, Committee on Oversight and Reform  
United States House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairwoman Maloney:

I submit this letter in response to your request for my opinion as a legal scholar on the current status of the Equal Rights Amendment (ERA). Although I write in my capacity as the Carl M. Loeb University Professor Emeritus of Constitutional Law at Harvard University, the views I express in this letter are mine alone, not those of any institution. Nor am I writing in the capacity of an advocate for including an explicit constitutional guarantee of sex equality – one that would align the United States with other industrialized democracies “whose constitutions have long provided for equality on the basis of sex.”<sup>1</sup> That I have long favored including the ERA in our Constitution is immaterial to whether I believe it is, in the language of Article V, “valid to all Intents and Purposes, as part of this Constitution.” Finally, I am not purporting to forecast here how the United States Supreme Court would rule if the question were to come before it. Although such forecasts are obviously not without significance, they must not be equated with what the Constitution should be deemed to include.<sup>2</sup>

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<sup>1</sup> Brief of Constitutional Law Scholars Catharine A. Mackinnon, Paul Brest, Rebecca Brown, Kimberle Crenshaw, Martha Field, Lawrence Lessig, Deborah Jones Merritt, Martha Minow, Jessica Neuwirth, Margaret Jane Radin, Dorothy Roberts, Diane Rosenfeld, Jane S. Schacter, Geoffrey R. Stone, Gerald Torres, and Laurence H. Tribe as *Amici Curiae* in Support of Plaintiffs-Appellants and Reversal, *Virginia v. Ferriero*, No. 21-5096 (D.C. Cir. 2022) (hereinafter Constitutional Law Scholars Amicus Brief) at p.5.

<sup>2</sup> As Justice Robert H. Jackson famously quipped in his separate concurring opinion in *Brown v. Allen*, “We are not final because we are infallible, but we are infallible only because we are final.” 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Although I would never presume to improve on the great Justice Jackson’s words, I cannot resist adding that even the Supreme Court’s “finality” is not all that final. E.g., compare *Brown v. Board of Education*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lawrence v. Texas*, 539 U.S. 558 (2003), with *Bowers v. Hardwick*, 478 U.S. 186 (1986). See the helpful discussion in Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEXAS L. REV. 487 (2018).

I begin by noting that there is no single, authoritative answer to the question of the ERA's status as part of the Constitution.<sup>3</sup> My own conclusion as a constitutional scholar is that under Article V of the Constitution, and in light of its history since being adopted by Congress fifty years ago today, on March 22, 1972<sup>4</sup> -- the ERA should be considered to have become part of the Constitution this January 15, two years after Virginia became the 38th state to ratify the proposed amendment.

I do not believe that either the expiration of Congress's original deadline, included in the amendment's proposing language, or its later extension, render subsequent ratifications invalid. Similarly, I do not believe that states' rescissions of their past ratifications need be taken into account when deciding the status of the ERA, given that Article V includes no basis for a state to rescind its prior ratification.

In my view, the role of the Executive Branch in this process is limited. The National Archivist should, as in the case of the long-delayed ratification of the Twenty-Seventh Amendment,<sup>5</sup> certify and publish the ERA as the Twenty-Eighth Amendment, leaving to the political process the question of what, if anything, to do next. The Archivist's office definitely should *not* serve as a barrier to recognizing the ERA as part of the Constitution based on the 2020 Opinion from the Department of Justice's Office of Legal Counsel (OLC).

Congress can and should reduce doubt as to the ERA's status by taking concurrent action to recognize the ERA's status as part of the Constitution. Doing so, however, would not prevent the Supreme Court, either in the case now pending in the D.C. Circuit or in a case in which a private litigant invokes the ERA as the basis of his or her legal claim, from concluding that it had become a dead letter some time ago. I would view any such conclusion as constitutionally erroneous, but I reiterate that I am making no prediction as to whether it would be forthcoming.

Ultimately, the question of what is truly part of the Constitution and what is not is up to the people themselves to decide over time, rather than being subject to resolution by any formal criterion or procedure to be found in the Constitution itself. Any belief to the contrary would subject constitutional analysis to an infinite loop of self-reference.<sup>6</sup>

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<sup>3</sup> David Pozen and Thomas P. Schmidt, *Is the ERA part of the Constitution? Depends on whom you ask*, WASHINGTON POST (Nov. 22, 2021) (online at <https://www.washingtonpost.com/outlook/2021/11/22/era-amendment-debate/>).

<sup>4</sup> Lila Thulin, *Why the Equal Rights Amendment Is Still Not Part of the Constitution*, SMITHSONIAN MAGAZINE (Nov. 13, 2019) (online at <https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/>).

<sup>5</sup> "No speedy ratification rule may be extracted from Article V's text, structure or history." Laurence H. Tribe, *The 27<sup>th</sup> Amendment Joins the Constitution*, WALL ST. J., at A15 (May 13, 1992).

<sup>6</sup> Douglas Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1979); Laurence H. Tribe, *The Invisible Constitution*, xvii – xxi, 2 – 5, 31, 152–54 (2008).

## **There is No Authoritative Answer to the Question of the ERA’s Status as Part of the Constitution.**

As evidenced by the ongoing controversy in determining the ERA’s status, it would be incorrect to assert that there is a single, simple answer to the questions involved in determining whether the ERA is a valid part of the Constitution.<sup>7</sup> At this Committee’s hearing on October 21, 2021, witnesses disagreed on the ERA’s validity.<sup>8</sup> Ms. Inez Stepman argued that the ERA had “expired last century,” while Ms. Eleanor Smeal asserted that the ERA “has met all the constitutional requirements for the adoption of an amendment to the Constitution of the United States.”

As you mentioned in your letter, OLC too has been inconsistent as to its opinion of the ERA’s validity. While the 2020 Opinion argues that the ERA had expired when the original deadline passed without the three-fourth’s majority having ratified,<sup>9</sup> the recent 2022 Opinion concludes that the 2020 Opinion does not serve as barrier to further ascertainment of the ERA’s validity by Congress or the courts.<sup>10</sup> The 2020 Opinion itself expressed disagreement with a 1977 Opinion, which had suggested both that Congress’s extension of the deadline by three years was valid and that states’ attempts at rescinding their prior ratifications were invalid.<sup>11</sup>

These disagreements serve to highlight the proposition that any assertion of a clear and authoritative answer to the questions surrounding the ERA’s validity as part of the Constitution would be disingenuous. While the constitutional text provides strong guidelines as to what types of actions the Constitution contemplates as part of the constitutional amendment process, neither the Constitution itself nor scholarship analyzing it authoritatively answers the various questions, discussed below, surrounding the ERA’s status.

## **The Initial Seven Year Time Limit Was Properly Subject to Extension by Concurrent Action of the Senate and House of Representatives.**

The threshold matter when considering any deadline-related issues with the ERA is the recognition that the original deadline imposed by Congress was included in the preamble of the proposing legislation, not in the text of the ERA itself.<sup>12</sup> The preamble set a seven year deadline, while the Amendment’s text included no such temporal reference. Thus, state legislatures voting on whether to ratify the ERA were not doing so within the context of a self-timed amendment

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<sup>7</sup> Garrett Epps, *The Equal Rights Amendment Strikes Again*, THE ATLANTIC (Jan. 20, 2019) (online at <https://www.theatlantic.com/ideas/archive/2019/01/will-congress-ever-ratify-equal-rights-amendment/580849/>).

<sup>8</sup> *The Equal Rights Amendment: Achieving Constitutional Equality for All*, House Committee on Oversight and Reform (Oct. 21, 2021).

<sup>9</sup> Office of Legal Counsel, Department of Justice, *Opinion: Ratification of the Equal Rights Amendment* (Jan. 6, 2020) (online at [www.justice.gov/olc/opinion/ratification-equal-rights-amendment](http://www.justice.gov/olc/opinion/ratification-equal-rights-amendment)).

<sup>10</sup> Office of Legal Counsel, Department of Justice, *Opinion: Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment* (Jan. 26, 2022) (online at <http://www.justice.gov/olc/file/1466036/download>).

<sup>11</sup> Office of Legal Counsel, Department of Justice, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977).

<sup>12</sup> *Proposing an amendment to the Constitution of the United States relative to equal rights for men and women*, H. J. Res. 208, 92nd Cong. (1972).

and therefore were not relying on the very amendment they were being asked to ratify to conclude that it would by its terms expire on a date certain (along with ratifications voted prior to that date) unless ratified by the requisite number of states by that point. Describing Congress's original imposition of the preamble deadline during debates over whether to extend that deadline, Sen. Birch Bayh asserted that Congress included the deadline "cavalierly, with little concern, with little worry that this would ever be a limiting factor on ratification..."<sup>13</sup> The preamble deadline is in this way best understood as a matter of congressional concern, not constitutional significance, and thus subject to editing and extension by Congress.

Because the initial deadline was a wholly congressional matter unrelated to the actual text of the ERA, Congress was free to extend the ratification period as it did in 1978.<sup>14</sup> As the 1977 OLC Opinion discussed, the contemporary Congress would be best informed as to current conditions and their relationship to the appropriate ratification period for the ERA.<sup>15</sup> Congress's power to adjust a ratification deadline that it has included outside the body of an amendment itself also follows from the Supreme Court's opinion in *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921), ruling that Congress held the power to determine an amendment's contemporaneity. Chief Justice Hughes echoed the same basic idea in his opinion for a fractured Court in *Coleman v. Miller*, 307 U.S. 433, 454 (1939), stating that "[o]ur decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province."

Thus, when Congress chose to extend the deadline in 1978, it was making an ongoing determination about the ERA's relevance and temporality, recognizing that the original proposing Congress could not predict the future and did not act to constitutionally time-limit the ERA through an in-text deadline.

### **The Expiration of the Extended Period Before the 38th State Ratified Did Not Render Subsequent Ratifications Ineffectual.**

There is no historical example of enforcing preamble deadlines like the one contained in the proposing resolution for the ERA. The Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments were all similarly proposed with time limits but passed before their original deadlines.<sup>16</sup> The same year that Congress extended the ERA, it proposed the D.C.

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<sup>13</sup> Statement of Sen. Bayh, 124 Cong. Rec. 33140 (Oct. 3, 1978); Constitutional Law Scholars Amicus Brief at p.16.

<sup>14</sup> *Joint resolution extending the deadline for the ratification of the equal rights amendment*, H. J. Res. 638, 95th Cong. (1978); Office of Legal Counsel, Department of Justice, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977). The Supreme Court stayed the judgment of the one federal district court that, having concluded otherwise, purported to direct the Idaho State Legislature to cease deliberating on the ERA after expiration of the initial seven-year period. *National Organization of Women v. Idaho*, 455 U.S. 918 (1982). In the interest of full disclosure, I note that I was counsel of record for N.O.W. in that case and secured the Supreme Court stay that permitted deliberation by state legislatures to continue past the initial seven year deadline.

<sup>15</sup> Office of Legal Counsel, Department of Justice, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977).

<sup>16</sup> Constitutional Law Scholars Amicus Brief at p.17.

Representation Amendment, where the deadline was included in the text of the amendment itself.<sup>17</sup> This strongly suggests that the 95th Congress understood the difference between the preamble and in-text time limits. Perhaps most importantly, the Congressional Pay Amendment became the Twenty-Seventh Amendment in 1992, over 200 years after it was originally proposed during the First Congress.<sup>18</sup>

The Constitution is an enduring document meant to last beyond any single Congress or any single lifetime. Suggesting that states' ratifications are invalid because they came after some congressionally imposed deadline external to the texts of the amendments being ratified would run contrary to the notion that the Constitution is meant to serve as the basis for an ongoing democracy, not the whims of individual and temporary preferences.<sup>19</sup> Any temporality concerns raised by the expiration of the extended deadline must therefore be considered wholly political or congressional, and not legal or constitutional, in nature. Congress is accordingly free to remedy these concerns by acting by concurrent resolution to shift the deadline forward again or disregard it altogether. Because these deadline concerns are unrelated to the text of the ERA on which state legislatures have based their ratification votes, the deadline's expiration does not impact post-deadline ratifications.

Indeed, once one accepts the proposition that today's Congress could, in principle, confirm the ERA's status as part of the Constitution notwithstanding the various deadline concerns some have raised, it follows that, even if Congress does nothing at all on the subject, certifying the ERA as the Twenty-Eighth Amendment would be entirely appropriate. For if the passage of various deadlines truly rendered the ERA a dead letter, its resuscitation would be beyond Congress's power.

#### **Article V Makes No Provision for a State to Rescind its Prior Ratification.**

Beyond these time-related questions, the debate around the ERA has also centered on a state's ability to rescind its own prior ratification of a constitutional amendment. Five states—Nebraska, Tennessee, Idaho, Kentucky, and South Dakota—have purportedly “rescinded” their prior ratifications of the ERA.<sup>20</sup> The West Virginia Senate also recently voted to rescind.<sup>21</sup> Article V of the Constitution, however, states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other

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<sup>17</sup> 124 Cong. Rec. 5272 (1978); Constitutional Law Scholars Amicus Brief at p.17.

<sup>18</sup> Constitutional Law Scholars Amicus Brief at p.17–18.

<sup>19</sup> Constitutional Law Scholars Amicus Brief at p.20.

<sup>20</sup> Alex Cohen and Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, Brennan Center (Jan 23, 2020) (online at <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained>).

<sup>21</sup> *WVa Senate Rescinds 1972 Equal Rights Amendment Ratification*, U.S. News (Feb. 11, 2022) (online at <https://www.usnews.com/news/politics/articles/2022-02-11/west-virginia-senate-rescinds-era-ratification>).

Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Notably absent from this otherwise prescriptive portion of the Constitution is any mention of a process by which a state may “rescind” or retract its prior ratification of an amendment proposed by Congress. The rescinding states are therefore acting beyond the bounds of the Constitution itself. Whatever political significance one might attach to their purported rescissions, it is difficult to see how they can have any binding legal import.

Historically such attempts at rescissions have not been recognized by Congress.<sup>22</sup> For example, in *Coleman*, Chief Justice Hughes discussed Ohio and New Jersey’s attempts to rescind their ratifications of the Fourteenth Amendment. 307 U.S. at 448. Despite these attempts, Congress’s concurrent resolution recognizing that the amendment had become part of the Constitution included both Ohio and New Jersey in the list of ratifying states.<sup>23</sup>

Allowing states to rescind their ratifications would also create an unworkable mess of the Constitution and the amendment process.<sup>24</sup> That process is purposefully burdensome because amendments, unlike normal legislation, become an enduring part of the Constitution itself. Allowing rescissions would create an unequal playing field for the states, with the impact of their ratifications being dependent on the changing whims of subsequent legislatures in other states.<sup>25</sup> Although the current amendment process, as discussed in this letter, is far from clear or simple, allowing rescissions would likely create such chaos that “[e]ven the Attorneys General of States that purported to rescind their ERA ratifications have opined that the rescissions would be legal nullities.”<sup>26</sup> This cannot have been either the original meaning of Article V or the meaning any coherent non-originalist interpretive approach would assign to it.<sup>27</sup> A power of rescission should therefore not be recognized as part of any valid path for state legislatures.

### **The 2020 OLC Opinion Cannot Legitimately Serve to Justify the Archivist’s Refusal to Publish the ERA as the Twenty-Eighth Amendment.**

The 2020 OLC Opinion should not be treated as a barrier to the Archivist publishing the ERA as part of the Constitution because any such treatment goes beyond the scope of the

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<sup>22</sup> Constitutional Law Scholars Amicus Brief at p.22.

<sup>23</sup> Cong. Globe, 40th Cong., 2d Sess. 4296 (1868).

<sup>24</sup> Constitutional Law Scholars Amicus Brief at p.23.

<sup>25</sup> Constitutional Law Scholars Amicus Brief at p.23.

<sup>26</sup> Constitutional Law Scholars Amicus Brief at p.23, citing Brenda Feigen Fasteau and Marc Feigen Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment*, 1 HARV. WOMEN’S L.J. 41 (1978). See also Danaya C. Wright, “An Atrocious Way to Run A Constitution”: *The Destabilizing Effects of Constitutional Amendment Rescissions*, 59 DUQ. L. REV. 12, 48–51 (2021).

<sup>27</sup> Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NORTHWESTERN UNIV. L. REV. 1243 (2019).

Archivist's original request, contradicts the OLC's own policy on best practices, and incorrectly interprets Supreme Court's precedent.<sup>28</sup>

Despite the fact that the Archivist's request focused entirely on clarifying on his role under Section 106(b) of U.S.C. Title I in the event that 38 states ratify the ERA,<sup>29</sup> OLC went much further. Of its own volition, OLC asserted that the ERA was dead, focusing on the original preamble deadline and disregarding Congress's first extension. Allowing this highly problematic and frankly inept OLC opinion to guide current Executive Branch action would contradict OLC's own "best practices," which state that OLC's "legal opinions should 'reflect the institutional traditions and competencies' of the Executive Branch as well as 'the objectives of the President' who currently holds the office."<sup>30</sup> As recently as January of this year, President Biden has made plain not only that he himself supports the ERA "loudly and clearly," but that he does not see any barrier to a congressional resolution recognizing the ERA's ratification.<sup>31</sup> As the 2022 OLC Opinion itself recognized, there is therefore no institutional basis for allowing the 2020 OLC Opinion to bind the current Executive Branch's actions.<sup>32</sup> Those actions of course include whatever the National Archivist does or fails to do.

Relying on the 2020 OLC Opinion is also problematic because it is wrong on the merits. The 2020 Opinion bases much of its assertion that the ERA is dead on the Supreme Court's opinion in *Dillon*. However, as discussed above, *Dillon* ultimately leaves to Congress, not the Executive Branch, the power to determine an amendment's contemporaneity. The Court in *Dillon* further understands Congress's deadline-setting power to be derivative of its general power to propose amendments.<sup>33</sup> These conclusions do not support the 2020 Opinion's view of the original ERA deadline as final, but instead imagine deadlines as a congressional tool mutable by future Congresses.

As discussed above, Congress's ability to change deadlines, the inability of states to rescind their ratifications, and the plain text of the Constitution all suggest that the ERA is now a valid part of the Constitution. The Archivist has a duty to declare it as such. Based on the OLC's own updated opinion and the substantive misunderstandings central to the 2020 Opinion, the

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<sup>28</sup> Letter to Chairwoman Maloney from The ERA Project and Professors Katherine Franke, David Pozen, Erwin Chemerinsky, Melissa Murray, Laurence H. Tribe, Martha Minow, Geoffrey R. Stone, Cary Franklin, and Michael C. Dorf (Jan. 8, 2022) (online at <https://gender-sexuality.law.columbia.edu/content/era-project-olc-letter>) (hereinafter ERA Project Letter).

<sup>29</sup> Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration (Dec. 12, 2018).

<sup>30</sup> ERA Project Letter, quoting Memorandum for Attorneys of the Office from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions*, at 2 (July 16, 2010) (online at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>).

<sup>31</sup> Statement from President Biden on the Equal Rights Amendment (Jan. 27, 2022) (online at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/statement-from-president-biden-on-the-equal-rights-amendment/>).

<sup>32</sup> Office of Legal Counsel, Department of Justice, *Opinion: Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment* (Jan. 26, 2022) (online at <http://www.justice.gov/olc/file/1466036/download>).

<sup>33</sup> ERA Project Letter at p.5.

Archivist should not see the 2020 Opinion as a barrier to publishing the ERA as the Twenty-Eighth Amendment. If he is to decline to do so, he must provide a different justification altogether. In my view, none is available.

### **Concurrent Action by Congress to Recognize the ERA Would Not Prevent the Supreme Court from Adjudicating its Validity.**

Although I have outlined Congress's ability to take concurrent action to extend or dismiss the existing deadline and thereby recognize the ERA as part of the Constitution, such concurrent action – which I have explained is not a necessary precondition to such recognition – would neither suffice to preclude review of the issue by the Supreme Court nor dictate the outcome of such review.

As a threshold matter, the Supreme Court recognized in *Dillon* and *Coleman* that the question of a congressional deadline's force is a justiciable one.<sup>34</sup> The same is true of the Court's precedents surrounding the Article V process more broadly.<sup>35</sup> While *Dillon* and *Coleman* leave to Congress the power to determine an amendment's contemporaneity under the political question doctrine, many other questions relating to the ERA and the amendment process remain squarely within the Court's purview.

However, the Court's intervention in the sphere of amendments to the Constitution is rendered particularly complicated as a prudential separation-of-powers matter because of the frequency with which amendments are passed to overrule the Court's constitutional decisions.<sup>36</sup> Thus, when interrogating these questions, the Court will have to evaluate the nature of the specific controversy at issue and determine whether, particularly in light of the Court's own involvement in the underlying matter, it presents a non-justiciable political question. While the case currently pending before the D.C. Circuit in *Virginia v. Ferriero* does not present such a non-justiciable question, other postures in future cases might preclude the Court's intervention or at least justify the Court's abstention.

In *Ferriero* or any other case where the Supreme Court ultimately holds that its review of the merits is not foreclosed by the political question doctrine or other applicable principles, it might very well decide to hold the ERA to be a merely lapsed proposal rather than a fully ratified constitutional amendment, whether on the legally inadequate grounds adopted by the 2020 OLC opinion or through overturning or narrowing its own precedent. A concurrent resolution by Congress would not preclude the Court's doing so but might make so bold a judicial action considerably less likely.

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<sup>34</sup> Constitutional Law Scholars Amicus Brief at p.10.

<sup>35</sup> Constitutional Law Scholars Amicus Brief at p.9, citing *Virginia v. Ferriero*, 525 F.Supp.3d 36, 50-51 (D.D.C. 2021).

<sup>36</sup> This is true of the Fourteenth, Sixteenth, Nineteenth, and Twenty-Fourth Amendments; Constitutional Law Scholars Amicus Brief at p.11-12.



## **What is Truly Part of the Constitution is Ultimately a Question for the People Themselves.**

That the ERA has faced a troubled path to recognition is unsurprising. The best available scholarship has demonstrated that, contrary to popular assumptions, nearly every amendment has traversed considerable obstacles on its way to becoming generally recognized as part of the Constitution.<sup>37</sup> Given the vagueness, ambiguity, open-endedness, and other dimensions of indeterminacy that characterize nearly the entire Constitution, it is ultimately our collective view of the document's core principles that must guide us in understanding what force to give it and what to regard as falling within its four corners. As the foundation, first and foremost, of American democracy, the Constitution both empowers the American people and relies on them for its ongoing legitimacy. Thus, a true understanding of what the Constitution is and what it contains – as well as what its text means and what to make of its omissions and silences – is ultimately a task that must be left to the people themselves, not to any incontestable set of formal criteria or mechanical procedures. Attempting to hyper-formalize and produce a single, coherent answer will lead down an endless path of regression.<sup>38</sup>

My conclusion as a constitutional scholar is that the ERA is currently a valid part of the United States Constitution, that Congress should act concurrently to recognize it as such, and that even if Congress takes no such action the Archivist should publish it as the Twenty-Eighth Amendment.

Respectfully,



Laurence H. Tribe

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<sup>37</sup> David Pozen and Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, COLUM L. REV. (Dec. 2, 2021) (available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3834066](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834066)).

<sup>38</sup> Douglas Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1979); Laurence H. Tribe, *The Invisible Constitution*, xvii – xxi, 2 – 5, 31, 152-54 (2008).