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Unequal Protection of the Laws for Women is Constitutional Terrorism, So How Come Nobody Knows About It?

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UNEQUAL PROTECTION OF THE LAWS FOR WOMEN IS CONSTITUTIONAL TERRORISM, SO HOW COME NOBODY KNOWS ABOUT IT?

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INTRODUCTION

Winning the vote in 1920 enfranchised American women in public life,[1] brought them out of the home, and dramatically changed their relationship with society,[2] but did nothing to ensure their legal equality. Belying the claim

* Adjunct Professor of Law and Director of the Women's and Children's Advocacy Project, New England Law | Boston; Mary Joe Frug Visiting Assistant Professor of Law, New England Law | Boston, 2021-22; Visiting Scholar, Harvard Law School, 2022-23. I coined the phrase "constitutional terrorism" to describe the regime under which women exist as unequal persons under the United States Constitution. The inequality of women is terroristic because it is "perpetrated by the state in the everyday enforcement of law and order" for the purpose of stoking fear in women and broadly influencing human behavior. Joseph M. Brown, *State Terrorism*, INTERNATIONAL STUDIES, INTERNATIONAL STUDIES ASSOCIATION AND OXFORD UNIVERSITY PRESS, (April 2, 2021), https://doi.org/10.1093/acrefore/ 9780190846626.013.600. I dedicate this new phrase and this article to the legacy of Alice Paul, whose fearless leadership and unbridled commitment to women's equality is not fully appreciated. Her brilliant decision to establish the National Woman's Party as a fiercely nonpartisan organization that held both sides accountable gave women unprecedented political power, which is why it was maliciously dissolved. The truth about Alice's work should be taught in every classroom, at every grade level. Women have a right and a need to know how they came to be subjugated, and why things will never change until the fight for equality is led by an incorruptible woman like Alice who understands the importance of prioritizing women over party.

1. Kaleena M. Beck, *A History of Women's Fight for Equality*, 63 ADVOC. 12, 12 (2020); Library of Congress, *Historical Overview of the National Woman's Party,* https://www.loc.gov/collections/women-of-protest/articles-and-essays/historical-overview-of-the-national-womans-party/ (last visited Oct. 13, 2021).

2. Monica Hesse, *Women's Suffrage Was a Giant Leap For Democracy. We Haven't Stuck the Landing Yet*, WASHINGTON POST (Aug. 3, 2020), https://www.washingtonpost.com/graphics/2020/lifestyle/100-years-of-womens-suffrage-whats-changed/.

that the United States is the greatest democracy on earth, women in America have never enjoyed equal rights under the Constitution. Every Constitution in the world written since the end of World War II contains a provision stating that men and women enjoy equal stature under the law;[3] the United States Constitution has never had similar language.[4] An amendment to establish women's equality, the "Equal Rights Amendment," (ERA) was first filed with Congress in 1923,[5] but it did not pass both houses until 1972.[6] To become part of the Constitution, the ERA then had to be ratified by three-fourths (thirty-eight) of the States.[7] In 2020, the ERA was ratified by the last necessary State, but it has not yet been added to the Constitution.[8]

This Article will discuss women's centuries-long struggle for equality, why the ERA matters as much today as it did when it was first filed in 1923, why the ERA is not currently part of the Constitution despite its ratification in 2020, how influential women's rights leaders and groups have worked against the ERA while claiming to be working for it, and what women must do differently today to get the ERA into the Constitution once and for all.[9]

OVERVIEW

Support for women's equality was strong when the ERA passed the House of Representatives in 1970,[10] and the Senate in 1972,[11] but it was burdened with a seven-year ratification deadline, which meant it had to be ratified quickly to become law.[12] Some said the deadline was not a problem, and that the ERA would easily be ratified by thirty-eight States before the deadline expired,[13] but Alice Paul, who wrote the ERA, was seen crying

3. Sen. Doc. No. S1723, 2020, https://www.congress.gov/116/crec/2020/03/12/CREC-2020-03-12-pt1-PgS1723.pdf.

4. *Id.*

5. Patricia Thompson, *The Equal Rights Amendment: The Merging of Jurisprudence and Social Acceptance*, 30 W. ST. U.L. REV. 205 (2003); *Equal Rights Amendment,* WIKIPEDIA, https://en.wikipedia.org/wiki/Equal_Rights_Amendment (last visited Oct. 18, 2021).

6. Thompson*, id.*

7. Erika Bachiochi, *The Contested Meaning of Women's Equality*, NATIONAL AFFAIRS (Winter 2021), https://www.nationalaffairs.com/publications/detail/the-contested-meaning-of-womens-equality (last visited, Oct. 13, 2021).

8. *Id.*

9. *See infra* Part One, Part Two, Part Three, Part Four, & Part Five.

10. H.R.J. Res. 264, 91st Cong., 2d Sess.; 116 Cong. Rec. 28004 (1970).

11. Thompson, *supra* note 5.

12. In 1970, Congresswoman Martha Griffiths filed the ERA without a ratification deadline, and it was resoundingly passed by the House of Representatives by a vote of 352 to 15, but it did not pass the Senate. The following year, Griffiths inexplicably changed the ERA's language to add a seven-year ratification deadline. Again, the ERA passed the House, and this time, it also passed the Senate without revision. Senator Sam Ervin, an ERA opponent, sponsored the ERA in the Senate and supported the deadline. *See* 116 Cong. Rec. 36302 (1970).

13. *See* 117 Cong. Rec. 35814-15 (1971) (Congresswoman Martha Griffiths stating, "Personally, I have no fears but that this amendment will be ratified in my judgment as quickly was the 18-year-old

outside Congress the day the ERA passed Congress because she was certain the deadline would ensure its demise.[14] She was right. When the deadline expired, only thirty-five States had ratified the ERA.[15]

Most advocates gave up, believing they had to start over with a new ERA, but that sentiment changed in 1992 when the Twenty-Seventh Amendment was ratified some 203 years after it was proposed by Congress.[16] Women were angry that the ERA was given such a short ratification deadline, while the less important Twenty-Seventh Amendment, which involved the timing of congressional pay raises, was accepted as valid despite a gap of more than two centuries from congressional proposal to final State ratification.[17] The extreme delay in ratifying the Twenty-Seventh Amendment gave women reason to believe the ERA's short deadline was unconstitutional and would be invalidated by the courts. Therefore, rather than starting over with a new ERA, women reignited their fight for the old one, developed a strategy to persuade three more States to ratify it, (three-State strategy)[18] and planned to fight it out in the courts if anyone objected to its validity because of the expired deadline.

After a decades-long battle to advance the three-state strategy, Virginia became the thirty-eighth and last necessary State to ratify the ERA in 2020,[19] but it was not added to the Constitution because the United States Archivist, whose job it is to add new amendments to the Constitution when they become ratified, refused to add the ERA.[20] He claimed his hands were tied because the Office of Legal Counsel (OLC) at the Department of Justice (DOJ) had issued a memorandum opinion stating that the ERA was not valid because its ratification deadline had expired.[21] Lawsuits were then filed against the

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vote. I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever. But I may say I think it will be ratified almost immediately").

14. *Rights of Passage: The Past and Future of the ERA*, https://web.archive.org/web/20200716031736/http://www.socialstudies.org/sites/default/files/publications/se/5905/590506.html (last visited, Oct. 13, 2021).

15. Wilfred U. Codrington III & Alex Cohen, *The Equal Rights Amendment Explained*, BRENNAN CENTER FOR JUSTICE (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

16. THE U.S. CONSTITUTION AND CONSTITUTIONAL LAW 105-108 (2012).

17. Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT 593, 594 (2000).

18. *Id.* at 594-95.

19. Sarah Rankin, *With Virginia's Ratification, ERA Fight Advances*, ASSOCIATED PRESS (Jan. 27, 2020, 5:28 PM), https://apnews.com/article/constitutions-us-news-discrimination-va-state-wire-virginia-fd7f31ce50bc15184317d1abefb08da1.

20. *NARA Press Statement on the Equal Rights Amendment*, released January 8, 2020, https://www.archives.gov.press/press-releases-4 (last visited, Oct. 11, 2021) [hereinafter *NARA Press Statement*].

21. *Id.*

Archivist to force him to publish the ERA in the Constitution as the Twenty-Eighth Amendment,[22] but the lawsuits were unsuccessful.[23]

Many factors contributed to the ERA's troubles over the years, but none so frustrating as the fact that women themselves, including well-known women's rights leaders, hurt the cause. The movement lacked unity, and some influential groups and individuals, including Ruth Bader Ginsburg, the American Civil Liberties Union (ACLU), the American Association of University Women (AAUW), the National Organization for Women (NOW), and the Feminist Majority, undermined efforts to ratify the ERA.[24]

The first part of this Article will explain why the ERA still matters today despite women's many advancements.[25] The second part will cover important events in the first round of battle for women's equality, from 1776 when America was founded as a nation to when the ERA's purported deadline expired in 1982.[26] The third part will address the renewed fight for the ERA that began around 1992.[27] The fourth part will discuss why the ERA is valid despite expiration of the deadline.[28] The fifth and final part will propose strategies for moving forward.[29]

PART ONE - WHY THE ERA STILL MATTERS

Equality between men and women is a fundamental human right.[30] More than ninety percent of Americans support women's equality,[31] but a nearly equal number are unaware that women do not yet have equal rights under the Constitution.[32] The issue is not taught in schools and few mainstream media resources are devoted to helping the public understand the issue. Most people lack even a basic understanding of how inequality affects women. When the issue comes up, some ask "what rights do men have that women do not

22. The first lawsuit was filed in Massachusetts federal court, by the author, on behalf of women. Equal Means Equal, et al., v. Ferriero, 478 F. Supp. 3d 105 (2020). A second lawsuit against the Archivist was filed weeks later by the Attorneys General of Virginia, Illinois, and Nevada. Virginia et al., v. Ferriero, 525 F. Supp. 3d 36 (2021).

23. *Equal Means Equal*, 478 F. Supp. 3d at 126; *Ferriero*, 525 F. Supp. 3d at 61.

24. Denning & Vile, *supra* note 17 at 594.

25. *See infra* Part One.

26. *See infra* Part Two.

27. *See infra* Part Three.

28. *See infra* Part Four.

29. *See infra* Part Five.

30. *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (explaining ". . .the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women . . .").

31. *Breaking: Americans – by 94% – Overwhelmingly Support the Equal Rights Amendment* (June 17, 2016), https://www.prnewswire.com/news-releases/breaking-americansby-94—-overwhelmingly-support-the-equal-rights-amendment-era-300286472.html.

32. V. Shannon, *Equal Rights for Women? Survey Says Yes, but. . .,* NEW YORK TIMES, (July 1, 2010), https://www.nytimes.com/2010/07/01/world/01iht-poll.html.

have?" The answer of course is that this is the wrong question. The right question is: "are women constitutionally *entitled* to equal treatment under any laws?" The answer to this question is no. None.

The ERA would establish women's legal equality for the first time in history, by requiring all government officials to *treat* women equally, and by mandating that all laws, policies, and programs of the government *are enforced equally*,[33] and *applied* equally on behalf of women.[34] Importantly, it would do this by requiring that courts apply a "strict scrutiny" standard of judicial review when assessing women's claims of discrimination or unequal treatment.[35] Such claims are currently subject to a lesser standard of judicial review, known as "intermediate scrutiny", which is much less protective than strict scrutiny because it allows all officials in all branches of government, including the courts, more leeway to discriminate against women.[36]

Strict scrutiny is the gold standard of judicial review. It applies when individuals and classes of people are treated differently and worse by the government because of who they are in society, and requires that courts declare such treatment unconstitutional unless it serves a "compelling" government interest, is "narrowly tailored" to serve that interest, and uses the "least restrictive means" to accomplish the government's goal so that it causes the least possible discriminatory effect.[37] Under intermediate scrutiny, the government's interest need only be "important," rather than compelling, and the "narrow tailoring" and "least restrictive means" requirements do not apply.[38] The "narrow tailoring" and "least restrictive means" tests are crucial aspects of strict scrutiny protection because they prevent unnecessary discrimination.[39] Without these elements, intermediate scrutiny allows the government to adopt laws and policies that explicitly deny

33. *See* Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (stating the persistent failure of police to aid a domestic violence victim was a "pattern or practice of affording inadequate protection, or no protection at all, to women who have complained of being abused by their husbands. . .[and is]. . . subject to the equal protection clause and section 1983 liability. . .").

34. Whren v. U.S., 517 US 806, 813 (1996) (stating ". . .the constitutional basis for objecting to discriminatory application of laws is the Equal Protection Clause").

35. Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring) (noting that adoption of the ERA would require courts to treat sex as a suspect classification subject to "strict scrutiny" review by the courts); Joint Judiciary Committee Report on the Equal Rights Amendment, Report No. 92-359, 92d Congress, *Equal Rights For Men And Women*, July 14, 1971, p.4 (explaining "[u]nder the text of the [ERA] . . . [j]ust as statutes classifying by race are subject to a very strict standard of equal protection scrutiny under the 14th Amendment, so too any State or Federal statute classifying by sex would likewise be subject to a strict standard of scrutiny . . .").

36. R. Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 RICH L. REV. 1279, 1283 n.19 (1994).

37. *Id.* at 1283 n.19; City of Boerne v. Flores, 521 U.S. 507, 534 (1997); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 529 (Aspen Law and Business, 1997).

38. *Id.*; Craig v. Boren, 429 U.S. 190, 218-20 (1976); U.S. v. Virginia, 518 U.S. 515, 533 (1996).

39. Kelso, *supra* note 36 at 1283 n.19.

women equal treatment,[40] and unequally *enforce* laws and policies when applying them to women, regardless of what the laws and policies say.[41] This second-class legal status applies to all laws and all government actions - from municipal rules about dog licenses to Freedom of Speech, and even laws against slavery.[42] This last point deserves emphasis. The Thirteenth Amendment abolished slavery, but because the Constitution *allows* the Thirteenth Amendment to be unequally enforced when applied to women, women are less effectively protected.[43] Put another way, it is less illegal to enslave women. In turn, it is more difficult to fight crimes like sex trafficking, which predominantly harm women.

Under intermediate scrutiny, lawmakers, police, prosecutors, agencies, municipal workers and even the courts have constitutional permission to treat women as second-class people under all laws and all government policies and programs, in all aspects of life, from employment, education, and public accommodations, to more fundamental areas of privacy, Freedom of Religion, Due Process, bodily integrity, personal autonomy, and liberty.[44]

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40. Twan Anh Nguyen v. Ins., 533 U.S. 53, 58-59, 73 (2001).

41. "Intermediate scrutiny" applies to sex/ gender and illegitimate children (and LGBTQ persons according to some courts, though this has not been determined by the Supreme Court and lower courts are inconsistent). ERWIN CHEMERINSKY, *supra* note 37 at 529. In 1996, *Boren's* intermediate standard was described by the Supreme Court as an "exacting" standard that requires the government to demonstrate an "exceedingly persuasive justification" for sex-discriminatory laws or policies. *Virginia*, 518 U.S. at 532-33 (1996). While "exceedingly persuasive" was thought to be better than *Boren's* "substantially related" test, (but see National Org. for Marriage v. McKee, 649 F.3d 34, 56-57 (1st Cir. 2011) holding that "exacting scrutiny" only requires proof of "substantial relation" not "exceedingly persuasive justification") there remain no requirements of "narrow tailoring" and "least restrictive means" (but see Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) holding that "narrow tailoring" - but not "least restrictive means" - is required under "exacting scrutiny" in First Amendment disclosure law cases) and the government's interest still need only be "important" rather than "compelling," which leaves a lot of room for discrimination. Moreover, the "exceedingly persuasive justification" rule appears unsettled because the Supreme Court ignored it entirely only a few years later in *Twan Anh Nguyen*, 533 U.S. at 58-59 (2001), where it required no proof from the government of "exceedingly persuasive justification" for a sex discriminatory law. More recently, the Supreme Court decided Sessions v. Morales-Santana, 582 U.S. 47 (2017), in which the "exceedingly persuasive justification" language reappeared, but the Court did not overturn *Nguyen;* it simply distinguished it on the grounds that the type of sex classification at issue in *Morales-Santana* was different. *Morales-Santana*, 582 U.S. at 64-65 (2017). And because the Court in *Morales-Santana* denied relief, the reintroduction of *Virginia's* "exceedingly persuasive justification" language is mere dictum. Regardless of whether "exceedingly persuasive justification" is presently the standard under intermediate scrutiny, the "exacting scrutiny" modification of intermediate scrutiny that women "won" in *Virginia* afforded women very little in terms of improved protections for their Equal Protection rights because it added no requirement that the government "narrowly tailor" laws and policies and use the "least restrictive means" to achieve its goal.

42. *Virginia*, 518 U.S. at 568.

43. Douglas Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555 (2002).

44. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15-40 (2004). *See also* JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING Book II: IDEAS 74 (Johnathan Bennett 2017 ed.) (1694) (stating "Where-ever any performance or forbearance are not equally in a man's power; where-ever doing or not doing, will not equally follow upon the preference of his mind directing it, there he is not *Free*").

Even equal pay laws are affected by intermediate scrutiny because courts have constitutional authority to rule that the word "equal" in an equal pay law does not require equal enforcement when applied to women. Inequality also causes women to suffer rampant discrimination in family courts where they disproportionately lose custody of their children, even to abusive men.[45]

Without equality, women suffer negative health consequences,[46] including lifelong trauma associated with human atrocities such as rape and domestic violence,[47] because the government has authority to deny women adequate protection from harm. For example, many States' hate crime laws do not cover women.[48] Hate crime laws recognize the added harm people endure when a crime happens to them because of who they are in society, such as Black, Asian, disabled, etc.[49] Under intermediate scrutiny it is legal to exclude women from hate crime laws that *should* equally protect from the violence they suffer because they are female. Under the ERA and strict scrutiny, courts would be compelled to rule that excluding women from hate crime is unconstitutional because it does not serve a compelling state interest and the laws could be tailored more narrowly to be less discriminatory by simply adding sex as a category.[50]

Under intermediate scrutiny, even civil rights laws that require equal treatment of women may be enforced in a manner that subjects women to second-class treatment. For example, Title IX[51] forbids sex discrimination in federally funded education programs and uses the same language as Title VI,

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45. Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What do the Data Show?*, 42 J. SOC. WELFARE & FAM. L., 92, 92, 96-97 (2020).

46. Nancy Krieger, *Discrimination and Health Inequities*, 44 INT'L J. OF HEALTH SERV. 643, 655, 687-88 (2014) (stating meta-analysis of studies showing discrimination's negative health consequences through multiple pathways, including that discrimination limits access to occupational and economic resources, thereby constraining options for living and working in healthy environments, and causing stressors that adversely affect psychological well-being, thus increasing the risk of somatic and mental illness).

47. The United States has consistently referred to sex-based violence as a human rights issue "that undermines not only the safety, dignity, overall health status, and human rights of the millions of individuals who experiences it, but also the public health, economic stability, and security of nations." U.S. Department of State, *United States Strategy to Prevent and Respond to Gender-Based Violence Globally*, 1, 7 (Aug. 10, 2012), https://2009-2017.state.gov/documents/organization/196468.pdf.

48. *State Hate Crime Statutes*, BRENNAN CENTER FOR JUSTICE (July 2, 2020), https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes.

49. *Id.*

50. Most Equal Protection lawsuits allege "intentional" discrimination because unintentional "disparate impact" lawsuits are not permitted under the Equal Protection Clause, Washington v. Davis, 426 U.S. 229, 248 (1976). This is because the Equal Protection doctrine is primarily concerned with motives, not effects. *Davis*, 426 U.S. at 238-39 (1976). Nonetheless, states may enact laws to prevent disparate impacts, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV., no. 2, 494, 497 (2003), though this would probably be unnecessary under the ERA because its language is broader than the Equal Protection Clause, thus would likely permit disparate impact lawsuits.

51. 20 U.S.C. § 1681(a).

which covers discrimination based on race and national origin,[52] yet women do not receive equal treatment or equal enforcement of Title IX on campus, on par with Title VI.[53] The similarity of language is legally irrelevant under intermediate scrutiny, because agencies and courts that enforce Title IX are not *constitutionally* obligated to treat women equally - even when *statutory* language indicates that they must.[54]

The disconnect between the seemingly clear language of a law like Title IX that promises sex equality, and a Constitution that permits second-class enforcement *of that law*, is not widely appreciated, yet its impact is clear, especially in the area of violence against women. Federal law forbids sex discrimination by law enforcement,[55] yet police and prosecutors routinely discriminate against women by failing to provide an adequate law enforcement response to sex-based crimes compared to their response to crimes committed against other categories of people.[56] This different and worse treatment by law enforcement causes women to endure higher rates of

52. Civil Rights Division: US Department of Justice, *Title IX of the Education Amendments of 1972,* (updated Aug. 6, 2015), https://www.justice.gov/crt/title-ix-education-amendments-1972 (explaining Title IX states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance); 42 U.S.C. § 2000d (stating) Title VI states: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance).

53. For example, victims of offenses covered by Title IX, such as sexual assault, are subjected to burdensome, complicated, and unfair grievance procedures on campus under 34 CFR part 106, compared to victims of offenses covered by Title VI who enjoy separate, much less complicated, and preferable grievance procedures under 28 CFR Ch.1 § 42.107(b) (7-1-11 Ed.). This means that if a student is assaulted on campus based on their race or national origin, they enjoy a fairer and less onerous process compared to what happens to a woman who is assaulted because she is female. Women even endure discrimination in the codified language of Title IX's regulations, despite the fact that the Title IX statute forbids sex discrimination. A statutory prohibition against sex discrimination is supposed to prohibit the promulgation of sex discriminatory regulations *under* that statute, but because Title IX is not rooted in a constitutional guarantee of equal enforcement, even Title IX itself may, lawfully, discriminate against women. One glaring example of this is codified at 34 CFR § 106.45(b)(6)(i)(ii). This Title IX regulation states that evidence of a victim's prior consensual sexual conduct with the perpetrator is per se admissible to prove that the victim consented to rape, but it says nothing about the perpetrator's prior offensive sexual conduct with the victim being admissible to prove the opposite, that the rape was not consensual. This would be unconstitutional under the ERA.

54. *Id.*

55. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141 (2012) (explaining this prohibits law enforcement officers from depriving persons of their rights under constitutional and federal law); Safe Streets Act 42 U.S.C. § 3789d(c)(1)(2012) (stating this Act also prohibits sex discrimination in programs funded under the Act); (The implementing regulation prohibits program recipients from actions "which have the effect of subjecting individuals to discrimination under [Section 3789d(c)] or have the effect of substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or origin." 28 C.F.R. § 42.104(b)(2).

56. United Nations General Assembly, 2006. *In-Depth Study on All Forms of Violence against Women: Report of the Secretary General*. A/61/122/Add.1. United Nations, New York, http://www.un.org /womenwatch/daw/vaw/v-sg-study.htm.

violence.[57] Indeed, studies show that women suffer disproportionately high rates of abuse *because* they lack full legal equality.[58] It should come as no surprise then that the United States is among the ten most dangerous countries for women, third most dangerous for sexual violence, tied with Syria.[59] Every sixty-eight seconds someone in America is sexually assaulted;[60] ninety percent of adult victims are female.[61] Males account for ninety-eight point nine percent of those arrested for forcible rape,[62] but only two percent of rapists spend even one day behind bars.[63] An average of more than five females a day in the United States are killed by men.[64] Tens of millions of women each year are victimized by men's violence,[65] but ninety percent of domestic abuse perpetrators are not charged, or their charges are dropped.[66]

Women suffer in countless other ways under intermediate scrutiny, even when they appear to have full equality under their State constitutions. This is because while States may grant their citizens better rights under State constitutions compared to the Federal Constitution,[67] and thirty-eight have done that by adopting "State ERAs" or other provisions that appear to grant full equality to women, (though few specifically use the words sex or

57. Jessica Lenahan (Gonzales), et. al v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, Doc. 11, para. 168 (2011) (quoting Maria Da Penha Fernandes (Brazil), Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/0, OEA/Ser.L./V/II.111, Doc. 20 rev. para. 56 (2001)) (quoting "State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence 'since society sees no evidence of willingness by the States, as the representative of the society, to take effective action to sanction such acts'").

58. *See e.g*., United Nations General Assembly, *supra* note 56; Linda L. Dahlberg & Etienne G Krug, *Violence a global public health problem,* REDALYC, ORG, 2002, at 280, 285 (rape is more common in cultures that support an ideology of male superiority). *See also* United Nations Children's Fund, *The State of the World's Children 2007: Women and Children The Double Dividend of Gender Equality,* UNICEF, New York, at 3-21.

59. Meka Beresford & Belinda Goldsmith, *India Most Dangerous Country for Women with Sexual Violence Rife – Global Poll,* THOMAS REUTERS FOUNDATION (June 25, 2018, 9:41 PM), https://www.reuters.com/article/idUSKBN1JM075/ (quoting "War-torn Afghanistan and Syria ranked second and third in the Thomson Reuters Foundation survey of about 550 experts on women's issues").

60. RAINN, *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.

61. *Id.* (citing 2000 data from Dept. of Justice).

62. FBI: UCR, *Crime in the United States* (2011), https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_66_arrests_suburban_areas_by_sex_2011.xls.

63. RAINN, *supra* note 60.

64. Wilcox, D., *2018 Women & Girls Allegedly Killed by Men & Boys*, WOMEN COUNT USA: FEMICIDE ACCOUNTABILITY PROJECT (2018), https://airtable.com/shrwuHqMomCq6uMhr/tblM2NwHXDxJVTOAp/viw9JRjeFSyTxCCtL (identifying 1841 women and girls killed by men and boys in the U.S. in 2018. 1841 divided by 365 is 5.04); Violence Policy Center, *When Men Murder Women, An Analysis of 2018 Homicide Data* (Sept. 2020), https://vpc.org/studies/wmmw2020.pdf.

65. Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report,* CENTERS FOR DISEASE CONTROL (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/nisvsreport2010-a.pdf.

66. Hamby, S., et al., *Intervention Following Family Violence: Best Practices and Helpseeking Obstacles in a Nationally Representative Sample of Families With Children*, 3 PSYCH. OF VIOLENCE 325, 332, https://www.apa.org/pubs/journals/releases/vio-a0036224.pdf.

67. Kahn v. Shevin, 415 U.S. 351, 356 (1974).

gender)[68] only thirteen *enforce* those provisions under a strict scrutiny standard of review, or better, when applying them to women.[69] The rest use a lesser standard, such as intermediate scrutiny, or worse,[70] because without the ERA, States are free to *apply* their State constitutional equality guarantees unequally to women.[71] Think about that. The United States Constitution *allows* States to give women *unequal* equal rights. This confusing constitutional reality is a key reason why so few women understand the nature and primary cause of their suffering.

Unequal treatment under the law w affects all aspects of women's lives but is especially harmful in the context of laws designed to protect them from the violence they endure *because they are female*.[72] Congress recognized this when it enacted the Violence Against Women Act many years ago and noted that the space between equal rights and unequal rights is where violence against women happens with impunity.[73]

The ERA would fix the Constitution by mandating that courts use strict scrutiny when reviewing women's legal challenges to sex discriminatory treatment by the government.[74] Under strict scrutiny, women will enjoy

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68. *Id.* at 353.

69. Bucholtz, B., *Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions From the 2002-2003 Term*, 39 TULSA L. REV. 75, 76-79 (2013).

70. *Kahn*, 415 U.S. at 353.

71. *Thurman*, 595 F. Supp. at 1527.

72. Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 19: Violence against Women,* paras. 1, 24(b), U.N. Doc. A/47/38 (1992) (recognizing "gender-based violence is a form of discrimination that seriously inhibits wren's ability to enjoy rights and freedoms" and recommending that State Parties "ensure that laws against family violence and abuse give adequate protection to women").

73. In enacting the civil rights provision of the Violence Against Women Act, Congress explicitly found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws" and that therefore "a [f]ederal civil rights action . . . is necessary to guarantee equal protection of the laws." H.R. Rep. No. 103-711, at 385 (1994) (Conf. Rep.).

74. Some argue that strict scrutiny could hurt women because it will prevent courts from upholding so-called "favorable" sex discriminatory laws meant to support and protect women, and that intermediate scrutiny is better because it would permit such laws. This view is misguided. While the Supreme Court has allowed discriminatory preferences in the past under intermediate scrutiny, as when it upheld the constitutionality of a Georgia law that favored mothers of illegitimate children over fathers of such children for purposes of deciding who may sue for the wrongful death of an illegitimate child, Parham v. Hughes, 441 U.S. 347 (1979), *Parham* is nearly half a century old and was based on the Court's legitimate concern at the time that women should be favored because of the relative ease with which a child's biological mother could be identified compared to a biological father. *Id*., at 359-61. Importantly, when *Parham* was decided, Equal Protection jurisprudence permitted discriminatory preferences even under strict scrutiny, *see* e.g., Califano v. Webster, 430 U.S. 313, 316-21. (1977). Thus, the Supreme Court would likely have reached the same conclusion in *Parham* if strict scrutiny had applied to sex-based Equal Protection claims in 1979, especially considering the Court's result-oriented approach to Equal Protection cases. Bucholtz, *supra* note 69 at 76-79. Although the Supreme Court later restricted racial preferences under strict scrutiny, Richmond v. J.A. Croson Co., 488 U.S. 469, 493-500 (1989), it continues to support the idea that race may legitimately be considered under strict scrutiny. Students for Fair Admissions v.

maximum legal protection for their bodies and rights. Without it, women will continue to suffer disproportionate harm in all aspects of their lives, simply because they are female.

PART TWO - THE FIRST ROUND OF BATTLE - 1776 TO 1982

To appreciate today's battle for women's equality, it is important to understand how women's legal status in America began not with inequality but with total invisibility and absence of personhood. In the early 1600s, America was a British colony.[75] It became an independent nation on July 4, 1776, when our founders issued a Declaration of Independence, which spoke to the injustices and maltreatment endured by the United States under British colonialism.[76] It declared, "all *Men* are created equal," and "governments are instituted among *Men*."[77] While the word "men" today is sometimes read as sex neutral, that was not the case in 1776.[78] Indeed, John Adams wrote to his wife Abigail only a few months before the Declaration of Independence was announced, "We know better than to repeal our Masculine systems . . . [as this] would compleatly [sic] subject Us to the Despotism of the Peticoat [sic] . . . "[79] John's letter was in response to Abigail's letter from March 31, 1776, in which she expressed concern about what America's new Constitution would say about the legal status of women:

President and Fellows of Harvard College, 600 U.S. ___ (2023) slip op., 39-40 (colleges determining whom to accept as students may lawfully consider an applicant's life experience as a racial minority). Thus, the Court would likely rule the same way under strict scrutiny with regard to sex-based preferences, such as restrictions on who may play on sports teams or expose themselves unclothed in private spaces. This is not only because courts may lawfully take women's past experiences into account under strict scrutiny, but also because concerns about separate spaces for women in the context of nudity and athletics raise questions not only about women's experiences, but also about privacy, safety, and fair competition. Privacy, safety, and fair competition objectively justify separate treatment of women for reasons that have nothing to do with unlawful sex discrimination in the same way that choosing a Black man to play the role of Frederick Douglass in a play has nothing to do with unlawful race discrimination. Finally, it is worth pointing out that in 2024, under a constitutional regime of intermediate scrutiny, the Biden Administration issued new Title IX regulations forbidding separate sports and private spaces for women in federally funded education programs. 34 CFR Part 106 [Docket ID ED-2021-OCR-0166] (unofficial). Thus, if one believes that private spaces and separate sports for women are important, intermediate scrutiny does not provide a supportive legal framework. Indeed, as discussed throughout this article, it is intermediate scrutiny that allows the government to disregard women's concerns as less important than the concerns of others.

75. Library of Congress, *Creating the United States,* REVOLUTION OF THE MIND, https://www.loc.gov/exhibits/creating-the-united-states/revolution-of-the-mind.html.

76. *Id.*

77. *Id.*

78. National Archives, *Abigail Adams to John Adams, 31 March 1776,* FOUNDERS ONLINE (March 31, 1776), https://founders.archives.gov/documents/Adams/04-01-02-0241.

79. Massachusetts Historical Society, *Letter from John Adams to Abigail Adams*, ADAMS FAMILY PAPERS (April 14, 1776), https://www.masshist.org/digitaladams/archive/doc?id=L17760414ja&hi=1&query=despotism&tag=text&archive=all&rec=3&start=0&numRecs=18.

> . . . and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable [sic] to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticuliar [sic] care and attention is not paid to the Laidies [sic] we are determined to foment a Rebelion, [sic] and will not hold ourselves bound by any Laws in which we have no voice, or Representation. That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity.[80]

Thomas Jefferson shared John Adams' dim view of women, expressing in 1778 that even in a "pure democracy," women are unworthy of equal citizenship as they cannot "mix promiscuously in the public meetings of men."[81]

While Adams and other men worked on a federal Constitution, individual States adopted their own constitutions, and some did not exclude women.[82] For example, when New Jersey adopted its constitution in 1776, it gave women the right to vote so long as they were unmarried and owned a certain amount of property.[83] A few years later, the United States Constitution was adopted.[84] It took effect in 1789 and established baseline rules about how America's three interdependent branches of government (executive, legislative, and judicial) would work and how the powers of the National and State governments would be divided.[85] Ten amendments, known as the Bill of Rights, were also proposed and became part of the Constitution in 1791.[86] The Bill of Rights included provisions to protect individuals against unchecked government power, such as Freedom of Religion, Freedom of

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80. *Abigail Adams to John Adams, 31 March 1776*, *supra* note 78.

81. NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 45 (Linda K. Kerber & Nell Irvin Painter eds., 2000).

82. *US Women's Suffrage Timeline,* NATIONAL PARK SERVICE, https://www.nps.gov/articles/us-suffrage-timeline-1648-to-2016.htm (last visited Oct. 19, 2021).

83. *Id.*; *Coverture*, WIKIPEDIA, https://en.wikipedia.org/wiki/Coverture (last visited, Oct. 21, 2021) (explaining Married women had very limited rights because of the doctrine of coverture).

84. Robert Williams, *The Pre-federal State Constitutions: The Founding Decade* (September 2009), https://academic.oup.com/book/1803/chapter/141491920.

85. *Creating the United States, supra* note 75.

86. *Bill of Rights* available at: National Archives, *Bill of Rights*, THE CENTER FOR LEGISLATIVE ARCHIVES: FEATURED CONGRESSIONAL DOCUMENTS (last reviewed Aug. 13, 2020), https://www.archives.gov/legislative/features/bor.

Speech, and protection against self-incrimination, but most rights were granted only to white men.[87] Black slaves, all women, and even Black men who were free had few if any rights under the Constitution.[88] Interestingly, New Jersey rescinded women's right to vote after the federal Constitution was adopted and gave the vote only to "free, white, male citizens."[89]

In the early 1800s, a movement to abolish slavery emerged and gained momentum in the North, where many women became active abolitionists.[90] When they were denied leadership roles in the anti-slavery movement, women began fighting separately for their own rights.[91] In 1848 a group of nearly 300 people, led by Elizabeth Cady Stanton and other women, met in Seneca Falls, New York, to convene the first Woman's Rights Convention.[92] It was there that 100 people signed the Declaration of Sentiments.[93] Stylistically similar to the Declaration of Independence, the Declaration of Sentiments spoke to the injustices and maltreatment suffered by women at the hands of men and noted that law itself rests upon "the false supposition of the supremacy of man and giv[es] all power into his hands."[94] Unlike the Declaration of Independence, the Declaration of Sentiments declared that "all men and women are created equal," and concluded with a demand that women be granted "immediate admission to all the rights and privileges which belong to them as citizens of these United States."[95]

Thirteen years later, America became embroiled in a Civil War over slavery, with northern states generally opposed and southern states generally in favor.[96] The North prevailed in 1865, after which three new constitutional

87. Mary Beth Norton, *Freedom of Expression as a Gendered Phenomenon, in* THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION 1787-1987, 43, 44-45, (James Brewer Stewart, eds., 1988) (stating while the Bill of Rights did not explicitly exclude women, it was understood that women were not covered. "To men of the late eighteenth century, the world of politics was so clearly exclusively male that masculine defining terms were unnecessary. It never crossed their minds that women might want to be included in politics someday, or that 'women's rights' might eventually become an issue").

88. Mary E. Becker, *The Politics of Women's Wrongs and the Bill of 'Rights": A Bicentennial Perspective*, 59 UNIV. OF CHI. LAW REV. 453, 504, 509, 512 (1992).

89. *US Women's Suffrage Timeline, supra* note 82.

90. Wendy F. Hamand, *The Woman's National Loyal League: Feminist Abolitionists and the Civil War*, 35 CIVIL WAR HIST. 39, 40-41, 44 (1989) (published electronically by The Kent State University Press: https://muse.jhu.edu/issue/22441/online).

91. Paul K. Staffard, *The 15th Amendment at 150 and the 19th Amendment at 100 Liberty and Justice for All*, 81 OR. ST. B. BULL. 48, 49 (November 2020).

92. *Id.*; University of Rochester Libraries, *Women's Rights Convention in Seneca Falls*, THE SENECA FALLS AND ROCHESTER CONVENTIONS, http://www.rochester.edu/sba/suffrage-history/womens-rights-convention-in-seneca-falls-ny/.

93. *US Women's Suffrage Timeline, supra* note 82.

94. *Declaration of Sentiments*, WIKIPEDIA, https://en.wikipedia.org/wiki/Declaration_of_Sentiments (last visited Oct. 17, 2021).

95. Stafford, *supra* note 91 at 49*; Declaration of Sentiments, id*.

96. Peter Drymalski, *Trial by Combat Lawyers on the Battlefields of the Civil War*, 86 N.Y. ST. B.J. 10, 17 (May 2014); *The Northern Abolitionist Movement*, ENCYCLOPEDIA.COM, https://www.

amendments, known as the Reconstruction Amendments, were adopted with the goal of bringing the nation back together.[97] The Thirteenth Amendment abolished slavery in 1865.[98] The Fourteenth Amendment followed in 1868, establishing in its first section Equal Protection of the laws for all "persons," as well as Privileges and Immunities for all "citizens."[99] The Fourteenth Amendment's second section protected voting rights for "males" who were "citizens."[100] This is the first time the word "male" appears in the Constitution.[101] The Fifteenth Amendment was then adopted in 1870, to establish voting rights for Black males.[102]

Women were angry that they had been denied voting rights in the Fourteenth and Fifteenth Amendments. They immediately fought back, forming suffrage associations[103] and even creating their own newspapers, such as The Woman's Journal in 1870.[104] Women also filed lawsuits in an attempt to establish their rights by court decision.[105] Myra Bradwell sued to

encyclopedia.com/history/energy-government-and-defense-magazines/northern-abolitionist-movement.

97. Cynthia L. Nicoletti, *The American Civil War As A Trial by Battle*, 28 L. & HIST. REV. 71, 73, 85 (2010); *Reconstruction*, HISTORY.COM (Oct. 29, 2009), https://www.history.com/topics/american-civil-war/reconstruction (last updated Jan. 24, 2024).

98. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 1, 2, 8 (2001). *See* U.S. CONST. amend XIII.

99. Byrant, *supra* note 43 at 581; U.S. CONST. amend. XIV, § 1.

100. Byrant, *supra* note 43 at 581; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XIV, § 2.

101. Mary Beth Norton, *The Constitutional Status of Women in 1787,* 6 MINN. J. OF L. & INEQ. 7, 14-15 (1988) (stating while use of the word "male" plainly disrespected women, it also recognized that women were politically relevant enough to exclude. The original Constitution had simply ignored women altogether because they did not exist as relevant persons in the minds of the Founding Fathers).

102. Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1477, 1478, 1482 (2014); U.S. CONST. amend. XV.

103. Before the Fifteenth Amendment was adopted, women and Black people were united in their fight for equal rights. Indeed, in 1848, Frederick Douglass, a leading abolitionist, spoke publicly in support of women's suffrage, Library of Congress, *Seneca Falls and the Start of Annual Conventions: Frederick Douglass Speaks in Support*, SHALL NOT BE DENIED, https://www.loc.gov/exhibitions/women-fight-for-the-vote/about-this-exhibition/seneca-falls-and-building-a-movement-1776-1890/seneca-falls-and-the-start-of-annual-conventions/frederick-douglass-speaks-in-support/. After the Civil War ended, women and Black people remained united. They formed the American Equal Rights Association (AERA) to demand the enfranchisement of Black people and women. But when the Fifteenth Amendment was proposed in 1869, it excluded women. Douglass no longer supported woman suffrage; he insisted that Black men deserved the vote more than Black (and other) women. This divided women and Black people, and incensed women's rights advocates. Women felt betrayed by Douglass. Two leaders in the woman suffrage movement, Elizabeth Cady Stanton and Susan B. Anthony, angrily argued back that educated white women were more worthy of the vote than "ignorant" Black men. Stanton and Anthony left the AERA and formed the National Woman Suffrage Association (NWSA) to advocate separately for a Sixteenth Amendment that would establish women's voting rights. In response, another organization, the American Woman Suffrage Association (AWSA), was formed to oppose NWSA. AWSA supported the exclusion of women from the Fifteenth Amendment and urged women to fight for the vote only at the state level. Lisa Tetrault, *Winning the Vote,* HUMANITIES (2019), https://www.neh.gov/article/winning-vote-divided-movement-brought-about-nineteenth-amendment.

104. *Woman's Journal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Woman%27s_Journal (last visited, Mar. 7, 2024).

105. Bradwell v. State, 83 U.S. 130 (1873); Minor v. Happersett, 88 U.S. 162 (1874).

enforce her rights as a "citizen" under the Privileges and Immunities Clause of Section 1 of the Fourteenth Amendment after she passed the Illinois bar but was denied a license to practice law.[106] Her case reached the Supreme Court in 1873, where she lost on the grounds that, although she was a "citizen," she had no right to a profession of her choosing under the Privileges and Immunities Clause.[107] Concurring justices cited the legal doctrine of coverture, noting that women did not need their own rights as they were covered by their husbands' rights.[108] They also discussed women's "paramount destiny" as wives and mothers.[109]

In another case, Virginia Minor filed suit after she was prohibited from voting in Missouri.[110] Her case reached the Supreme Court in 1874, where she argued that her right to vote was protected by the Fourteenth Amendment's Equal Protection and Privileges and Immunities Clauses.[111] The Court ruled against Ms. Minor under the Privileges and Immunities Clause on the grounds that although she was a "citizen," the right to vote was not a Privilege or Immunity of citizenship, and voting rights were protected only for men, in the Fourteenth and Fifteenth Amendments.[112] The Court recognized at the outset of its ruling that Ms. Minor had also asserted an Equal Protection claim,[113] but it nowhere discussed the Equal Protection Clause.

In 1879, only a few years after ignoring Ms. Minor's Equal Protection claim, the Supreme Court decided *Strauder v. West Virginia*, in which it ruled that the Fourteenth Amendment's Equal Protection Clause applied to race.[114] Then in 1886, the Court decided *Yick Wo v. Hopkins*, in which it held that the Equal Protection Clause also applied to national origin.[115] In both cases women were excluded from the Court's list of categories of people entitled to Equal Protection of the laws.[116] Adding constitutional insult to injury, on the very day the Supreme Court decided *Yick Wo*, it also decided *Santa Clara*

106. *Bradwell*, 83 U.S. at 137-38.
107. *Id.* at 139.
108. *Id.* at 141.
109. *Id.*
110. *Minor,* 88 U.S. at 165.
111. *Id.*
112. *Id.* at 165, 171, 175, 177.
113. *Id.* at 165.
114. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880) (explaining the Fourteenth Amendment's Equal Protection guarantee was "primarily designed" for the "colored race," noting in dictum that a state "may confine [jury] selection to males,"), *rev'd,* 419 U.S. 522 (1975).
115. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating the Fourteenth Amendment's Equal Protection guarantee extended to "race, color, or nationality"); David E. Bernstein, *Revisiting Yick Wo v. Hopkins*, 2008 U. ILL. L. REV. 1393.
116. *Minor,* 88 U.S. at 165, 171, 175, 177 (showing the Court refused to apply the Equal Protection Clause in Ms. Minor's case even though she asserted an Equal Protection claim (Ms. Bradwell did not). Ms. Minor's case was reviewed only under the Privileges and Immunities Clause, though her primary allegation was that she had been treated unjustly *because* she was a woman, which is not a Privileges and Immunities issue). *See also Yick Wo*, 118 U.S. at 356, 369.

County v. Southern Pacific R. Co., in which it stated that corporations were "persons" under the Fourteenth Amendment's Equal Protection Clause.[117] The combination of these Supreme Court rulings made clear that women had no Equal Protection rights at all, but corporations did, even though the plain language of the Fourteenth Amendment established Equal Protection rights for "persons," and women were certainly persons, at least in a biological sense. Corporations were not.[118]

Having lost in the courts, women set out to amend the Constitution to establish their own voting and Equal Protection rights.[119] They focused first on voting, and in 1878 the Woman Suffrage Amendment was filed with Congress,[120] where it languished for decades.[121] In 1913, in response to congressional inaction, two well-known suffragists, Alice Paul and Lucy Burns, founded the Congressional Union for Woman Suffrage (CUWS) and organized a suffrage parade in Washington D.C., the day before Woodrow Wilson's inauguration.[122] Thousands of women showed up for what has been called "the first civil rights march on Washington."[123] Paul and Burns were fiercely nonpartisan, and were willing to criticize and boycott any politician who refused to support voting rights for women.[124] They joined forces with the National American Woman Suffrage Association (NAWSA), and their nonpartisan philosophy was initially strong, but opposition grew as some advocates refused to criticize politicians from certain political parties even if they opposed women's suffrage, so in 1916 Paul and Burns established the National Woman's Party (NWP) (incorporated in 1918) as a new iteration of the CUWS after breaking away from NAWSA.[125]

NAWSA then turned its focus to fighting for suffrage only at the State level.[126] Paul and the NWP, by contrast, wanted a federal suffrage amendment because suffrage at the State level would not protect all women

117. Santa Clara County v. Southern P.R. Co., 118 U.S. 394, 409 (1886).

118. *Yick Wo,* 118 U.S. at 356, 369; *Santa Clara County,* 118 U.S. at 409.

119. *Women's Suffrage Timeline,* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/public_education/programs/19th-amendment-centennial/toolkit/suffrage-timeline/ (last visited, Mar. 7, 2024).

120. Stafford, *supra* note 91 at 49-50; *Women's Suffrage Timeline*, *supra* note 119.

121. *Marquee Documents: 19th Amendment Ratification*, NATIONAL ARCHIVES TRAVELING EXHIBITS SERVICE, https://www.archives.gov/files/exhibits/nates/files/19th-amendment-ratification-fact-sheet.pdf (last visited Mar. 7, 2024).

122. *Women's Suffrage Timeline, supra* note 119.

123. Rebecca Boggs Roberts, *The Great Suffrage Parade of 1913*, NATIONAL PARK SERVICE (Mar. 7, 2024, 6:53 PM), https://www.nps.gov/articles/000/the-great-suffrage-parade-of-1913.htm.

124. Robert S. Gallagher, *Before the Colors Fade Alice Paul:* I Was Arrested, Of Course . . ." *An Interview with the famed suffragette, Alice Paul,* AMERICAN HERITAGE (Feb. 1974), https://www.americanheritage.com/alice-paul-i-was-arrested-course#16.

125. *Women's Suffrage Timeline, supra* note 119.

126. *Historical Overview of the National Women's Party, supra* note 1.

equally.[127] The NWP's platform was simple: adoption of the Woman Suffrage Amendment. The NWP declared itself "united" around the single issue of suffrage "irrespective of the interests of any national political Party" and promised to assert "unceasing opposition to all who oppose this Amendment."[128] When they met with men from the major political parties who sought their support, the women made clear that they did not care to hear about their party's platform, and what they would do for women.[129] The only thing the NWP wanted to know was whether the men supported the federal suffrage amendment.[130]

The NWP used militant, non-violent tactics and direct action, such as protests and political boycotts.[131] In 1917, Paul and Burns began a vigil outside the gates of the White House, holding signs and criticizing President Wilson and the Democratic Party for refusing to support the federal suffrage amendment.[132] It was the first time people picketed outside the White House.[133] Many of the women who stood vigil, known as the Silent Sentinels, were arrested and jailed.[134] While incarcerated, they went on hunger strikes, and were violently force-fed and abused by prison guards,[135] but they persisted.

When they were released from incarceration after many months, the Sentinels continued their protests in D.C., led by Paul and Burns.[136] They even burned President Wilson in effigy in front of the White House.[137] Due to their relentless tactics, Wilson eventually changed his position and urged Congress to support the Woman Suffrage Amendment.[138] The Sentinels were pleased but did not relent until the Amendment was passed by Congress in

127. Beek, *supra* note 1 at 12; *Historical Overview of the National Woman's Party*, LIBRARY OF CONGRESS, https://www.loc.gov/collections/women-of-protest/articles-and-essays/historical-overview-of-the-national-womans-party/ (last visited Mar. 12, 2024).

128. INEZ HAYNES IRWIN, THE STORY OF THE WOMAN'S PARTY 5, 157 (Kraus reprint Co. 1971) (Harcourt Brace, 1921) (In the Early 1900s, the National Woman's Party was 50,000 members strong. Alice used the Party to "institute a Suffrage campaign to swift, so intensive, so compelling – that again and again it pushed the war news out of the preferred position on the front pages of the newspapers …" Her strategy has been described as "masterful." She forced the president of the United States to "move from a position of what seemed definite opposition to the Suffrage cause to an open espousal of it …").

129. *Id*. at 159.

130. *Id.*

131. MARY FRANCIS BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 43 (Susan Hubar & Joan Hoff-Wilson eds., 1986).

132. Jennifer Errick, *How a Group of Silent Women Won a Battled With President Wilson a Century Ago*, NATIONAL PARKS CONSERVATION ASSOCIATION (Aug. 20, 2020), https://www.npca.org/articles/2639-how-a-group-of-silent-women-won-a-battle-with-president-wilson-a-century.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. KATHERINE H. ADAMS & MICHAEL L. KEENE, ALICE PAUL AND THE AMERICAN SUFFRAGE CAMPAIGN 224 (Univ. of Ill. Press, 2008).

138. *Id.* at 226.

1919 and sent to the States for ratification.[139] It was quickly ratified and became the Nineteenth Amendment in 1920.[140] Many historians believe it was Alice Paul's leadership and the National Woman's Party that won women the right to vote in 1920, and that it was because they were "annoying and persistent and troublesome and being just like that sand that gets into your eyes when the wind blows . . ." that Congress finally decided to act.[141]

Once women had the right to vote,[142] the NWP immediately began fighting for full legal equality.[143] The first draft of an Equal Rights Amendment was written in 1921 by women lawyers from the NWP but it was never filed with Congress.[144] It read, "No political, civil, or legal disabilities or inequalities on account of sex or on account of marriage, unless applying equally to both sexes, shall exist within the United States or any territory subject to the jurisdiction thereof."[145] In 1923 a new version of the ERA was written by Alice Paul and Crystal Eastman and filed with Congress, though no action was taken.[146] It read, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[147] In 1943, the ERA was rewritten once last time, to mirror the style of the Fifteenth and Nineteenth Amendments.[148] It stated, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[149] Some objected to the word "sex" rather than "women" because "sex" included men and only women had been denied rights under the Constitution.[150] Nonetheless, women's efforts to persuade Congress to

139. *See Marquee Documents: 19th Amendment Ratification*, *supra* note 121.

140. *Id.*

141. P. COLMAN, THE VOTE, WOMEN'S FIERCE FIGHT 346 (PGM PRESS, 2019); *see also* IRWIN, *supra* note 128 at 3-5.

142. Even after the Nineteenth Amendment was adopted, States were free to impose restrictions on voting so long as they did not discriminate based on sex, just as States were free to restrict voting for Black men after the Fifteenth Amendment was adopted so long as restrictions were not explicitly discriminatory based on race. Tetrault, *supra* note 103. . Some States adopted literacy requirements and imposed poll taxes that were not facially racist or sexist, but since Black people often had limited income and it had been illegal to educate slaves, these requirements disproportionately prevented Black people from voting. Women of all races and ethnicities were similarly prevented from voting if they could not read, could not afford the poll tax, or were married and their husbands either could not afford poll taxes or refused to give their wives the money to pay them.

143. BERRY, *supra* note 131 at 44.

144. *Equal Rights Amendment, supra* note 5.

145. *Id.*

146. Errick, *supra* note 132.

147. Thompson, *supra* note 5 at 209; *Equal Rights Amendment*, *supra* note 5.

148. *Equal Rights Amendment, supra* note 5.

149. Susan C. Del Pesco, *Quieting the Sentiments*, 37 DEL. LAW. 8 (Winter 2019); *Equal Rights Amendment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Equal_Rights_Amendment (last visited, Oct. 18, 2021).

150. Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women,* 43 HARBINGER 122, 124 (2019).

pass the ERA in the 1940s and 50s were unsuccessful.[151] It was not until the Civil Rights movement of the 1960s that women began uniting and lobbying for the ERA–and public support was strong.[152]

In 1966, the National Organization for Women (NOW) was founded.[153] Alice Paul eagerly joined the group believing it would generate even more support for the ERA, but at its first convention in 1966, in Washington D.C., NOW's president, Betty Friedan, announced that NOW would not be supporting the ERA, and would instead appoint a committee to write a new ERA and start the entire process over.[154] Alice Paul and the NWP were furious. They had a strong presence at the convention and succeeded in persuading the membership to continue supporting the ERA notwithstanding Friedan's opposition.[155] Paul later said that NOW was causing "quite a lot of trouble" at this time by "going to the legislatures and insisting on talking all the time not about equality for women but . . . other subjects, [such as abortion] which gets the men all mixed up . . ."[156]

In 1971, after the House passed the ERA but before the Senate did, the Supreme Court decided *Reed v. Reed*, which involved a challenge to an Idaho law that said "males must be preferred to females" when courts select administrators of estates.[157] The Supreme Court found the law discriminatory based on sex, and ruled for the first time since the Fourteenth Amendment's adoption in 1868 that women were a class of "persons" under the Equal Protection Clause.[158] This was good news in that women now *had* Equal

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151. *Id.*

152. *Id.*

153. National Organization for Women, *Highlights*, https://now.org/about/history/highlights/ (last visited Mar. 12, 2024).

154. Amelia R. Fry, *Conversations with Alice Paul, Woman Suffrage and the Equal Rights Amendment, Oral History*, 530-31 (The Regents of the University of California, 1976) https://archive.org/details/conversationsalice00paulrich/page/530/mode/2up.

155. *Id.* at 535.

156. *Id.*

157. Reed v. Reed, 404 U.S. 71, 76-77 (1971).

158. *Reed*, 404 U.S. at 76-77. Note that in at least three cases decided before *Reed*, the Supreme Court addressed issues related to discrimination against women, but not in a way that recognized women as a class of people with Equal Protection rights. In *Muller v. Oregon*, the Court upheld the constitutionality of an Oregon law that restricted women's hours of employment under the Due Process and Equal Protection Clauses, but they focused on Due Process and did not cite any of the Court's prior rulings recognizing race and national origin as protected classes under the Equal Protection Clause. Muller v. Oregon, 208 U.S. 412, 422-23 (1908). In fact, the Court wrote that "looking at it from the viewpoint of the effort to maintain an independent position in life, [women are] not upon an equality [with men]." *Muller,* 208 U.S. at 422. In *Goesaert v. Cleary*, the Court upheld the constitutionality of a Michigan law that forbade women to be bartenders unless they were the wives or daughters of the male owner of the establishment. Goesaert v. Cleary, 335 U.S. 464, 465-67 (1948). A seemingly straightforward sex discrimination case, the Court was anything but straightforward, emphasizing that the class of people they were discussing was not women but women who were not wives and daughters of establishment owners. *Goesaert,* 335 U.S. at 464. *Again*, the Court did not cite any of its prior rulings recognizing race and national origin as protected classes under the Equal Protection Clause. *Goesaert,* 335 U.S. at 464. In *Hoyt*

Protection rights, but it was terrible news, too, because the Court ruled that women would not have *equal* Equal Protection rights as they would be enforced in the courts unequally, under only a "rational basis" standard of judicial review.[159] Rational basis was a much weaker standard than strict scrutiny, which applied to Equal Protection rights[160] based on categories such as race and national origin.[161]

The difference was significant. At the time *Reed* was decided, sex was not a suspect class and strict scrutiny applied only to "suspect" classes, such as race and national origin. Under strict scrutiny discriminatory laws, policies, and programs are unconstitutional unless they serve a "compelling" government interest, are "narrowly tailored" to serve that interest, and are written using the "least restrictive means" to have the least discriminatory impact on the suspect class.[162] Conversely, under rational basis review, discriminatory laws, policies, and programs are constitutional so long as they bear a "rational relationship" to a "legitimate" (rather than "compelling") government interest.[163] They need not satisfy the "narrow tailoring" or "least restrictive means" tests.

One way to think about the different types of judicial scrutiny is to picture a triangle divided horizontally into three parts. The piece at the top depicts the small percentage of discriminatory laws that make it through strict scrutiny and are deemed constitutionally acceptable. The middle section depicts the larger percentage of discriminatory laws that make it through intermediate scrutiny. The largest section at the bottom represents the percentage of discriminatory laws that make it through rational basis scrutiny. Using this concept, it becomes clear that while women were glad when the *Reed* decision came down because they were finally recognized as "persons" under the Equal Protection Clause, they were also offended because the Court

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v. Florida, the Supreme Court discussed the constitutionality of a Florida law that excluded women from mandatory jury service. Hoyt v. Florida, 368 U.S. 57, 64 (1961). Women could serve as jurors but not be compelled. *Hoyt,* 368 U.S. at 57. The Court resolved the issue under the constitutional right to an impartial jury; there was no Equal Protection claim or discussion of the Equal Protection Clause by the Court. *Hoyt,* 368 U.S. at 57. In fact, the Court went out of its way to point out that the case was not akin to cases where jurors were excluded based on race. *Hoyt,* 368 at 57.

159. *Reed,* 404 U.S. at 76.

160. Strict scrutiny also applies when content-based speech is regulated, and when a fundamental right is at stake. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited, Mar. 7, 2024).

161. See e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (exploring race); Graham v. Richardson, 403 U.S. 365, 376 (1971) (exploring alienage); Oyama v. California, 332 U.S. 633, 640, 663 (1948) (discussing "rigid scrutiny" for national origin).

162. *See supra* note 37.

163. *See id.*

situated them at the very bottom of the triangle, which meant that nearly all sex discriminatory laws would be upheld by the courts.[164]

Although *Reed* gave women *some* Equal Protection rights, it had the simultaneous effect of dampening public support for the ERA because opponents were able to argue that the need for the ERA was no longer as urgent because women were at least recognized as a class of people for Equal Protection Clause purposes. Perhaps not surprisingly then, the same year *Reed* was decided, Congress refused to support the ERA unless it was amended to include a seven-year ratification deadline.[165] It would have been politically difficult for Congress to get away with significantly burdening the ERA with a ratification deadline if *Reed* had not been decided when it was. A Senate subcommittee even proposed adding sections to the ERA restricting its applicability in the areas of child support, sex crimes, privacy, protective labor laws, college admissions policies,[166] and the military, though this was likely only a diversion meant to distract women from criticizing the addition of the deadline. In short order, the Senate's proposed changes were rejected, and a seven-year deadline was added.[167] Once the deadline was in place, the Senate quickly passed the ERA in March of 1972, the House agreed with the deadline, and it was sent to the states for ratification.[168] Some people celebrated, but others, including Alice Paul, were dejected. Paul said, "we lost" because she knew that the seven-year deadline would make it easy for opponents to defeat ratification.[169]

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164. In 1976 the judicial review standard for women's Equal Protection rights was changed to intermediate scrutiny in *Craig v. Boren*. It was an improvement over rational basis scrutiny but, as discussed further herein, was still much weaker than strict scrutiny. *Craig*, 429 U.S. at 204-05, 207-09; *Reed,* 404 U.S. at 76-77.

165. Bachiochi, *supra* note 7.

166. During this same time period, women also wanted to amend Title VI of the Civil Rights Act to add "sex" as a protected class category because Title VI prohibited discrimination in federally funded programs and activities, but only for the categories of "race, color, and national origin." Women simply wanted to add the word "sex" to Title VI to give them the same civil rights protections as other people, but higher ed lobbyists and others fought against them and forced women to settle for Title IX as a compromise. Title IX was a segregated, stand-alone law that applied only to sex, and only to education. Although the language of Title IX and Title VI are exactly the same, the segregation of women from Title VI contributed to the public's perception of women as unworthy of the same legal protections as other classes of people. Indeed, for decades after its enactment, Title IX was not understood as a broad-sweeping prohibition against sex discrimination because it was propagandized as a sports equity law. It was not until the early 2000s, after Harvard came under federal investigation for violating Title IX because of its discriminatory sexual assault policy, that the public began to understand that Title IX forbids all forms of sex discrimination, including sexual assaults, in the same way that Title VI forbids all forms of discrimination, including racist assaults. W. MURPHY, FROM EXPLICIT EQUITY TO SPORTS TO SEXUAL ASSAULT TO EXPLICIT SUBJUGATION: THE TRUE STORY BEHIND TITLE IX AND WOMEN'S ONGOING STRUGGLE FOR EQUALITY IN EDUCATION 47-76 (Michele A. Paludi, et al., eds., 2015).

167. BERRY, *supra* note 131 at 63.

168. *Id.* at 63-64.

169. *Rights of Passage: The Past and Future of the ERA, supra* note 14.

By the end of 1972, twenty-two states had ratified the ERA[170] and despite *Reed*, momentum in support of ratification was strong, but that changed dramatically when the Supreme Court decided two very important women's rights cases in 1973. The first was *Roe v. Wade*, which established a federal constitutional right to abortion under the Due Process Clause of the Fourteenth Amendment, *and* designated it a "fundamental right," which meant attempts by the States to restrict abortion rights would be subject to the rigorous strict scrutiny standard.[171] *Roe* was perceived by many, though not all,[172] as a momentous victory for women but, like *Reed*, it diminished public

170. MaryAnn Grover, *The Patchwork Quilt of Gender Equality: How State Equal Rights Amendments Can Impact the Federal Equal Rights Amendment,* 30 B.U. PUB. INT. L.J. 151, 155 (2021); Equal Rights Amendment – Proposed March 22, 1972, *List of State Ratification Actions*, https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-20 (last visited, Oct. 13, 2021) [hereinafter *List of State Ratification Actions*].

171. Roe v. Wade, 410 U.S. 113, 154-56, 165 (1973). A right is considered "fundamental" when it is "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 324-25 (1937), or is "deeply rooted in this nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 484 (1977). Determining whether something is "deeply rooted" in history and tradition is often driven by ideological bias in "both the search for and interpretation of relevant and available historical evidence." Matthew Grothouse, *Implicit in the Concept of Ordered Liberty How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1059-60, 180 (2016). Whether a right is "implicit in the concept of ordered liberty" focuses on whether the right is essential to an individual's destiny and self-determination, which is undoubtedly true about a woman's right to terminate a pregnancy. Indeed, the Supreme Court held as much. *Roe,* 410 U.S. at 152-53. But the Court rescinded the status of abortion as a "fundamental right" in *Planned Parenthood of Pennsylvania v. Casey*, describing it instead as a Due Process liberty interest no longer subject to strict scrutiny. Abortion restrictions would instead be subject to a less rigorous "undue burden" test. Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 871-76 (1992). Undue burden requires no compelling government interest and does not apply a "least restrictive means" analysis. It is a much weaker judicial review standard than strict scrutiny. *Planned Parenthood of Pennsylvania*, 505 U.S. at 871-877. The Supreme Court later overturned both *Roe* and *Casey* in *Dobbs*, and held, inexplicably, that deciding whether to continue a pregnancy is not protected by the Constitution at all because it is not an explicit constitutional right, nor is it a liberty interest under the Due Process Clause. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 256-57 (2022). The Court never engaged an Equal Protection analysis, saying instead in dictum that abortion restrictions are not a sex-based concern, thus need not be reviewed und the Equal Protection Clause. *Dobbs* at 235-37. To support this claim, the Court cited Geduldig v. Aiello, 417 U.S. 484 (1974), a case that held pregnancy was not a sex-based concern because only women can get pregnant. *Geduldig* at 496, n. 20. *Geduldig* has long criticized by scholars for its intellectual dishonesty, Liss, S., The Constitutionality of Pregnancy Discrimination: The Lingering Effects of *Geduldig* and Suggestions For Forcing Its Reversal, 23 *N.Y.U. Review of Law and Social Change*, pp. 59-103 (1997). In light of *Dobbs*, women who care about abortion rights should channel resources toward the ERA as it is broader than the Fourteenth Amendment, thus will restore constitutional protections for abortion regardless of the fact that men cannot get pregnant. *See* Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024) (remanding with instructions requiring the lower court to apply strict scrutiny when reviewing abortion restrictions for constitutionality under the Pennsylvania Constitution's ERA, and ruling that the ERA provides broader protections than the Equal Protection doctrine, thus recognizes reproductive health as a sex-based concern regardless of the fact that men cannot get pregnant), slip op. at 83, 107, 112-113, 120, 124, https://www.pacourts.us/assets/opinions/Supreme/out/J-65-2022cdo%20-%201058156 5825341310 3.pdf.

172. *See* Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J. OF L. AND FEMINISM 133, 139, 142-44 (1991) (arguing that giving women a "right to privacy" in pregnancy matters "was like granting women expensive, limited, and easily revokable guest privileges at

support for the ERA because opponents could claim the ERA was even less necessary now that women's abortion rights were subject to the highest degree of strict scrutiny protection. Even worse, *Roe* divided the women's movement by treating abortion as a Due Process issue rather than as an Equal Protection issue.[173] This imposed new and substantial financial burdens on women's political activism as they would now have to fight separately for abortion and the ERA. Ultimately, *Roe* diverted resources and attention away from the ERA and toward abortion rights by establishing a brand-new legal doctrine that would require extensive litigation to determine its scope and limitations.

Days before the Supreme Court decided *Roe*, it heard oral arguments in another important women's rights case, *Frontiero v. Richardson*.[174] The timing was no coincidence. The question in *Frontiero* was whether it violated women's Equal Protection rights[175] for the military to give increased housing allowances to women, regardless of actual dependency needs, on the grounds that women were more likely than men to be dependent on their spouses for financial support.[176] The Court ruled in a plurality opinion[177] that this violated women's Equal Protection rights, but much more significantly, the Court also ruled that women's Equal Protection rights would now be subject to strict scrutiny review.[178] The Court reasoned that sex, like race, is determined at birth and immutable, therefore women were obviously a "suspect" class, entitled to strict scrutiny protection for their Equal Protection rights, on par with the standard afforded race and national origin.[179]

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the exclusive men's club called the Constitution." Butler also notes that establishing women's pregnancy-related rights as rooted in "privacy," rather than equality, helps to insulate from state regulation other forms of sexual harm that women endure).

173. *Roe,* 410 U.S. at 164, 168.

174. Frontiero v. Richardson, 411 U.S. 677, 678 (1973).

175. *Frontiero,* 411 U.S. at 678-79. *Frontiero* dealt with Equal Protection rights under the Fifth Amendment, which applies to the federal government while the Fourteenth Amendment's Equal Protection Clause applies to the states, but they use the same legal standards in terms of scrutiny by the courts. Adarand Constructors v. Peña, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable," so "the standards for federal and state racial classifications [are] the same").

176. *Frontiero*, 411 U.S. at 679-80.

177. A "plurality opinion" is one where several justices, though not a majority of the court, support the rationale behind a decision. The Supreme Court has held that judges should give great weight to plurality opinions. Texas v. Brown, 460 U.S. 730, 737 (1983).

178. *Frontiero*, 411 U.S. at 688.

179. *Id.* at 686 (". . . since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ..."). *See also* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) ("No one can change his place of birth (national origin), the place of birth of his forebears (n[at]ional origin), his race or fundamental sexual characteristics").

Frontiero was decided only a few months after *Roe* in 1973, and together these cases appeared to give women all the constitutional rights they needed: strict scrutiny review for Equal Protection rights and for Due Process/abortion rights.[180] This made the ERA seem utterly unnecessary as its primary purpose was to maximize legal protections for women. It came as no surprise, then, that support for the ERA waned after *Frontiero*. No States ratified in 1973 after *Frontiero* (which was decided in May of that year), only three ratified in 1974, one in 1975, and one in 1977.[181] It would have been politically difficult for State lawmakers to refuse to ratify the ERA in 1972 and 1973 when public support was strong, but after *Roe* and *Frontiero* they could easily take no action by simply pointing out that the Supreme Court had given women exactly what the ERA would give them–strict scrutiny for everything.[182]

In the aftermath of *Frontiero*, one would have expected women's rights attorneys across the country aggressively and enthusiastically to start filing Equal Protection lawsuits to enforce and firmly establish women's strict scrutiny rights in the lower courts, but that did not happen. To the contrary, even Justice Ruth Bader Ginsburg, then a well-known lawyer who participated in the *Frontiero* case as amicus counsel,[183] filed briefs in women's rights cases after *Frontiero* in which she cited *Frontiero,* but inexplicably did not ask for strict scrutiny. For example, in the 1973 Supreme Court case, *Cohen v. Chester*, which involved a challenge to a school board regulation that required the termination of pregnant teachers at a fixed stage in their pregnancies, rather than based on their ability to work, Justice Ginsburg filed an amicus brief laying out her view of *Frontiero*.[184] She wrote that under *Frontiero,* women were now a "suspect" class, but she did not ask the Court to apply strict scrutiny. Instead, she said *Frontiero* required only "close" scrutiny.[185] She mentioned the phrase strict scrutiny only twice in her brief, once in an introductory section where she generally described the various types of scrutiny, and then again in a section where she pointed out

180. *Frontiero*, 411 U.S. at 690-91; *Roe,* 410 U.S. at 165-66.

181. *List of State Ratification Actions, supra* note 170.

182. BERRY, *supra* note 131 at 99 (". . . a negative pattern of Supreme Court decisions provided a better case for the approval of a federal ERA than legal developments tending toward greater equality").

183. *Frontiero,* 411 U.S. at 677.

184. Cohen v. Chester County School Board, No. 72-1129, 1937 U.S. S. Ct. Briefs LEXIS 11, at *45-47 (1973) [hereinafter *RBG Cohen Brief*].

185. *RBG Cohen Brief*, *supra* note 184 at *39. Justice Ginsburg also incorrectly used the phrase "close judicial scrutiny" to describe the standard of review for fundamental rights claims, *Id.* at 40-41. The Supreme Court had ruled in *Roe* that "strict scrutiny" was the proper standard of review for such claims, and Justice Ginsburg correctly wrote that the unjust termination of pregnant women raises issues under both Equal Protection and Fundamental Rights doctrines, but she erroneously argued that only "close scrutiny" should be applied to both. *See also Skinner,* 316 U.S. at 541 (holding "strict scrutiny" applies to fundamental rights claims).

that the Second Circuit and a federal district court in California had applied a standard *less* protective than strict scrutiny when reviewing similar laws regarding employment of pregnant women.[186] This point bears repeating. Justice Ginsburg clearly understood the significance of the phrase strict scrutiny, yet she wrote that *Frontiero* adopted only "close scrutiny,"[187] even though the *Frontiero* court clearly did not adopt close scrutiny. In fact, the phrase "close scrutiny" was mentioned only twice in *Frontiero*, once in the introduction when the Court quoted the Appellants as having urged the Court to adopt "close scrutiny," and again in a concurring opinion where Justice Powell referred back to that same introductory language.[188] The *Frontiero* Court did not recognize, much less adopt or apply "close scrutiny," it adopted and repeatedly stated that it was applying "strict scrutiny."[189]

Justice Ginsburg's failure to argue strict scrutiny in *Cohen* is curious as she clearly understood that "close scrutiny" was a different and worse standard than strict scrutiny. Indeed, she expressly described "close scrutiny" in her brief as an "intermediate" standard of review that was less protective than strict scrutiny, and she "urge[d]" the *Frontiero* Court to adopt "close scrutiny" *only* if the Court declined to adopt a more "rigid scrutiny" standard, though she did not say what that more rigid standard was.[190]

Stranger still, Justice Ginsburg included in her *Cohen* brief a statement about how "recent commentary and judicial opinion jurists" have recognized the "emergence of an 'intermediate approach'" between rational basis and strict scrutiny for Equal Protection claims.[191] In support of this statement she cited two lower court cases and one law review article.[192] While she may have been correct about an emerging "intermediate" standard in the lower courts, she had no reason to cite it in her *Cohen* brief because she already had *Frontiero's* far preferable strict scrutiny standard on her side. A student writing a law review article might find it interesting that a new "intermediate" standard of judicial scrutiny could be on the horizon, but an *advocate* for women in the aftermath of *Frontiero* should have insisted that the Court apply strict scrutiny because that is the language the Supreme Court used. Referencing an "intermediate" standard and not asking the Court to apply strict scrutiny, was malpractice against all women.

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186. *RBG Cohen Brief*, *supra* note 184 at 55.
187. *Id.* at 46.
188. *Frontiero,* 411 U.S. at 682, 691.
189. *Id.* at 686-87.
190. American Civil Liberties Union, *Brief of American Civil Liberties Union Amicus Curiae* 6, 8-9, 22-23 (1972), https://socialchangenyu.com/wp-content/uploads/2019/06/1971-Frontiero-and-Frontiero-v.-Laird-ACLU-Amicus.pdf. [hereinafter *RBG Frontiero Brief*).
191. *RBG Cohen Brief, supra* note 184 at 40.
192. *Id.*

Justice Ginsburg also incorrectly wrote in her *Cohen* brief that *Reed* was "confirmed" by *Frontiero*,[193] but *Frontiero* did not "confirm" *Reed*, it dramatically departed from it in a favorable way for women, by moving the standard of review up from the lowest level of rational basis scrutiny to the highest level of strict scrutiny. Justice Ginsburg should have emphasized the importance of *Frontiero* overturning *Reed's* offensive rational basis test and adopting the most rigorous of legal standards, but she instead obfuscated the monumental importance of *Frontiero* by repeatedly citing *Reed* in a favorable way despite its woeful standard of rational basis review. Lower courts clearly understood the paramount importance of *Frontiero* and the fact that the Court had adopted strict scrutiny for women, and they rightly applied it in their cases.[194] But, Justice Ginsburg did not.

Cohen was not the only case where Justice Ginsburg failed to argue strict scrutiny after *Frontiero*.[195] She did something similar in *Weinberger v. Wiesenfeld*,[196] where she represented a man who filed an Equal Protection challenge to a federal law that treated men and women differently when determining eligibility for social security benefits. As she did in *Cohen*, Justice Ginsburg cited and argued the meaning of *Frontiero* in her brief, but never once mentioned strict scrutiny.[197] She also cited *Reed* and *Frontiero* together, suggesting again incorrectly that they established the same standard of review,[198] rather than pointing out their very different standards, explaining why strict scrutiny was better, and insisting that women were entitled to it. She even failed to cite or apply the "compelling interest" test even though "compelling interest" is required under strict scrutiny.[199] Likewise, strict scrutiny requires "narrow tailoring," yet in her *Weinberger* brief, Justice Ginsburg nowhere asked for or even mentioned the phrase "narrow tailoring" even though the Supreme Court had previously described it as an essential aspect of strict scrutiny review.[200] Instead, Justice Ginsburg

193. Brief on file with author, at 45. Appellee Br. 45, No. 73-1892 [hereinafter *RBG Weinberger Brief*].

194. *See e.g*., Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973) (citing *Frontiero* and striking down a policy that treated unwed mothers differently and worse than unwed fathers. The Court ruled that under *Frontiero*, strict scrutiny review was "now mandated for sex-based classification[s]", because sex was a "suspect" class, on par with race, and was subject to a "heavy burden of justification" requiring the government to show a "compelling" interest) Hanson v. Hutt, 83 Wn. 2d 195, 199-200 (1973) (citing *Frontiero* as adopting "strict scrutiny" for sex classifications and relying on the *Frontiero* Court's rationale to apply strict scrutiny to a Washington law that denied women unemployment benefits when they became pregnant).

195. *See generally RBG Weinberger Brief*, *supra* note 193.

196. Weinberger v. Wiesenfeld, 20 U.S. 636, 641-43 (1975).

197. *RBG Weinberger Brief, supra* note 193 at 11.

198. *Id*. at 14, 16.

199. *See supra* note 37 .

200. San Antonio School District v. Rodriguez, 411, U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972). *See also* Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

argued in *Weinberger* that to withstand a constitutional challenge, a sex-discriminatory law need only "fairly and substantially serve" the government's interest.[201] This "fairly and substantially serve" test was taken from *Reed's* weak rational basis standard.[202] More malpractice against all women.

If Justice Ginsburg had not been intimately involved in *Frontiero,* one could argue that she may have lacked a robust understanding of the issues, but she was amicus counsel in the case, and had filed a brief essentially claiming that she was speaking on behalf of all women because her client was the ACLU Women's Project.[203] She was even given ten minutes to argue before the Supreme Court,[204] which is highly unusual for amicus counsel. Professor Ginsburg began her oral argument by mentioning that she would be advocating for strict scrutiny, but she never actually argued the constituent components of strict scrutiny, and she failed completely to ask for strict scrutiny in her brief.[205] In her brief, she argued only that sex classifications should be subject to "rigid" scrutiny and the "compelling interest" test.[206] She urged the Court to adopt an alternative standard of "close scrutiny" only if it declined to adopt a "rigid scrutiny" standard, and she wrote that "close scrutiny" required only a "legitimate legislative objective" that was reasonably "necessary" to accomplish the objective.[207] These are not the components of strict scrutiny. Justice Ginsburg's brief never mentioned the "least restrictive means" test[208] or "narrow tailoring," two vital elements of Equal Protection analysis under strict scrutiny.[209]

In addition to being deeply involved in *Frontiero*, Justice Ginsburg was also the personal attorney to Sally Reed in the 1971 *Reed v. Reed* case.[210] As noted above, Justice Ginsburg did not ask for strict scrutiny in either case, and both cases weakened support for the ERA at a critical time.[211] Interestingly, *Frontiero* and *Reed* both happened to make their way to the Supreme Court while Justice Ginsburg was working on behalf of the

201. *RBG Weinberger Brief, supra* note 193 at 13-14.
202. *Reed,* 404 U.S. at 76.
203. *RBG Frontiero Brief*, *supra* note 190 at 1-2.
204. *Frontiero v. Richardson*, WIKIPEDIA, https://en.wikipedia.org/wiki/Frontiero_v._Richardson#:~:text=Her%20appearance%20before%20the%20court,and%20women%2C%E2%80%9D%20Ginsburg%20stated.
205. *See generally RBG Frontiero Brief*, *supra* note 190.
206. *Id.* at 29.
207. *Id.* at 23.
208. *Id.* at 22-23.
209. *See supra* note 37.
210. Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596.
211. *Id.* at 30-33.

ACLU.[212] She was the ACLU's general counsel from 1973-1980, and a member of its Board of Directors from 1974-1980.[213]

Justice Ginsburg's affiliation with the ACLU is important because the ACLU was adamantly opposed to the ERA for decades.[214] During the 1950s, the ACLU worked hard to defeat the ERA, claiming women did not need equality because "only the remnants of feudalism remain."[215] They also said "the greatest discriminations which women suffer from today do not derive from law at all, but from custom and habit."[216] The ACLU further claimed the "practice of unequal pay for equal work" for women was "nothing but a universally bad habit."[217]

Throughout the 1960s, the ACLU was fighting for equal rights for Blacks, Hispanics, Native Americans, and prisoners, while actively opposing equal rights for women.[218] When President Kennedy's Commission on the status of Women asked the ACLU for input about the ERA, they responded by "rejecting the National Woman's Party's demand for the ERA."[219]

Then in September 1970, right before Justice Ginsburg co-founded the ACLU's Women's Rights Project in 1971 and began working on cases that ultimately weakened support for the ERA, the ACLU abruptly and without explanation changed its position and expressed support for the ERA.[220] Their claimed support for the ERA was obviously disingenuous[221] as reflected in Justice Ginsburg's failure to advocate for strict scrutiny in women's rights cases when she represented the ACLU's Women's Rights Project. Moreover,

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212. *See generally Frontiero,* 411 U.S. 677; *Reed,* 404 U.S. 71.

213. *American Bar Foundation Mourns the Loss of Supreme Court Justice Ruth Bader Ginsburg*, AMERICAN BAR FOUNDATION (Sept. 22, 2020), https://www.americanbarfoundation.org/the-abf-mourns-the-loss-of-supreme-court-justice-ruth-bader-ginsburg/ (last visited Oct. 23, 2021).

214. WILLIAM A. DONOHUE, THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION 91 (Routledge, Taylor & Francis Group).

215. *Id*. at 91-92.

216. *See id.*

217. *See id.* at 92.

218. *See id.*

219. *See* DONOHUE, *supra* note 214 at 92.

220. *See id.* at 93.

221. The National Organization for Women (NOW), which often signed onto Justice Ginsburg's briefs, was similarly disingenuous when it claimed during the same time period that it supported the ERA. In fact, NOW was openly opposed to the ERA when it was founded in 1966. While NOW did ultimately testify at Congress in support of the ERA in 1972, it did not actively begin supporting state ratifications until after *Frontiero* and *Roe* were decided in 1973, and it did not make ratification of the ERA a priority until 1977, which was much too late as it was clear by then that the ERA would fail to win enough state ratifications before the deadline expired. BERRY, *supra* note, 131 at 66-68. Other seemingly pro-women's groups were also oddly hostile to the idea of women's equality. When the Civil Rights Act of 1964 was pending before Congress, Alice Paul and the Woman's Party insisted that women be included in it, so they could be protected from discrimination on par with race and other protected class categories in the areas of employment, education, public accommodations, and federally funded programs, but no other women's groups supported the idea, and the American Association of University Women actively opposed it. Fry, *supra* note 154 at 616, 635.

after declaring support for the ERA, the ACLU publicly supported lowering penalties for rape, and endorsed laws that would allow the use of a rape victim's prior sexual history against her in rape trials.[222] The ACLU did not support laws that would allow other crime victims' prior histories to be used against them.[223] Nor did they propose reducing the penalties for other violent crimes the way they did for rape.[224]

To be fair to Justice Ginsburg, her many writings at the time include several where she expresses support for women's equality and the ERA.[225] In September of 1973, for example, she published an article in the American Bar Association Journal supporting women's full equality and expressly acknowledging that a plurality of the Court in *Frontiero* established strict scrutiny review for sex classifications.[226] Yet that same year, she also published a short piece in the Women's Rights Law Reporter saying that *Frontiero* adopted only close scrutiny.[227] She described *Frontiero* as a "plurality opinion" that "declares 'classifications based upon sex, like classifications based on race, alienage, or national origin . . . inherently suspect,' and therefore subject to 'close judicial scrutiny.'"[228] Nowhere in her Women's Law Reporter piece did Justice Ginsburg use the phrase strict scrutiny as she had in the American Bar Association Journal piece.[229] Tellingly, when she wrote in the Women's Law Reporter that *Frontiero* adopted a "close judicial scrutiny" standard, she put the phrase in quotation marks but included no citation to the case itself, as she had for other quoted

222. *Id*. at 95.
223. DONAHUE, *supra* note 214 at 94.
224. *Id.*
225. Letter From Ruth Bader Ginsburg, Law Professor, Rutgers Univ., to Hon. Don Edwards, Congressman (April 15, 1971), https://catalog.archives.gov/id/26283960 (in Support of the Equal Rights Amendment). *See generally* Ruth Bader Ginsburg, *The Need For The Equal Rights Amendment*, 59 A.B.A. J. 1013, (September 1973); Ruth Bader Ginsburg, *Gender, and the Constitution,* 44 U. CIN. L. REV. 1, 28-34 (1975); Ruth Bader Ginsburg, *Let's Have E.R.A. as a Signal*, 63 A.B.A. J. 70, (1977); Ruth Bader Ginsburg, *Women, Equality, and the Bakke Case*, 4 C.L. L. REV. 8 (Nov./Dec. 1977); Ruth Bader Ginsburg, and Kurland, P., *Is the E.R.A Constitutionally Necessary*, 2 UPDATE ON LAW-RELATED EDUC. 16 (Spring 1978); Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19 (1978); Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex,* 10 CONN. L. REV. 814, 822-25 (1978); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time,* 57 Tx. L. Rev. 919 (1979).
226. Ginsburg, *The Need for The Equal Rights Amendment, supra* note 225 at 1015-16.
227. Ginsburg, *Comment: Frontiero v. Richardson*, 1 WOMEN'S RTS L. REP. 2, 3 (1973).
228. *Id.* at 3.
229. *See generally id.*

material in the article.[230] Only a month later, she filed her brief in *Cohen* asking for "close scrutiny" rather than strict scrutiny.[231]

Justice Ginsburg's failure to advocate for strict scrutiny before *Frontiero* is curious, but her failure to advocate for strict scrutiny after *Frontiero* is inexplicable and unforgivable because, as a plurality decision, *Frontiero's* adoption of strict scrutiny was more vulnerable to revision by the Supreme Court than a majority ruling.[232] The more enthusiastically a plurality ruling is used and supported by advocates and lower courts, the greater the chance the ruling will be accepted as firm precedent. Justice Ginsburg's failure to argue that *Frontiero* required strict scrutiny made it easier for the Court to overturn *Frontiero* a few years later.[233]

In 1976, when it was clear that public and political support for the ERA had dissipated and that the ERA would not be ratified before the deadline expired,[234] the Supreme Court decided *Craig v. Boren*,[235] in which it overturned *Frontiero* and took strict scrutiny away from women, replacing it with the less protective standard of intermediate scrutiny.[236] Two of the justices who had endorsed strict scrutiny in *Frontiero*, Joseph Brennan and Byron White, changed their minds in *Boren*, without explanation, and voted to reduce women's Equal Protection rights from strict scrutiny to intermediate scrutiny.[237] That two justices had such a dramatic change of opinion on such an important constitutional issue after only three years was odd, especially considering that Justice Brennan had reiterated his commitment to strict scrutiny in a dissent in the 1974 case, *Geduldig v. Aiello*.[238]

Justice Ginsburg involved herself in *Boren*, too, filing an amicus brief on behalf of women, and again failing to ask the Court to apply strict scrutiny.[239] In fact, the phrase strict scrutiny appears nowhere in her *Boren* brief.[240]

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230. *Id.* at 3, 4. In another section of the same article, Justice Ginsburg states that the ERA is still necessary notwithstanding *Frontiero*, but she says nothing about the ERA being necessary *because* the "close scrutiny" standard she claims (incorrectly) was adopted in *Frontiero* is less protective than strict scrutiny. Indeed, she nowhere mentions that the ERA would require strict scrutiny. *See supra* note 190 and related text.

231. *RBG Cohen Brief*, *supra* note 184 at *41.

232. Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (referencing a plurality decision as not binding precedent). *But see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) for an example of a plurality decision that has been widely accepted as binding and authoritative.

233. *Boren,* 429 U.S. at 197.

234. BERRY, *supra* note 131 at 66-68.

235. *See generally, Craig,* 429 U.S. 190 (1976).

236. *Craig,* 429 U.S. at 197.

237. *Id.* at 191.

238. *Geduldig v. Aiello*, 417 U.S. 484, 503 (1974) (Brennan, J., dissenting).

239. *See generally RBG Cohen Brief*, *supra* note 184.

240. *See generally id.*

While the Supreme Court's handling of the various levels of scrutiny in Equal Protection jurisprudence was hardly a vision of clarity at the time *Boren* was decided, the fact that *Boren* overturned *Frontiero* by taking strict scrutiny away and replacing it with the less rigorous intermediate scrutiny standard was quite clear.[241] Even in Justice William Rehnquist's dissent, where he bemoaned the idea that women now had intermediate scrutiny because he believed they deserved only rational basis scrutiny, he applauded the majority for retreating from *Frontiero* and taking strict scrutiny away from women, calling it the decision's "only redeeming feature."[242]

In 1979, Justice Ginsburg wrote a law review article in which she talked about the Supreme Court's handling of women's Equal Protection rights, noting that "[n]o fifth vote has emerged to range sex among the 'suspect' categories."[243] Her article made clear that she understood the importance of strict scrutiny for women. but failed to explain why she had repeatedly failed to ask for it in the briefs she was submitting to the Supreme Court in the early 1970s on behalf of women's Equal Protection rights. Again, the issue is not that Justice Ginsburg did not *win* strict scrutiny. The problem is that she never *asked* for it.

In 1980, Justice Ginsburg was appointed to serve as a justice of the Court of Appeals for the D.C. Circuit; she became a justice of the Supreme Court in 1993.[244] As a member of the Supreme Court, she had a chance to become that missing "fifth vote" she had complained about in 1979, however, she never once wrote an opinion supporting strict scrutiny for women.

After *Boren*, women knew that strict scrutiny would be impossible without the ERA, and they had only a few years left before the ERA's deadline would expire.[245] In 1978, with the original 1979 deadline looming and only thirty-five of thirty-eight States having ratified, Congress voted to extend the deadline to June 30, 1982, but no more States ratified, and some that had already ratified attempted to rescind their ratifications.[246] On July 1, 1982, the day after the deadline expired, the Supreme Court issued its ruling in *Mississippi v. Hogan*, reaffirming that women would continue to receive only second-class intermediate scrutiny for their Equal Protection rights.[247]

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241. *Craig,* 429 U.S. at 197.

242. *Id.* at 217-18.

243. Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. Q., 161, 165 (1979).

244. Ruth Bader Ginsburg, *United States Jurist*, Britannica.com; available at https://www.britannica.com/biography/Ruth-Bader-Ginsburg.

245. BERRY, *supra* note 131 at 88.

246. *The Equal Rights Amendment Explained,* Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained (last visited, Oct. 9, 2021).

247. Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

Some women wanted to start over with a new ERA, but most stopped fighting and decided to focus on advancing women's rights at the State level.[248]

In 1996, the Supreme Court heard a case that gave Justice Ginsburg an opportunity to express her opinion on the standard of review for women's Equal Protection rights, but again she did not support strict scrutiny.[249] She wrote instead that women deserved a lesser standard of "exacting scrutiny" that requires only an "exceedingly persuasive justification" rather than a "compelling" government interest.[250] "Exacting scrutiny" also requires no "narrow tailoring" or application of the "least restrictive means" test. Nearly a decade later, during a lecture at Duke University in 2005, Justice Ginsburg was asked whether constitutional law would have evolved differently if the ERA had been ratified.[251] She strangely replied that it would have made only a "symbolic" difference.[252]

PART THREE - ERA IS REVITALIZED

From 1982 to 1992, there was little interest in the ERA, but in 1992 the public's attention was revitalized when the Twenty-Seventh Amendment was added to the Constitution some 203 years after it was proposed by Congress.[253] Women were stunned that the Twenty-Seventh Amendment was considered valid after 203 years given that the ERA was considered dead after only ten years.[254] They believed that the government's acceptance of the Twenty-Seventh Amendment gave them a strong basis for arguing that the ERA's relatively short ratification deadline was unconstitutional.[255] A small group of women who had convened an *ERA Summit* in 1990 to discuss ERA strategies, including whether to start over with a new ERA, shifted their strategy in 1992 to focus on using what happened with the Twenty-Seventh Amendment to persuade three more States to ratify the existing ERA.[256]

Another important development in 1992 spawned even more interest in the ERA. The Supreme Court ruled in *Planned Parenthood v. Casey* that abortion would no longer be considered a "fundamental right" subject to strict scrutiny review.[257] It would instead be considered a lesser "liberty interest,"

248. Denning & Vile, *supra* note 17 at 594.

249. *Virginia*, 518 U.S. at 519.

250. *Id.* at 555-56.

251. *Justice Ruth Bader Ginsburg: A "Lady" Who Led the Fight for Gender Equity*, Duke Law News, https://web.law.duke.edu/features/2005/ginsburg/.

252. *Id.* at 253.

253. *The Twenty-Seventh Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive -constitution/interpretation/amendment-xxvii/interps/165 (last visited, Oct. 9, 2021).

254. Denning & Vile, *supra* note 17 at 594-96.

255. *Id.*

256. Letter from Laura Callow to Wendy Murphy (April 16, 2019).

257. *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 953 (1992) (Rehnquist J., concurring in judgment in part and dissenting in part).

subject to a weaker judicial review standard of "undue burden."[258] Undue burden in the context of Due Process law is analogous to "intermediate scrutiny" under Equal Protection law in that it requires only a "reasonable relationship" between a valid state interest and the means used to protect it.[259] No "compelling" government interest, "narrow tailoring" or "least restrictive means" tests are applied.[260]

After *Casey*, women had no strict scrutiny protection for Equal Protection or Due Process/abortion rights, even though they had been given strict scrutiny for both in 1973 in *Frontiero* and *Roe*.[261] It should be reiterated here that public support for the ERA waned in 1973 *because* it appeared that women no longer needed the ERA after they were given strict scrutiny in *Frontiero* and *Roe*.[262] When it became clear that the ERA would not be ratified before its deadline expired, strict scrutiny was taken away, first from women's Equal Protection rights in *Boren* and later from women's abortion rights in *Casey*.[263]

Having lost all strict scrutiny rights by 1992, women urgently needed the ERA. Advocates brought the three-state strategy to the attention of women's groups, such as NOW.[264] At the 1995 National NOW Convention in Columbus, Ohio, women from an ERA advocacy group known as the *ERA Summit*, (which had been founded in 1991 by Allie Hixson of Kentucky and Flora Crater of Virginia) planned to ask NOW's members to vote in favor of the strategy, but a delegate named Ellie Smeal used a parliamentary procedure to prevent the members from voting.[265] NOW eventually did vote on the issue, Smeal argued against it, and the three-state strategy was not supported.[266] Smeal then persuaded NOW to drop its support for the ERA altogether.[267] Several years later, women from the *ERA Summit* established the *ERA Campaign Network*.[268] A group from the *Network*, including Jennifer McLeod of New Jersey, attended a meeting of the Feminist Majority,

258. *Id.* at 871-76.
259. *Undue Burden,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/undue_burden.
260. *Id.*
261. Under *Roe's* strict scrutiny standard, even minor restrictions on women's abortion rights pre-viability, such as waiting periods and parental notification laws were illegal. See Hodgson v. Minnesota, 497 U.S. 417 (1990) (parental notification) and City of Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (waiting period). When the Supreme Court removed "strict scrutiny" in *Planned Parenthood v. Casey* and replaced it with the "undue burden" standard, these types of restrictions became legal, indeed, they were upheld in *Casey* itself. *Casey,* 505 U.S. at 881-900. If the ERA had been ratified before *Casey* was decided, it would have been more difficult for the Supreme Court to lower strict scrutiny to "undue burden.".
262. BERRY, *supra* note 131 at 88.
263. *Craig*, 429 U.S. at 217-18; *Casey*, 505 U.S. at 881-90.
264. Letter to Ellie Smeal from Laura Callow (Aug. 8, 2018).
265. *Id*.
266. *Id*.
267. *Id*.
268. Letter to Ellie Smeal, *supra* note 264.

then headed by Smeal, hoping to persuade them to support the three-state strategy.[269] They asked to distribute literature explaining the idea but were physically prevented from doing so.[270] Despite her opposition to the ERA, Smeal would later say that she used it as an organizing tool because "it has always been our biggest money raiser."[271]

From the 1990s through the 2000s, the *ERA Campaign Network* and *ERA Summit* advocated for the three-state strategy.[272] Their work included having a bill filed with Congress in 1994 to recognize the validity of the ERA if three more States ratified it.[273] NOW was openly hostile to the bill, and it received little support.[274] Over the next several years,, several non-ratified states introduced, but did not pass, bills to ratify the ERA.[275] The Illinois House of Representatives passed an ERA ratification bill in 2003, but it did not pass the Senate.[276]

In 2009, Kamala Lopez, an American actress who had just learned that women did not have equal rights, founded the *ERA Education Project*, in connection with which she coined the phrase "Equal Means Equal" (EME) and established an organization of the same name.[277] She then started working on a film about the ERA to help raise public awareness.[278]

In 2012, the United States Archivist, David Ferriero, issued a public letter regarding the status of the ERA.[279] The Archivist is essentially the federal government's librarian; he is mandated by federal law to "forthwith" publish new amendments in the Constitution when they become ratified.[280] Mr. Ferriero stated that he would publish the ERA and make it part of the Constitution, notwithstanding expiration of the deadline, if three more States ratified it.[281] His letter was in response to a letter from Congresswoman Carolyn Maloney asking whether he would publish the ERA if and when

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269. *Id*.

270. *Id.*

271. BERRY, *supra* note 131 at 120.

272. Letter from Laura Callow to Wendy Murphy (April 16, 2019).

273. Francis, R., *The Equal Rights Amendment: Frequently Asked Questions*, p.4, https://www.alicepaul.org/wp-content/uploads/2021/05/FAQ-as-of-2021-05-25.pdf

274. *Id.;* Letter from Linda Smith to Laura Callow in 2016, forwarded from Laura Callow to Wendy Murphy (July 13, 2019).

275. *Ratification Info State by State,* ALICE PAUL INSTITUTE, https://www.equalrightsamendment.org/era-ratification-map.

276. *Id*.

277. *Kamala Lopez*, EQUAL MEANS EQUAL, https://equalmeansequal.org/kamala-lopez/ (last visited Oct. 11, 2021).

278. *Id.*

279. Letter from David Ferriero, U.S. Archivist, U.S. Government, to Hon. Carolyn Maloney, U.S. Representative, U.S. Government. (Oct. 25, 2012) (available at https://www.archives.gov/files/foia/ferriero-response-to-02.09.2022-maloney-letter.02.18.2022.pdf) [hereinafter *Letter from David Ferriero*].

280. 1 U.S.C. § 106b.

281. Letter from David Ferriero, *supra* note 279.

three more States voted to ratify it.[282] Women responded to the Archivist's 2012 letter by working even harder on the three-state strategy.[283]

In 2016, EME released the influential ERA advocacy film, "Equal Means Equal," and Nevada ratified the ERA a year later.[284] EME then worked with advocates in Illinois to ratify the ERA there in 2018.[285] Curiously, many women's groups, such as NOW, the Feminist Majority, and the ERA Coalition, did nothing to help ratify the ERA in Nevada and Illinois, although they took credit or sent fundraising letters out after each successful ratification vote.[286] Equally strange, a group known as the Women's March organized a rally in Washington D.C. in 2017, ostensibly to bring women together to make demands on national leaders regarding women's issues, but the ERA was never mentioned.[287] In fact, EME submitted a proposal to the Women's March organizers, offering to give a speech about the ERA at the rally, but it was denied.[288] More than four million women and men took part in the event, and numerous speakers were invited to talk about women's issues, but nobody was allowed to mention the ERA,[289] even though active campaigns to ratify the ERA were then underway in at least two States.[290]

In January 2020, when Virginia became the thirty-eighth and last necessary State to ratify the ERA, the Archivist reneged on his 2012 promise and refused to publish the ERA in the Constitution as the Twenty-Eighth Amendment.[291] Mr. Ferriero explained that he had received a memorandum

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282. *Id.*

283. Colin Dwyer & Carrie Kaufman, *Nevada Ratifies the Equal Rights Amendment . . . 35 Years After the Deadline*, March 21, 2017, NPR (Mar. 21, 2017, 3:43 PM), https://www.npr.org/sections/thetwo-way/2017/03/21/520962541/nevada-on-cusp-of-ratifying-equal-rights-amendment-35-years-after-deadline.

284. *Id.*

285. Bill Chappell, *One More to Go, Illinois Ratifies the Equal Rights Amendment*, NPR (May 31, 2018), https://www.npr.org/sections/thetwo-way/2018/05/31/615832255/one-more-to-go-illinois-ratifies-equal-rights-amendment.

286. Letter from Kamala Lopez to Wendy Murphy (Apr 10, 2021); letter from Laura Callow to Ellie Smeal (August 8, 2018).

287. Letter from Kamala Lopez, *Id*.

288. *Id*. The Legal Director of the Women's March, Ting Ting Cheng, later became the head of an ERA organization at Columbia Law School. *Columbia University Law School, Center for Gender & Sexuality Law,* ERA Project, https://gender-sexuality.law.columbia.edu/content/team-mission. When this organization was established in 2021, its mission statement said that it supported the ERA, but news stories generated on behalf of the organization undermined the ERA by stating that it was not valid, even though three-fourths of the states had ratified it. One story said "several additional steps remain in order for it to officially be added to the Constitution. . ." *The ERA: The Amendment is Just the Beginning*, Women's e-News, February 24, 2021, https://womensenews.org/2021/02/the-era-the-amendment-is-just-the-beginning/. This article undermined the ERA because it was published at a time when two federal lawsuits were pending that asked the courts to rule that the ERA was already valid. *Supra* note 22. By declaring that "several additional steps were needed," the organization was voicing its opposition to the lawsuits.

289. Emily Chapin, *Women's March: One Year Later, Museum City of New* York (2017) https:www.mcny.org/story/womens-march.

290. *The Equal Rights Amendment*, *supra* note 273. *See generally id*.

291. *NARA Press Statement, supra* note 20.

opinion from the OLC at the DOJ stating that the ERA could not be published.[292] The OLC claimed that the ERA was not valid because its ratification deadline had expired.[293] At the time, Donald Trump was president, and the DOJ was headed by a conservative Attorney General named William Barr.[294]

Mr. Ferriero had been nominated to the position of United States Archivist by President Obama, a Democrat, yet he chose to obey a Republican OLC's opinion about the ERA's deadline despite the fact that no Archivist in history had ever refused to publish an amendment after the last necessary State ratified it, and Ferriero himself had promised that he would publish the ERA notwithstanding the deadline if three more States ratified it.[295] Stranger still, Ferriero was not legally required to obey the OLC. The OLC could express an opinion on the validity of the ERA, but it had no legal authority to prevent the Archivist from obeying the law and publishing it in the Constitution because the Archivist's duty to publish is ministerial, nondiscretionary, and mandated by federal statute.[296]

On January 5, 2020, EME filed a lawsuit against the Archivist in Massachusetts federal court to compel him to publish the ERA.[297] The lawsuit was filed on behalf of women as a class and asked the court to validate the ERA and order the Archivist to publish it in the Constitution.[298] EME's primary argument was that the Archivist had no discretion not to publish, and that the ERA was valid because the deadline was not valid.[299] A second lawsuit was filed weeks later in federal court in Washington D.C., by attorneys general from Nevada, Illinois, and Virginia, the three States that ratified the ERA after the deadline expired.[300] Led by Virginia, they made

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292. *Id.*

293. *Ratification of the Equal Rights Amendment, Memorandum for the General Counsel National Archives and Records Administration*, slip op., Jan. 6, 2020, released January 8, 2020, https://www.justice.gov/olc/file/1232501/download (last visited, Oct. 11, 2021) [hereinafter *Ratification of the Equal Rights Amendment, Memorandum for the General Counsel*].

294. *William Barr*, WIKIPEDIA, https://en.m.wikipedia.org/wiki/William_Barr (last visited Oct. 11, 2021).

295. *Letter from David Ferrero*, *supra* note 279.

296. Dillon v. Gloss, 256 U.S. 368, 376 (1921) (that ratification was not proclaimed until January 29, 1919, is not material, "for the date of its consummation, and not that on which it is proclaimed, controls."); Leser v. Garnett, 258 U.S. 130, 137 (1922) (Archivist merely authenticates a state's documents); U.S. ex. Rel. Widenmann v. Colby, 265 F. 998, 999 (D.C. Cir. 1920) ("No discretion is lodged in [the Archivist]."). See Danaya Wright, *Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifications* 12 U.C. IRVINE L. REV. 1013, 1077-83 (2021).

297. *Equal Means Equal, et al.*, 141 S. Ct. 611, Docket No. 1:20-cv-10015-DJC (D. Mass) (the Author was lead counsel for plaintiff).

298. *Id.*

299. *Ratification of the Equal Rights Amendment, Memorandum for the General Counsel, supra* note 293.

300. *Virginia et al., v. Ferriero*, 466 F.Supp.3d 253, Docket, Docket No. 1:20-cv-00242-RC (D.D.C.).

the same arguments that EME made in the Massachusetts case, but unlike the Massachusetts case, they did not sue on behalf of women.[301] Theirs was a States' rights lawsuit; they sued on behalf of their rights as States to have their ratification votes counted.[302]

Both lawsuits were pending during the summer of 2020, right before the presidential election when voters would choose between Republican incumbent President Donald Trump and his Democrat opponent, Joseph Biden.[303] The Trump administration was fighting against the ERA in both lawsuits and its OLC was blocking the ERA from publication, so women were encouraged to vote for Joe Biden because he said he supported the ERA,[304] and his female running mate, Kamala Harris, had spoken openly about her support for the ERA.[305] Women believed that if Joe Biden was elected, he would withdraw the DOJ's opposition in the two lawsuits, appoint a new Attorney General who would rescind the Trump Administration's OLC opinion, and direct the Archivist to publish the ERA in the Constitution.[306]

Approximately fifty percent of women in America voted for Joe Biden,[307] yet when he was sworn into office in January 2021, he did nothing for the ERA.[308] In fact, he continued fighting against it in both federal lawsuits, making the same arguments President Trump had made.[309] On March 5, 2022, the Biden Administration filed a brief with the D.C. Circuit Court of Appeals, the second most powerful federal court in the country, arguing against the ERA.[310] Around the same time, President Biden boasted publicly about his decision to withdraw from a Trump-era lawsuit in Connecticut

301. Virginia et al., v. Ferriero, 525 F.Supp.3d 36, 40.

302. *Virginia et al.,* 525 F.Supp.3d at 40.

303. *The 2020 Trump-Biden Matchup*, Pew Research Center, August 13, 2020, https://pewresearch.org/politics/2020/08/13/the-2020-trump-biden-matchup (last visited Oct. 11, 2021).

304. *The Biden Agenda For Women*, Biden Harris Democrats, released July 27, 2020, (Archived on the Wayback Machine) https://joebiden.com/womens-agenda (last visited, Oct 11, 2021); Democratic Debate, June 27, 2020, available at https://m.youtube.com/watch?v=cX7hni-zGD8&t=48s&pp=2AEwkAIB.

305. Chloe Angyal, *Kamala Harris Says It's Time To Make Women Full Citizens At Last*, Marie Claire, Feb. 27, 2019, https://www.marieclaire.com/politics/a26551159/kamala-harris-equal-rights-amendment (last visited, Oct. 11, 2021).

306. Lloyd Grove, *'This is Some Bullshit': Women's Group Rails Against Biden Inaction on Equal Rights Amendment*, June 10, 2021, The Daily Beast, https://www.thedailybeast.com/this-is-some-bullshit-womns-group-rails-against-biden-inaction-on-the-equal-rights-amendment (last visited, Oct. 16, 2021).

307. Ruth Igielnik, et al., *Behind Biden's 2020 Victory*, June 30, 2021, Pew Research Center, https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/ (last visited Oct. 16, 2021).

308. Grove, *supra* note 306.

309. *Id*.

310. *Illinois v. Ferriero*, 60 F.4th 704, No. 21-5096, 2022 WL 656524 (D.C.C.) Doc. #1937869, filed 3/04/22 (note: this is the same case as *Virginia v. Ferriero*, No. 21-5096 (D.C.C.) but Virginia withdrew as a Plaintiff because a new attorney general was elected in Virginia after the case was filed and he did not support the litigation).

where the Trump Administration had been opposing transgender rights.[311] He could have done the same thing in the ERA cases, but he did not.

President Biden also refused to direct the Archivist to publish the ERA or even ask his newly appointed Attorney General, Merrick Garland, to withdraw the Trump Administration's OLC opinion.[312] He could have simply called the Archivist to tell him to obey the law and publish the ERA. Instead, he engaged in the same anti-ERA tactics as Donald Trump.[313]

On January 27, 2022, the date on which the ERA by its terms became enforceable (two years after ratification), President Biden issued a public statement in which he claimed to support the ERA and blamed Congress for why the ERA was not yet published in the Constitution.[314] His statement was met with fierce criticism[315] as it was well-known that he, not Congress, was fighting against the ERA in court, blocking the ERA from publication, and refusing to rescind the Trump Administration's OLC opinion.[316]

Many Republicans had been openly hostile to the ERA, while most Democrats had claimed to be supportive.[317] It was now clear that neither party supported women's equality.

Like the duplicitous Biden Administration, some women's groups refused to support the Massachusetts ERA lawsuit while claiming to support Women's equality. They supported the D.C. case, but did not support the Massachusetts case, even though it was the only one filed on behalf of women.[318] The Feminist Majority even instructed organizations not to support the Massachusetts case.[319] A few women's organizations, such as the National Women's Political Caucus, signed amicus briefs in both lawsuits, but other groups refused to support the Massachusetts case.[320]

Some said they would not support the Massachusetts case because they believed EME would lose on standing grounds.[321] While EME did lose on

311. Pat Eaton-Robb, *Biden Administration Withdraws From Transgender Athlete Case*, Associated Press, February 24, 2021, https://apnews.com/article/connecticut-school-athletics-high-school-sports-law suits-william-barr-)d7fa2922b5fa5686a2f5d79ce081481.

312. *Id*.

313. Wendy Murphy, *Biden Has Insulted Women and Their Intelligence*, BOSTON HERALD, January 31, 2022, https://www.bostonherald.com/2022/01/31/murphy-biden-has-insulted-women-and-their-intelligence/.

314. Susan Heavey, *Biden Urges Congress to Act Now on Equal Rights Amendment*, Reuters, January 27, 2022, https://www.usnews.com/news/top-news/articles/2022-01-27/biden-urges-congress-to-immediately-recognize-equal-rights-amendment.

315. Murphy, *supra* note 313.

316. Murphy, *supra* note 313.

317. *The Biden Agenda for Women, supra* note 304.

318. E-mail from Roberta W. Francis to Lucy Beard (June 22, 2020).

319. *Id*.

320. The National Organization for Women, the ERA Coalition, and the Feminist Majority all refused to support the Massachusetts case.

321. *Id*.

standing grounds, the Plaintiffs in the D.C. case had an even weaker standing argument, and they, too, lost on standing grounds, [322] yet even lawyers who claimed to be supporters of women's rights and boasted about filing amicus briefs in the DC case, such as Virginia Attorney Patricia Wallace, refused to file the same brief in the Massachusetts case.[323] It is curious that an attorney would claim to support a cause yet decline to submit an amicus brief in support of that cause on the grounds that they believe the lawsuit may not succeed. Many lawsuits are unsuccessful, and activists doing social justice work often expect to lose, but lawyers submit amicus briefs nonetheless to make sure courts understand the breadth of public support. While some attorneys might not want to expend resources writing an amicus brief in a case that will not likely succeed, some lawyers and groups that refused to support EME's case in Massachusetts had already written or signed onto a brief in the D.C. case.[324] They could have simply changed the case caption and filed the same brief in the Massachusetts case because the issues were the same in both cases. Well-known attorney David Boies, who filed a brief in the D.C. case on behalf of numerous corporations in support of the D.C. case, offered to submit his brief in the Massachusetts case, but his female co-counsel, Patricia Wallace, inexplicably disagreed, so the brief was not filed.[325]

Allies in the fight for women's equality are not always sincere, and they do not necessarily align along left/right, liberal/conservative, or Democrat/Republican lines. For example, the Massachusetts ERA lawsuit was assigned to a woman judge named Denise Casper, who had been nominated to the bench by Barack Obama, and the D.C. ERA lawsuit had been assigned to Rudolf Contreras, another Obama nominee[326] yet both judges were hostile to the ERA and ruled that the plaintiffs had no standing to sue.[327] The Massachusetts judge was blatantly wrong on standing.

Standing basically means that a plaintiff has a right to file a lawsuit because they were injured by the defendant's actions or inactions.[328] The plaintiffs in the Massachusetts case pointed out several ways that they had been injured by the Archivist's failure to publish the ERA, including that it

322. *Virginia et al., v. Ferriero*, 466 F.Supp.3d 253, 1:20-cv-00242 (DC Dist.), Doc. #117, March 5, 2021.

323. The National Organization for Women, the ERA Coalition, and the Feminist Majority all supported the D.C. case.

324. E-mail from Roberta W. Francis to Lucy Beard (June 22, 2020); emails between Patricia Wallace and Arlaine Rockey (July 7 – September 17, 2020).

325. *Id.*

326. Denise Casper, *BallotPedia*, https://ballotpedia.org/Denise_Casper (last visited Oct. 16, 2021); Rudolph Contreras, *BallotPedia*, https://ballotpedia.org/Rudolph_Contreras (last visited Oct. 16, 2021).

327. *Equal Means Equal et al, v. Ferriero*, 1:20-cv-10015-DJC (D. Mass), Doc. #35, August 6, 2020; *Virginia et al., v. Ferriero*, 1:20-cv-00242 (DC Dist.), Doc. #117, March 5, 2021.

328. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

caused all women catastrophic harm by denying them the benefits of full equality, but Judge Casper disagreed, which was disturbing because she easily could have found standing given the doctrine's malleable nature, especially in public interest cases which are often influenced by political concerns.[329] Put simply, a judge can rule that a plaintiff lacks standing even when they clearly do, and vice versa.

Judge Contreras' dismissal of the D.C. case on standing grounds was not as surprising as the Massachusetts dismissal because the plaintiffs in the D.C. case had asserted States' rights, not women's rights, and they had failed to include a Tenth Amendment claim. The Tenth Amendment provides that the federal government, including the Archivist, may only exercise powers expressly granted to them by the Constitution; all other powers rest with the States.[330] As the Constitution nowhere gives the Archivist the power to refuse to publish a constitutional amendment once three-fourths of the States have ratified it—the plaintiff States would have had standing to sue under the Tenth Amendment but they filed no such claim.[331] When asked why no Tenth Amendment claim was filed, the attorney representing the Plaintiffs declined to answer.[332]

In Judge Casper's ruling dismissing the Massachusetts lawsuit on standing grounds, she did not reach the merits or determine the ERA's validity.[333] Judge Contreras, by contrast, dismissed the D.C. case for lack of standing, but then ruled on the ERA's validity as well, even though dismissal on standing means he had no jurisdiction to address the merits. He ruled that the ERA was not valid because the ratification deadline had expired.[334] It

329. See e.g., Pierce, R., *Standing Law Is Inconsistent and Incoherent*, Yale Journal on Regulation, Sept. 7, 2021, https://www.yalejreg.com/nc/standing-law-is-inconsistent-and-incoherent/ (last visited, Oct. 16, 2021).

330. U.S. CONST. amend. X.

331. 1 U.S.C. § 106b.

332. Video meeting with advocates, including the author, January 2022.

333. *Equal Means Equal et al, v. Ferriero*, 1:20-cv-10015-DJC (D. Mass.), Doc. #35, August 6, 2020.

334. Virginia, et al. v. Ferriero, civ. No. 20-242 (RC) 2021 WL 848706; Virginia et al. v. Ferriero, 1:20-cv-00242 (D.C. Dist.), Doc. #117, March 5, 2021. Judge Contreras ignored many strong arguments in support of the ERA's validity, and ruled that Congress had authority to impose a deadline on the ERA's ratification because under Article V Congress has the power to choose the mode of ratification and this power somehow extends to the power to restrict the amount of time the states have to complete the ratification process. This odd rationale ignores the long-settled view that choosing the mode of ratification is a ministerial function that has nothing to do with deadlines. Choosing the mode of ratification is a procedural decision not a substantive one, that merely gives Congress the ability to decide whether ratification takes place by legislative decision-making or State convention. See *Memorandum from John M. Harmon, Assistant Attorney General to the Hon. Robert Lipshultz, Counsel to the President on the Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977) [hereinafter *Memorandum from John Harmon*]. Even if Congress may impose deadlines, Judge Contreras blithely concluded that the placement of the ERA's deadline in its preamble rather than its text was of no consequence despite the fact that no court had ever ruled that Congress may place a deadline in a preamble and less than a handful of amendments had deadlines in preambles. The vast

seemed odd, to say the least, that an Obama-nominated judge would go out of his way to gratuitously rule against women's equality in a case where he could have said nothing because he had denied the plaintiffs standing, which meant he lacked jurisdiction to decide the issue.

This betrayal by two Democrat-nominee judges was not nearly as troubling as Justice Ruth Bader Ginsburg's comments in early 2020 during a talk at Georgetown University Law School, right after the two ERA lawsuits were filed. She was asked an obviously planned question about the status of the ERA in light of the new lawsuits, in response to which she stated that the ERA was not valid because of the deadline, and that women needed to start over.[335] Justice Ginsburg made her remarks before either Judge Contreras or Judge Casper had a chance to issue any rulings.[336]

The timing of Justice Ginsburg's comments raises important questions about her ethics as it is generally inappropriate for a sitting justice of the Supreme Court to publicly state her opinion on an issue that could come before her, and she knew that two ERA lawsuits had just been filed and were pending in federal court, which meant they could be appealed to the Supreme Court. (The Massachusetts case did subsequently reach the Supreme Court, on a petition for writ of certiorari, which was denied). ERA opponents celebrated Justice Ginsburg's remarks, while ERA supporters struggled to understand why a seeming proponent of women's equality would express hostility toward the ERA at such a consequential moment in time. Even more shocking, Justice Ginsburg then personally contacted Archivist Ferriero while both lawsuits were pending and twice told him not to publish the ERA. These conversations were recounted personally by Mr. Ferriero to ERA activists Coline Jenkins and Jean Sweeney.

After the Massachusetts ERA case was dismissed for lack of standing, the Plaintiffs appealed to a three-judge panel of the First Circuit Court of Appeals.[337] Oral argument was held on May 5, 2021, during which EME asserted numerous arguments in favor of the ERA's validity and in support of EME's standing, including the fact that women as a class were clearly

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majority had deadlines in the text or no deadlines at all. The significance of there being absolutely no precedent on the issue of deadlines in preambles cannot be overstated. Without any case law on point from any court, Judge Contreras had the judicial flexibility to rule that placement of a deadline in a preamble was unconstitutional. The absence of precedent gave him wide discretion to formulate his own conclusion, based on law and policy. Judge Contreras, an Obama nominee, easily could have done the right thing for women, but he declined. His ruling should thus be seen as an expression of his personal and political view that women are unworthy of equality.

335. R. Berman, *Ruth Bader Ginsburg Versus the Equal Rights Amendment*, THE ATLANTIC (Feb. 15, 2020), https://www.theatlantic.com/politics/archive/2020/02/ruth-bader-ginsburg-equal-rights-amendment/606556/ (last visited Oct. 17, 2021).

336. *Id.*; *Equal Means Equal et al.,* 1:20-cv-10015-DJC (D. Mass); *Virginia et al.*, 1:20-cv-00242 (DC Dist.), Doc. #117.

337. *See generally* Equal Means Equal v. Ferriero, 3 F.4th 24 (1st Cir. 2021).

injured by the Archivist's refusal to publish the ERA.[338] The Biden Administration's DOJ argued against the ERA and against EME having standing to sue, and the court ultimately ruled that EME had no standing.[339] Oddly, however, the First Circuit ignored EME's two best standing arguments, which was inappropriate. Though courts do sometimes deny standing, they cannot lawfully just ignore a standing argument altogether.

One of the standing arguments EME asserted that was ignored by the court was based on a nearly identical 1980 case from the Ninth Circuit, *Idaho v. Freeman*.[340] The *Freeman* case began when ERA opponents filed suit in Idaho federal court to challenge the constitutionality of a 1978 federal law that extended the ERA's original ratification deadline from 1979 to 1982.[341] NOW filed a motion to intervene in the case, arguing that it had standing to advocate in favor of the ERA on behalf of all women .[342] The Idaho District Court denied NOW's motion, but the Ninth Circuit overturned the lower court and ruled that NOW did have standing because women, and by extension NOW as a group that represents women, have a protectable legal interest in the ERA's ongoing vitality.[343]

EME argued that if NOW had standing in *Freeman* because it represented women and women have a "protectable legal interest" in the ERA's vitality, then EME had standing in the Massachusetts case because it also represented women and the ERA's vitality was undoubtedly at stake.[344] The First Circuit did not disagree with EME's *Freeman* argument; it simply ignored *Freeman* altogether.[345]

EME's second argument was that they had standing because Judge Contreras in the D.C. ERA case had granted full party standing to several states that were opposed to the ERA, allowing them to intervene on the grounds that they would be injured if the Archivist published the ERA.[346] Judge Contreras reasoned that validation of the ERA would require those states to begin repairing sex discriminatory laws and policies, to bring them

338. *EME Presents Historic Argument on Behalf of Women Before the First Circuit Court of Appeals, May 6, 2021*, https://media.ca1.uscourts.gov/files/audio/20-1082.mp3. [also available at https://www.youtube.com/watch?v=qJmwuiocgll.].

339. *Equal Means Equal et al.,* Docket No. 20-1082, (C.A. 1) (June 29, 2021), http://media.ca1.uscourts.gov/pdf.opinions/20-1802P-01A.pdf.

340. *See generally* State of Idaho *v.* Freeman, 625 F.2d 886 (9th Cir. 1980).

341. *Id.* at 886.

342. *Id.* at 887.

343. *Id.* (the lower court in *Freeman* had denied NOW standing, but the Ninth Circuit reversed. When the case was remanded, the National Organization of Women had full party standing to litigate all aspects of the case).

344. *Equal Means Equal*, 3 F.4th at 28.

345. *Id.*

346. *Virginia et al.*, 525 F.Supp.3d at 40.

into compliance with the ERA before its effective date of January 27, 2022,[347] and that this gave the states standing because forcing them to repair sex discriminatory laws would cause them injury.[348] EME cited Judge Contreras' ruling and argued that if the ERA opponent states in the D.C. case had standing because they would be "injured" by the act of repairing sex discriminatory laws, then EME had standing because *not* publishing the ERA injured them and all women by denying them the benefits of that repair work.[349] Again, the First Circuit did not disagree with EME's argument; it simply ignored it.[350] An *en banc* appeal was then filed with the full First Circuit, in which EME argued that the three-judge panel wrongly ignored EME's two best standing arguments.[351] The appeal was denied without comment in January 2022.[352]

While EME was fighting hard and filing lots of briefs in the Massachusetts case, the Plaintiffs in the D.C. case were delaying their proceedings.[353] They did not even file a notice of appeal from the dismissal of their case until the last minute, and the briefing schedule was then delayed for months.[354] EME had already argued and lost its appeal by August 2021, but the D.C. case was moving so slowly their briefs were not even due until October 2021, at which point the Plaintiffs asked for a further delay on the filing of their brief, until January 2022.[355] Coincidentally, a congressional Committee on Oversight and Reform held a hearing on the ERA on October 21, 2021.[356] The hearing had nothing to do with any bill then pending before Congress, and the Committee had no authority over the ERA, but panelists discussed the ERA anyway, including the fact that the Archivist had no authority not to publish it.[357] This was well understood when the Archivist first announced his refusal to publish the ERA in January 2020 but nobody in Congress convened a panel to discuss the issue until almost two years later.[358]

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347. Section 3 of the ERA states that it takes effect "two years after the date of ratification." This ensures that government officials have time to identify sex discriminatory laws, policies, and programs, and bring them into compliance with the ERA. 118 Cong. Rec. 9419 (1972) (two-year delay in enforcement of ERA is necessary to give Federal and State officials adequate time to repair their laws).

348. *See infra* note 378..

349. *Equal Means Equal*, 3 F.4th at 27.

350. *Equal Means Equal et al.,* Docket No. 20-1802, Aug. 8, 2021, Doc. #00117772658.

351. *Id.*

352. *Equal Means Equal*, 141 S. Ct 611.

353. *Equal Means Equal, et. al.*, Docket No. 1:20-cv-00242, Doc. #118 (2021).

354. *Id.*

355. *See generally Equal Means Equal et. al.*, Docket No. 1:20-cv-00242.

356. House Committee on Oversight and Reform, *The Equal Rights Amendment: Achieving Equality for All* (Oct. 21, 2021), https://oversight.house.gov/legislation/hearings/the-equal-rights-amendment-achieving-constitutional-equality-for-all.

357. *Id.*

358. *Id*.

Panelists at the October 2021 congressional hearing addressed why the ERA was important to women, but not one person said a word about how the ERA would require courts to use the strict scrutiny standard of review,[359] and that elevating women's Equal Protection rights from intermediate scrutiny to strict scrutiny was necessary to protect women from all forms of discriminatory harm. To the contrary, when one constitutional scholar was asked what effect the ERA would have on women's lives, she said nothing about strict scrutiny and offered as a response only that if the ERA had been in effect in 2000, it would have prevented the Supreme Court from overturing a key provision of the Violence Against Women Act[360] (VAWA) in *U.S. v. Morrison*.[361] She was wrong. *Morrison* involved a constitutional challenge to a section of the VAWA that allowed women to file civil lawsuits against non-state actors who perpetrated sex-based violence.[362] The Supreme Court struck down the provision as unconstitutional on the grounds that Congress has no authority to regulate violence against women under the Commerce Clause or the Fourteenth Amendment.[363] The Court explained that the Commerce Clause only covers matters that have a substantial effect on interstate commerce, and violence against women does not substantially affect interstate commerce.[364] The other possible source of authority, the Fourteenth Amendment, only applies to state action, so it gives Congress no authority to enact laws allowing women to file lawsuits against non-state perpetrators of sex-based violence.[365] While the ERA would give Congress certain authority to enact laws in furtherance of the ERA, they could only regulate state action. Thus, *Morrison* would not have been decided differently under the ERA.

During and after the congressional hearing in October 2021, most women's groups and ERA advocacy groups did little to shine a light on the Biden Administration's opposition to the ERA. Many condemned Trump for blocking the ERA and fighting against it in two federal lawsuits, but few criticized Biden for doing the same thing.

PART FOUR - WHY THE ERA IS VALID DESPITE THE PURPORTED DEADLINE

Under Article V of the U.S. Constitution (Article V), when an amendment is "ratified by the legislatures of three fourths of the several

359. *Richardson*, 411 U.S. at 692 (Powell, J., concurring) (Court should not decide whether sex is a suspect classification subject to strict scrutiny review because the ERA, which was then pending before the States, would determine the answer to that question).

360. House Committee on Oversight and Reform, *supra* note 356 at 19, 41.

361. *See generally* United States v. Morrison, 529 U.S. 598 (2000).

362. *Id.* at 601-02, 605.

363. *Id*. at 602, 627.

364. *Id*. at 609-10, 613 (quoting United States v. Lopez, 514 U.S. 549, 558-559 (1995)).

365. *Id.* at 621 (quoting United States v. Harris 106 U.S. 629, 639 (1882).

states," it "shall be valid to all intents and purposes, as part of this Constitution . . . ."[366] On January 27, 2020, Virginia became the last of three-fourths of the States to ratify the ERA.[367] Therefore, under the plain language of Article V, the ERA is now the Twenty-Eighth Amendment to the U.S. Constitution.[368]

In furtherance of Article V's express purpose of ensuring that an amendment becomes valid the moment the last necessary state ratifies it, Congress enacted 1 U.S.C. § 106b, which requires the Archivist to publish amendments and make them part of the Constitution under the conditions set forth in Article V:

> Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as part of the Constitution of the United States.[369]

Despite the clear language of Article V and § 106b, the Archivist refused to publish the ERA after Virginia ratified it on January 27, 2020 because on January 8, 2020, the OLC issued a memorandum opinion stating that the Archivist could not publish the ERA because its ratification deadline had expired.[370] That same day, the Archivist issued a statement declaring that he would "abide by the OLC opinion,"[371] yet the Archivist was not authorized, much less obligated, to defer to the OLC and no Archivist had ever before deferred to any government official on the issue of whether a constitutional amendment should be published. Nor had any Archivist concerned himself with determining an amendment's constitutionality prior to publication because § 106b nowhere permits the Archivist to assess the constitutionality of the process or decline to publish for *any* reason.[372] It states only that after three-fourths of the states have ratified he must "forthwith cause the

366. U.S. CONST. art. V; *Dillon*, 256 U.S. at 375 (an amendment automatically becomes law when the last of three-fourths of the States ratifies it).
367. Rankin, *supra* note 19.
368. U.S. CONST. art. V.
369. 1 U.S.C. § 106b.
370. *NARA Press Statement*, s*upra* note 20 .
371. *Id.*
372. *See generally* 1 U.S.C. § 106b.

amendment to be published."[373] His task is ministerial and mandatory; he has no discretion to do anything else.[374]

If Congress wanted the Archivist to have authority to determine an amendment's constitutionality prior to publication, it would have included a provision in § 106b stating that the Archivist must certify that an amendment "*has been adopted according to the provisions of the Constitution.*" Instead, Congress inserted a comma after the word "adopted," making clear the purpose of that phrase is to emphasize that the Archivist's duties, such as acting "forthwith," are constitutionally mandatory. Nothing in § 106b or Supreme Court precedent gives the Archivist authority to assess or "certify"[375] constitutionality, yet that is exactly what the Archivist did when he refused to publish the ERA. This caused nationwide turmoil and confusion as to the ERA's validity.[376]

Because publication is a ministerial task, it does not establish validity,[377] but it does have important legal effect. With regard to the ERA in particular, publication in January 2020 would have caused government officials to begin the process of repairing sex discriminatory laws and programs, to bring them into compliance with the ERA before it became enforceable two years later.[378] When EME sued the Archivist for his refusal to publish the ERA, it

373. *Id.*

374. *Colby*, 265 F. Supp. at 999 ("No discretion is lodged in [the Archivist]").

375. When the Twenty-Seventh Amendment was published by the Archivist in 1992, he did not "certify" its constitutionality despite serious doubts about its validity in light of the 203-year gap between congressional proposal and State ratification. He simply published it without noting that he or anyone else had determined the amendment's constitutionality — or needed to. He quoted the language of Article V and § 106b, and *specified* which States ratified, which is exactly what he should have done with the ERA. *See generally*, 1 U.S.C. § 106b.

376. On February 11, 2020, a month after the Archivist announced that he would not publish the ERA, twenty Attorneys General from the Democratic Party released a letter expressing confusion. *Letter from State Attorneys General to U.S. Congress* (February 22, 2020) (available at https://portal.ct.gov/-/media/AG/Press_Releases/2019/2112020Multistate-LT-to-Congress-re-ERA.pdf?la=en) [hereinafter *Attorneys General Letter*]. Their confusion was obviously caused by the Archivist's actions as they also expressed confidence that the ERA was valid because the deadline was not valid. Despite their written acknowledgements that the ERA was valid, three of the Attorneys General who signed the letter subsequently and inexplicably fought against the ERA in lawsuits that had been strategically filed to help validate it. Elizabeth Cady Stanton Trust v. Neronha, No. 1:22-cv-00245-MSM-LDA (Rhode Island); Elizabeth Cady Stanton Trust v. Nessel, No. 22-000066-MB (Michigan); Elizabeth Cady Stanton Trust v. James, No. 903819-22 (New York). Women expected these Democrat Attorneys General to take advantage of these "friendly" lawsuits to help the plaintiffs validate the ERA, but that did not happen. All three fought against the ERA.

377. *Dillon,* 256 U.S. at 376 ("That the [Archivist] did not proclaim ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls."). *See Garnett*, 258 U.S. at 137 (Archivist merely "authenticates" a State's documents).

378. *See Ferriero*, 525 F. Supp. 3d 36, 43 Docket No. 20-242 RC 2021 WL 848706 (allowing several States to intervene in a lawsuit to force publication of the ERA on the ground that publication of the ERA would establish a new regime under which all States would be compelled to begin the process of repairing sex discriminatory laws and policies).

was intended, in part, to ensure that the repair work would begin, even though the courts would ultimately have to determine the ERA's validity.[379]

For guidance in determining the ERA's validity in light of its ratification deadline, the courts would look to *Dillon v. Gloss*[380] where the Supreme Court said that Article V gives Congress implied authority to impose deadlines. But *Dillon* was decided a century ago, and the aspect of *Dillon* that addressed the deadline issue was dictum, thus could be disregarded as it had no bearing on the Court's holding in the case.[381] Further, *Dillon* language supporting congressional authority to set ratification deadlines is premised on the arcane notion that state ratifications should be substantially contemporaneous with congressional proposal in order to ensure national consensus.[382]

This requirement of contemporaneity as proof of consensus has not withstood the test of time, as evidenced by the adoption of the Twenty-Seventh Amendment in 1992, some 203 years after congressional proposal. Congress itself voted to validate the Twenty-Seventh Amendment despite the passage of more than two centuries from proposal to ratification.[383] No official from any branch of government refused to respect the Twenty-Seventh Amendment, or declare that it could not be published in the Constitution, on the grounds that its ratification was not contemporaneous with its proposal by Congress.[384] Nor did any government official try to block the Twenty-Seventh Amendment from being added to the Constitution even

379. *Flores*, 521 U.S. at 524; Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

380. *Dillon*, 256 U.S. at 375-76.

381. In the 1939 case, *Coleman v. Miller*, the Supreme Court characterized *Dillon's* language about Congress having authority to impose ratification deadlines as a holding. Coleman v. Miller, 307 U.S. 433, 452 (1939). But the Supreme Court cannot simply declare *Dillon's* dictum to be a holding, especially where *Coleman* itself was a highly divided court and the issues (whether the Kansas legislature could ratify the proposed Child Labor Amendment after previously voting against it, and whether it could do so thirteen years after congressional proposal) were not the same as those addressed in *Dillon*. In any event, it was only a concurring opinion in *Coleman* where the Court discussed Congress having "sole and complete" power over the amendatory process. *Coleman*, 307 U.S. at 459. In other words, *Coleman* did nothing to change the non-binding value of *Dillon's* dictum on the issue of whether Congress may impose ratification deadlines.

382. *Dillon*, 256 U.S. at 375.

383. Congress, like the Archivist, has no authority to adjudicate constitutionality, but that is effectively what it did with the Twenty-Seventh Amendment on May 21, 1992. S. Con. Res. 120–102nd Congress (1991–92); H. Con. Res. 120–102nd Congress (1991–92).

384. Notably, the Archivist readily performed his duty to publish the Twenty-Seventh Amendment when the last of three-fourths of the States ratified it, despite the passage of 203 years since congressional proposal. He published the Amendment on May 7, 1992, *before* the Office of Legal Counsel ("OLC") at the Department of Justice ("DOJ") issued a two-page letter reciting the language of 1 U.S.C., §106(b) and stating that "the effective date of the amendment is the date on which it was ratified by the thirty-eighth State to do so." Congressional Pay Amendment*, Opinions of the Office of Legal Counsel of the Dep't of Justice*, 16 Op. O.L.C. 85, 86 (May 13, 1992). The OLC did not provide a full and formal legal analysis until six months later, on November 2, 1992. Memorandum Opinion for the Counsel to the President, November 2, 1992, https://www.justice.gov/file/20561/download. It is curious that the Archivist felt compelled to publish the Twenty-Seventh Amendment without waiting for the OLC to opine, yet he felt compelled *not* to publish the ERA until he received a comprehensive legal analysis from the OLC.

though the Supreme Court had ruled in *Dillon* that a proposed amendment may not remain "open for all time," and that the Twenty-Seventh Amendment in particular was already too old, in 1921, to ratify. [385] Either *Dillon's* requirement of contemporaneity as proof of consensus is no longer good law,[386] or the Twenty-Seventh Amendment is not part of the Constitution.[387]

Whether Congress may impose deadlines at all is in doubt,[388] but even if it may, it must do so in a constitutionally appropriate manner, which did not happen with the ERA because the deadline was placed in a preambulatory clause rather than in the text of the Amendment. This violates Article V because states only have a right to ratify (or not) proposed amendments; they have no authority to ratify (or not) language in a preamble.[389] Moreover, Article V only gives Congress authority to propose amendments and determine the mode of ratification;[390] it says nothing about Congress having authority to enact adjunctive substantive laws, in preambles or otherwise, that restrict the rights of the states to participate as equals in the amendatory process.

If Congress wants to restrict States' rights under Article V, by setting time limits on their ratification powers or otherwise, it must first change Article V to give itself the authority to do so, which requires amending the Constitution in a way that *complies* with Article V.[391] Put another way, while

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385. *Dillon*, 256 U.S. at 374.

386. Although it took forty-eight years to ratify the ERA, an arguably non-contemporaneous amount of time, national polling in 2018 demonstrates consensus in support of the ERA. *Suffolk University/USA Poll* (October 2018), https://www.suffolk.edu/-/media/suffolk/documents/academics/research-at-suffolk/suprc/polls/national/2018/10_25_2018_ marginals_pdftxt.pdf?la=en&hash=BAA8D75B19250EFC54EB3DCAEBBEB32FDA1FB2A0 (a national survey of people in all fifty States found 75% were more likely to vote for a candidate that supports the ERA).

387. That the Twenty-Seventh Amendment was "validated" by Congress despite the passage of 203 years from proposal to ratification is reason enough to invalidate the ERA's purported deadline because Congress' acceptance of the Twenty-Seventh Amendment is effectively a declaration that deadlines do not matter. It also means that Congress sees the passage of time as a mere technicality that cannot bar adoption of an amendment that the American people want, and that has been ratified by the requisite number of States. Not validating the ERA in light of how the Twenty-Seventh Amendment was adopted is constitutionally intolerable.

388. *See generally* Wright, *supra* note 296.

389. *See Equal Rights Amendment Extension, Hearings on H.J. Res. 134 Before the Subcomm. On Civ. and Const. Rights of the H. Comm. See generally, On the Judiciary*, 95th Cong. 57 (1978) (states were "ratifying the text of the Amendment and not the preliminary language of the resolution").

390. "Mode" of ratification refers to the choice between ratification by State legislatures and ratification by state conventions. United States v. Sprague, 282 U.S. 716, 732 (1931) (citing Dodge v. Woolsey 18 HOW 331); Hawke v. Smith, 253 U.S. 221; *Dillon*, 256 U.S. 368; National Prohibition Cases, 253 U.S. 350) ("the choice of mode rests solely in the discretion of Congress"). Power to determine the procedural mode is not the same as power to subject the States to a ratification time limit that substantially limits their rights under Article V.

391. *See generally*, U.S. CONST. art. V. Just as Congress cannot simply pass a law abridging the President's presentment powers under Article I, it cannot pass a law abridging the States' amendatory powers under Article V. If Congress wants to restrict States' rights it must propose a constitutional

Congress may include anything it wants in a proposed amendment's text; it may not, under Article V, enact laws adjunctive to Article V that undermine States' Article V rights and inhibit their ability to participate as equals with the National government in the amendatory process.[392] Unless Article V itself is changed to empower the National government to restrict States' Article V rights, ratification deadlines in preambles must be seen as unconstitutional because they disrupt Article V's balance of power, and "shift power granted to the States—and the people—to the Congress."[393] Maintaining Article V's balance of power between the National and State governments was "of utmost concern to the framers."[394]

The significance of placing a deadline in a preamble rather than in the text of an amendment has never been addressed by the Supreme Court,[395] though one federal appellate court addressed the question in *Illinois v. Ferriero*, and ruled that placement in a preamble did not invalidate the ERA's deadline because Article V empowers Congress to dictate the "mode" of ratification and setting a deadline in a preamble is one way that Congress determines the "mode."[396] This is an absurd reading of Article V as the meaning of the word mode is plainly spelled out in Article V and refers only to whether ratification takes place by legislative decision-making or state convention, a ministerial function that does not restrict States' rights.[397]

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amendment to change Article V, thus allowing the States to decide whether they want their Article V powers to be restricted.

392. *Id.*; *Dillon,* 256 U.S. 368 (providing no such authority as the deadline in that case had been placed in the text of the amendment).

393. Mason Kalfus, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 454 (1999).

394. *Id.* at 453 (1999) (citing FARRAND, M., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 202–03 (Yale University Press 1911)).

395. In *Nat'l Org. for Women v. Idaho*, the Supreme Court had an opportunity to rule on the ERA's deadline issue, but it declined**.** Nat'l Org. for Women v. Idaho**,** 459 U.S. 809 (1982). That case was before the Court on a petition for certiorari from a district court decision where a single judge ruled that Congress had no authority to extend the ERA's original deadline from 1979-1982. *Freeman*, 529 F. Supp. at 1155. The federal government and others involved in the Idaho case then sought review in the Supreme Court. *See, e.g.*, Pet. of Adm'r of Gen. Servs. for Writ of Cert., Carmen v. Idaho, No. 81-1313 (U.S. Jan. 22, 1982); Pet. for Writ of Cert., *Nat'l Org. for Women, Inc.*, No. 81-1283 (U.S. Jan. 8, 1982). The Supreme Court granted probable certiorari, but when the ERA's extended deadline expired on June 30, 1982, before the Court could hear argument, the government urged the Court to dismiss the case as moot on the grounds that the ERA had "failed of adoption no matter what the resolution of the legal issues presented." Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3, *Nat'l Org. for Women, Inc.*, Nos. 81-1282 et al. (U.S. July 9, 1982). The Court dismissed the case as moot, but nowhere adopted the government's language that the case was moot because it "failed of adoption." A dismissal on mootness in a case where only the authority of Congress to *extend* the deadline was in controversy was hardly a determination by the Court that the deadline itself was valid.

396. Illinois v. Ferriero, 60 F.4th 704, 719 (D.C. Cir. 2023).

397. *See Memorandum from John Harmon*, *supra* note 334; *Sprague*, 282 U.S. at 732.

Moreover, scholars and government officials alike agree that language in a preamble has no substantive effect.[398] Congress itself acknowledged as much when it was proposing to add a deadline to the preamble of the Twentieth Amendment.[399] Members objected on the grounds that placing it in the preamble would be "of no avail" as it would not be "part of the proposed constitutional amendment."[400] Congress thus placed deadlines in the text of the next three amendments.[401]

The danger of allowing Congress to impose extra-textual ratification deadlines on the States cannot be overstated as this would give the National government unilateral authority to determine whether the Constitution will be amended at all. Congress could impose short deadlines on amendments preferred by the States, for the purpose of defeating them, and long deadlines or none at all on amendments preferred by Congress.[402] This cannot be tolerated under Article V as the framers were clear that to sustain a healthy republic, States' amendatory powers must be *equal* to those of the National government.[403]

On this point, it should be noted that Congress' handling of ratification deadlines has been arbitrary at best. No deadlines were included in any amendments for the first 130 years. Congress began imposing deadlines relatively recently with the Eighteenth Amendment in 1917, and has done so only a handful of times, without consistency.[404] A deadline was imposed on the Eighteenth but not the Nineteenth Amendment, and when deadlines were

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398. *See* Kalfus, *supra* note 393 at 464; Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 408–09 (1983). In comparable circumstances, courts have declined to enforce language from preambles on the grounds that they "ha[ve] never been regarded as the source of any substantive power conferred. . .." Jacobsen v. Massachusetts, 197 U.S. 11, 22 (1905). *See* District of Columbia v. Heller, 554 U.S. 570, 578 (2008) (apart from "that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause"). *See generally* Tinsley v. Methodist Hosp. of Indiana, 70 F.3d 1275 (7th Cir. 1995). *See also,* Attorneys General Letter, *supra* note 376, ("Neither the Constitution nor the language of the ERA [] contain a time limit for State ratification . . . [R]ather than including any [deadline] in the ERA's text, Congress relegated a seven-year deadline to the joint resolution that proposed the ERA . . . No court has found that such an external limit is at all binding" on the States).

399. *See generally* 75 Cong. Rec. 3856 (1932).

400. *Id.*

401. *See* Dellinger, *supra* note 398 at 408.

402. Short deadlines can also cause States *to* ratify, by subjecting them to undue pressure, as happened with the Eighteenth Amendment, which was quickly repealed. The point is not whether short rather than long deadlines always cause certain results; it is that deadlines allow the national government to put pressure on the States in ways that undermine their autonomy and equal constitutional powers under Article V.

403. THE FEDERALIST NO. 43 (Alexander Hamilton) (Article V "equally enables the general and the States governments"); THE FEDERALIST NO. 39 (James Madison) (the balance struck in Article V makes the amendment process "neither wholly national nor wholly federal."); THE FEDERALIST NO. 21 (Alexander Hamilton) (framers were concerned with the potentially harmful effects that a strong national government could have on the autonomy of the States).

404. U.S. CONST. amend. XVIII.

imposed, some were placed in the text while others were placed in a preamble.[405] Apparently aware that the States have a right to decide for themselves whether to be subjected to a ratification deadline, Congress placed deadlines in the text of amendments Eighteen, Twenty, Twenty-One, and Twenty-Two.[406]

It was not until 1960 that Congress first placed a deadline in a preamble, claiming a need to "declutter" the text.[407] This began with the Twenty-Third Amendment and continued with the Twenty-Fourth, Twenty-Fifth and Twenty-Sixth Amendments.[408] Then in 1978, effectively conceding that placing deadlines in preambles was constitutionally problematic, Congress placed a deadline in the text *and* the preamble of a proposed amendment.[409] Stranger still in light of the seeming concern that amendments, to be valid, should be ratified fairly quickly after congressional proposal, Congress voted to approve the Twenty-Seventh Amendment, and the Archivist published it, in 1992, some 203 years after congressional proposal. This action by Congress belies the idea that ratification deadlines serve any legitimate constitutional purpose.

Such cavalier treatment of ratification deadlines reflects a lack of due regard for the equal role of the States in the amendatory process. It also ignores the importance of ensuring that the Constitution's processes are predictable and consistent.[410]

The Archivist apparently understood and respected the seriousness of the amendatory process when he issued a letter in 2012 stating that under § 106b he was duty bound to recognize and record ERA ratification votes when he received them, regardless of the deadline, and that is exactly what he did in 2017, 2018, and 2020 when Nevada, Illinois, and Virginia, respectively, ratified the ERA.[411] Yet if the ERA's deadline is valid, the Archivist would

405. *Id.*; *See generally* U.S. CONST. amend. XIX.

406. U.S. CONST. amend. XVIII; U.S. CONST. amend. XX; U.S. CONST. amend. XXI; U.S. CONST. amend. XXII.

407. *See generally* 101 Cong. Rec. 6628 (1955). If placing a deadline in a preamble were truly about decluttering, why would Congress "clutter" the ERA with procedural matters such as delaying the effective date of the amendment for two years after ratification? Preventing the States from deciding whether to be subjected to a ratification deadline dramatically tips the balance of Article V powers against the States, while delaying an amendment's enforcement date does not, yet the States were permitted to vote on the two-year delay, but not whether they should be forced to ratify within seven years.

408. *See generally* U.S. CONST. amend. XXIII; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXV; U.S. CONST. amend. XXVI.

409. 92 Stat. 3795 (1978).

410. INS v. Chadha, 462 U.S. 919, 945 (1983) (discussing the value of "explicit and unambiguous" constitutional provisions).

411. The Archivist recorded the ratification votes of Nevada and Illinois in 2017 and 2018 without comment, but when he recorded Virginia's ratification vote in 2020, he added the following statement for all three States: "ratification actions occurred after Congress's deadline expired." NATIONAL ARCHIVES AND RECORDS ADMINISTRATION: EQUAL RIGHTS AMENDMENT, LIST OF STATE RATIFICATION ACTIONS (available at https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf)

have had no need to record those votes as they would have been no more subject to official recording than junk mail. That the Archivist recorded them in the same manner that he recorded ratification votes that occurred before the purported deadline expired demonstrates his awareness that he had no discretion not to perform his duties under § 106b, regardless of the deadline. Indeed, the Supreme Court said as much in *Leser v. Garnett* where it held that "official notice to [the National Archivist] that [a state] had [ratified a proposed amendment] was conclusive upon him, and being certified by his proclamation, is conclusive upon the courts."[412] The Archivist was obviously relying on *Leser* when he wrote in his 2012 letter that he would publish the ERA if three more states ratified it and that attempted rescissions of prior ratifications would be disregarded.[413] Nevertheless, when the last necessary state ratified the ERA in January 2020, the Archivist acted in derogation of black letter statutory and constitutional law, Supreme Court precedent, and his own attestation of duty.[414]

It bears repeating that the Archivist's 2012 letter caused advocates to devote substantial resources fighting for ERA ratifications in unratified states.[415] No Archivist in history had ever refused to publish an amendment after the last necessary state ratified it, much less after explicitly promising that he *would* publish because he was duty bound to do so. No doubt relying on this historical reality and the Archivist's 2012 letter, States that had not yet ratified the ERA by 2012 determined that the deadline posed no barrier to ratification, which is why Nevada ratified in 2017,[416] followed by Illinois in 2018,[417] and Virginia in 2020.[418] Needless to say, the Archivist would not

(citing OLC letter released January 8, 2020, see note 16). The Archivist should have similarly published the ERA, adding a qualifying comment if he felt compelled to do so.

412. *Leser*, 258 U.S. at 137.

413. Five States either voted to rescind prior ERA ratifications or attempted to do so, but no court has ever recognized rescissions as valid, and the general consensus is that rescission is not possible. *See* Wright, D., "*An Atrocious Way to Run A Constitution": The Destabilizing Effects of Constitutional Amendment Rescissions*, 59 DUQUESNE L. REV. 12, 17 (2021). This view is supported by the fact that the Fourteenth Amendment was adopted and declared valid after two States, New Jersey and Ohio, whose ratification votes were necessary for adoption, rescinded their ratifications but had their votes counted. BERRY, *supra* note 131 at 72. Likewise, New York rescinded the Fifteenth Amendment, and Tennessee rescinded the Nineteenth Amendment, but none of these rescissions have been recognized as valid and all these states have had their initial ratification votes counted. *See Amendments to the Constitution of the United States,* https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf.

414. His letter was in response to a letter from Congresswoman Carolyn Maloney asking what steps he would take if the last necessary State ratified the ERA after the purported deadline expired. The Archivist replied, "Once NARA receives at least 38 State ratifications of a proposed Constitutional amendment, NARA publishes the Amendment along with a certification of the ratifications and it becomes part of the Constitution." He expressed no concern about the deadline or the ERA's validity. *See* Letter from Archivist to Congresswoman Carolyn Maloney (Oct. 25, 2012) (on file with ERA).

415. *Id.*

416. S.J. Res. 2, 79th Leg. (Nev. 2017).

417. S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018).

418. Rankin, *supra* note 19.

have declared in 2012 that he would publish the ERA if three more states ratified it, and lawmakers in three different states would not have wasted public resources ratifying the ERA, if they believed they were dealing with a legal nullity.

PART FIVE – WHERE DO WE GO FROM HERE?

That some people who claim to support the ERA have undermined the cause of women's equality is troubling, but not uncommon, even for well-intentioned advocates.[419] For example, in recent litigation in Texas aimed at overturning new abortion restrictions after the Supreme Court overturned *Roe v. Wade*, the Center for Reproductive Rights (CRR) filed a case on behalf of women, challenging the constitutionality of the restrictions under the Texas Constitution's equivalent of the ERA.[420] Challenging abortion restrictions under state constitutional equality provision is important when the Federal Constitution no longer provides pregnant women with the rights they need to control their own bodies and lives. This was made abundantly clear in a recent landmark ruling of the Pennsylvania Supreme Court, which ruled that abortion funding restrictions must be reviewed under the State's Equal Rights Amendment, pursuant to a strict scrutiny standard.[421] Importantly, the language of the Pennsylvania ERA reads exactly the same as the federal ERA.[422] Thus, women who care about abortion would be wise to remember that a national ERA could obviate the need to litigate abortion rights state by state, and would protect abortion rights for all women equally, regardless of their economic status, or where they live.

Despite the monumental importance of the Pennsylvania court's reliance on the state ERA and strict scrutiny to strike down abortion restrictions, the CRR lawsuit in Texas, filed on behalf of all women in Texas, asked the court to enforce only second-class rights for women under the Texas Constitution's sex-equality guarantee.[423]

Specifically, CRR asked the court to apply only a "rational relationship" standard of review when assessing the constitutionality of abortion restrictions under the Texas equivalent of the ERA,[424] even though the Texas Supreme Court had ruled many years earlier that women were entitled to strict

419. For example, a book about sexual assault on campus, written by a highly acclaimed author, was perceived by many as supportive of rape victims, but it was also panned as disrespectful and harmful to the cause of violence prevention and respect for women's equality. *See generally*, Murphy, W., *Krakauer's Missoula: Where Subversive Meets Verisimilitude*, 42 Journal of College and University Law, no. 2, pp.479-517 (2016).

420. Zurawski v. Texas, Cause No. D-1-GN-23-000968, Travis County, 353rd Judicial District.

421. *Allegheny Reproductive Health,* 309 A.3d at 808.

422. *Id*. at 10

423. *Id.*

424. Petitioners' Amended Complaint, pg. 109, ¶¶ 461–62, 469, 470.

scrutiny.[425] CRR prevailed at the lower court, but the State appealed the decision to the Texas Supreme Court and in CRR's brief on appeal it again failed to ask for strict scrutiny or even cite the leading case that gave women strict scrutiny.[426] Several women's rights groups filed a Motion to Intervene in the case, effectively accusing the CRR of legal malpractice against all women and asking the Court to follow its own precedent and apply strict scrutiny in the case.[427]

In another abortion rights case, the ACLU filed a lawsuit in Nevada challenging that state's abortion funding restrictions under Nevada's new state constitutional ERA, but unlike the plaintiffs in Texas they *did* ask the court for strict scrutiny.[428] However, when discussing the constituent components of strict scrutiny, the ACLU asked only that the court apply the compelling state interest and narrow tailoring tests; they did not ask the court to apply the third and most important component of strict scrutiny, the least restrictive means test,[429] even though the Nevada Supreme Court had previously ruled that strict scrutiny requires use of the least restrictive means test.[430] It bears stating the obvious that no lawyer who claims to be advocating for women's rights should ever ask for less than maximum legal protection and the most rigid standard of judicial review. Yet, as noted extensively above, this is hardly the only time that seeming advocates for women worked against the cause.

The development of sexual harassment law shows how seeming feminists worked against women while appearing to be working for them. The phrase

425. In the Interest of McLean, 725 S.W. 2d 696, 698 (1987) (quoting Mercer v. Board of Trust, North Forest Independent School District, 538 S.W.2d 201 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) ("Our reading of the Equal Rights Amendment elevates sex to a suspect classification. . . [and must be] afforded maximum constitutional protection". . . [which] "does not yield except to compelling state interests" and "only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest."

426. Zurawski v. Texas, *supra* note 420.

427. Texas v. Zurawski, Docket No. 23-0629, Petition in Intervention filed by the author on behalf of The Women's and Children's Advocacy Center, Equal Means Equal and The Elizabeth Cady Stanton Trust, pg. 3, n.1, docketed, November 9, 2023. On May 31, 2024, the Texas Supreme Court ruled that only a rational basis standard should apply and used it to uphold a six-week abortion ban under the Texas Constitution's Equal Protection Clause. *Texas v. Zurawski*, slip op. at 36-38. The Court ignored the Intervenors' brief urging application of strict scrutiny. It also declined to address Plaintiffs' claim that the six-week ban separately violated the Texas Constitution's Equal Rights Amendment. If the federal ERA had been in place, the Texas Supreme Court would have been compelled to apply it, and would likely have struck down the six-week ban using the same strict scrutiny criteria that the Pennsylvania Supreme Court used when it struck down abortion funding restrictions months earlier under the Pennsylvania ERA. *Allegheny Reproductive Health*, *supra* note 421.

428. Silver State Hope Fund v. Nevada, Case No. A-23-876702, Clark County, Eighth Judicial District.

429. *Id.* at 26.

430. Carrigan v. Comm. On Ethics, 236 P.3d 616, 618 (2010).

"sexual harassment" was coined in 1975 by women at Cornell,[431] soon after the ERA passed Congress and after Title IX was enacted, in 1972. It was then popularized in a book by Catharine MacKinnon in 1979.[432] Several years later, it became the centerpiece of a landmark Supreme Court case, *Meritor v. Vinson*,[433] that recognized "sexual harassment" for the first time as a basis for workplace discrimination lawsuits under Title VII of the Civil Rights Act of 1964.[434] That *Meritor* was unanimous and written by Justice Rehnquist should have raised suspicions about whether the decision was good for women. After all, Justice Rehnquist only a few years earlier had condemned the idea that women were worthy of equal treatment in the workplace under the Fourteenth Amendment,[435] and Title VII already covered workplace discrimination, the definition of which included sexual misconduct and other behaviors that, after *Meritor*, fell under the new definition of sexual harassment.[436]

The new "sexual harassment" doctrine adopted in *Meritor* led to an increase in women's employment discrimination lawsuits, which was a good thing, but it also made sex discrimination claims based on sexual misconduct harder to prove than sex discrimination claims based on less serious harms like discriminatory hiring.[437] In addition, it shifted the legal lens through which women's experiences of sexual misconduct in the workplace would be

431. L. Farley, *I Coined the Term "Sexual Harassment." Corporations Stole It*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html.

432. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

433. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

434. *See generally* 42 U.S.C. § 2000e, et seq.

435. *Boren,* 429 U.S. at 217-18.

436. *See generally* Hager, M., *Harassment and Constitutional Tort: The Other Jurisprudence*, 16 HOFSTRA LAB. AND EMP. L. J., No. 2, Article 1, 279-353 (1999).

437. "Sexual harassment" as a subcategory of sex discrimination led to a two-tiered enforcement system where the worst expressions of workplace discrimination, such as sexual assault, became more difficult to prove than other forms of sex discrimination, such as wrongful termination. Sex discrimination was defined as an employer who: (1) Failed or refused to hire or discharge an individual, or otherwise discriminated against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin, or (2) limited, segregated, or classified his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Sexual harassment was now separate from sex discrimination, and required far more proof: (1) Unwelcome conduct; (2) based on sex (defined to include sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature), that either, (3) affected a term, condition, or privilege of employment and the employer knew or should have known of the conduct and failed to take action, or (4) was an express or implied condition for receiving job benefits, or refusal of advances would result in termination. 29 C.F.R. § 1604.11(a) (1986). It makes no sense that women from Cornell and elsewhere felt it necessary to establish a special definition of "sexual harassment" when they could have simply insisted that courts recognize sexually offensive conduct as actionable under Title VII's existing definition of sex discrimination. They could have fought to hold employers liable if they were aware of the conduct and took no effective action to stop it. There was no need to create a separate *type* of sex discrimination, call it something other than sex discrimination, *and* make it harder to prove.

framed and understood.[438] Instead of falling under the prestigious and consequential labels of "civil rights" and "discrimination," the very serious form of discrimination that takes place in the form of sexual misconduct would now be known by the very different term, "sexual harassment."[439]

This segregation of sexual misconduct away from the language of civil rights was harmful to women because the magic of civil rights laws is the way they communicate discriminatory harm as injurious not only to the individual, but also to entire categories of people, as well as communities, and society as a whole.[440] Civil rights laws enable the public to share collectively in a victim's pain when discriminatory harm happens, thus more people become personally invested in solutions. Mis-framing serious sex-based harm as something other than a civil rights issue denies women the benefits of public engagement and prevents widespread understanding of women's suffering as a problem in which the public has a legitimate stake. Most importantly, not using the language of civil rights inhibits women's ability to understand the class-based nature of sexual misconduct, thus preventing them from uniting in solidarity around the issue as a problem they endure *because they are female*.

Women are obviously a class of people; a sex class comprised of people who endure burdens and suffer harm because of their femaleness, yet this social and political reality is not always recognized, and scholars have long bemoaned this lack of respect for the class-based nature of femaleness as a primary reason behind women's failure to achieve full equality, or receive equal treatment under any laws, including civil rights laws.[441] In the absence of widespread appreciation for the idea that women are a class of people, unequal treatment is met with acceptance instead of outrage. For example, women's groups rarely complain that Title IX is enforced differently and

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438. *See generally Meritor*, 477 U.S. at 57

439. Framing is a way of "packaging" information to give it meaning in light of existing information. Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 105-06 (2007). In turn, framing determines not only our understanding of ideas, but also, how those ideas influence our perceptions of behavior, and what we expect from the courts and other government officials regarding laws and public policies. *See generally id.*

440. *See generally* Civil Rights, LEGAL INFO. INST., https://www.law.cornell.edu/wex/civil_rights. Reichardt v. Payne, 396 F. Supp. 1010, 1018 (N.D. Cal. 1975) (quoting Griffin v. Breckenridge 403 U.S. 88, 97 (1971)); Pendrell v. Chatham College, 386 F. Supp. 341, 347 (W.D. Pa. 1974); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 442 (E.D. Pa.1973) (courts holding that sex discrimination is class-based under the meaning of 42 U.S. C. § 1985(3)).

441. For an excellent discussion of how women's struggle for equality has been harmed by the Supreme Court's focus on sex stereotypes rather than the biological differences between men and women, *see* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PENN L.R. 955-1040 (1984) ("a political struggle that embraces recognition that men and women are limited by biology and able to transcend it may be stronger than the one that ignores the core reality of sex difference . . .", at 1039).

worse than Title VI on college campuses even though they *should* be enforced under the same policies and procedures because the language is identical.[442]

With the ERA in place, women's status as a class of people will become constitutionally explicit and undeniable, which means that women's rights, bodies, and lives will be better protected from harm, and their voices will be louder on all the social, economic, and political issues they care about. But to get the ERA into the Constitution women must first unite, politically, *as women* and direct all resources toward the single issue of validating the ERA. This is exactly how women won the right to vote. They established their own political party and stayed laser focused on suffrage until it was in the Constitution.

Women must do the same for the ERA—establish a single-issue Women's Equality Party, or Women's Equality Union, and refuse to support any candidate who does not prioritize and actively work toward establishing the ERA as a valid constitutional amendment. This will require strong leadership, which has not existed for women in the United States since Alice Paul and the National Woman's Party were in power. Alas, the pre-existing Woman's Party cannot be summoned to rise in support of the ERA because a deal was struck in 1997[443] to dissolve it and transform it into an educational organization. Malicious people injected themselves into the Woman's Party for the purpose of destroying it. They agreed to dissolve the Party in exchange for an agreement by the government to turn the Woman's Party's headquarters in Washington D.C. into a museum.[444] That such a deal was made is disturbing, as it is difficult to establish a new political party, and the work of the Woman's Party was far from done. But even without a formal party, women can achieve equality and so much more if they simply work together as a fiercely nonpartisan political class of *female people* and remain incorruptibly[445] focused only on equality.

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442. *See supra* notes 51-54 and accompanying text.

443. The formal dissolution of the National Woman's Party ("NWP") began in 1993 when a lawsuit was filed against the Woman's Party, by the Woman's Party Corporation, in the Superior Court for the District of Columbia. *Woman's Party Corporation v. National Woman's Party*, No. 93-CA-6051 (June 1, 1993). The Corporation wanted to prioritize protection of the property where the Woman's Party was housed, while party leaders were less interested in the physical house and more concerned about women's political power and the Party itself. A settlement was reached in 1996 and the Party was dissolved the following year. The Corporation ceased operations on January 1, 2021 and assigned use of its name to the Alice Paul Institute.

444. Conversation in person between author and Belmont-Paul House docent in 2018.

445. Attempts to corrupt and co-opt women's groups have been relentless. As recently as early 2022, a man named John Esler, who was affiliated with Harvard University and had no background in women's rights, injected himself into ERA activism in an attempt to derail advocates from pursuing effective strategies to validate the ERA. He met with ERA advocacy groups and got a Harvard-affiliated law firm to write an opinion repudiating the idea of filing lawsuits to force validation of the ERA, and he offered money to groups only if they pursued ineffective strategies such as organizing art shows in support

Uniting as women, regardless of the differences that divide us, is an essential next step in the struggle for equality because all women will benefit from the harnessing of group power. Establishing women as a stable political class is essential to political activism, especially when the class is fighting for something as fundamental as equality.[446] Women must stay focused on the fact that we were denied Equal Protection rights in 1868 *because* of our femaleness, which means we need to fight back *as women* to fix the Fourteenth Amendment *for women* by establishing the ERA as a constitutional amendment.

For too long, the women's movement has suffered from ineffective leadership and fractured political power. Even the word feminism has been hijacked to mislead women into believing there are different types of feminism.[447] There are not. Feminism is the simple idea that women deserve legal, social, political, and economic equality.[448] People who share these values should come together in fearless commitment to these vital ideals, regardless of what others say about the meaning of labels.

Having full equality does not mean women are the same as men, or that women do not need and cannot have special rights. Women will continue to enjoy sex-based rights just as Black people with full Equal Protection rights and the benefits of strict scrutiny still enjoy the advantages that race brings to preferential policies despite the Supreme Court's recent overturning of affirmative action policies in higher education.[449] The ERA does not require absolutely equality of the sexes in all situations, it simply requires courts to apply strict judicial scrutiny whenever the government treats women differently and worse, to ensure that such treatment is constitutionally necessary because it advances a compelling government interest, is narrowly tailored, and uses the least restrictive means to serve that interest.[450]

Equality for women also does not mean that all women experience the same type or degree of oppression. Women of color and women of different nationalities, religions, and sexual orientations often endure greater burdens than white heterosexual women. However, it is also true that some white heterosexual women living in poverty experience greater burdens than

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of the ERA. Women must be more skeptical of people who claim to support the ERA, especially if they represent monied interests.

446. P. DAmato, *The Uses and Abuses of Political Party Unity,* TRUTH OUT (May 28, 2016) https://truthout.org/articles/the-uses-and-abuses-of-unity/ (last visited Oct. 16, 2021).

447. *8 Different Types of Feminism You Should Know About*, OPINION FRONT, https://opinionfront.com/types-of-feminism-you-should-know-about (last visited, Oct. 16, 2021).

448. "*Feminism* n., the policy, practice or advocacy or political, economic, and social equality for women." *See About FMF,* Feminist Majority Foundation, https://feminist.org/about/ (last visited, Oct. 16, 2021).

449. *Supra* note 74.

450. *Roe,* 410 U.S. at 155.

wealthy women of color. And despite the fundamental nature of basic equality, some women may not want it, just as some Black slaves did not want freedom. But the benefits of equality, including better legal protections for women's safety, autonomy, liberty, and self-determination, must be provided even to those who do not want them. Women's rights leaders should help women understand this and appreciate why fighting for equality *first* is nonnegotiable. Women must unite across all the lines that divide them because the source of their common oppression, femaleness, is the very place from which they will derive their greatest political strength.

When women do come together, there will be serious and well-funded efforts to divide them, as there were when women united in their fight for suffrage. In 1869, soon after women formed the National Woman's Suffrage Association,[451] the American Woman's Suffrage Association emerged as a separate group with different ideas about how to achieve suffrage, and whether to fight at the state or national level.[452] When the Woman Suffrage Amendment was finally filed with Congress in 1878, it went nowhere for many decades because women were not united.[453] It was not until Alice Paul established the National Woman's Party in 1916 and brought women together across party lines that women finally won the right to vote.[454]

The way Alice Paul led the fight for suffrage is an important lesson in how women must fight for equality today, especially in terms of Paul's willingness to be fiercely nonpartisan and challenge any government official regardless of how they stood on other issues. Paul wasted no time on women's groups that were more concerned about partisan politics. Women must follow Paul's lead and criticize all politicians, regardless of party, if they fail to prioritize women's equality. Perhaps more importantly, women need to stop financially supporting women's groups that spend resources on issues other than equality, and they need to openly condemn women's groups that claim to support the ERA but work behind the scenes to undermine it .

For example, many years before EME's ERA lawsuit was filed in Massachusetts in 2020, it was widely known that EME would be filing suit on behalf of women as soon as the last necessary State ratified the ERA. Members of EME (including this author) gave many talks and distributed information about their litigation strategy and explained how they planned to argue that the ERA was valid because the ERA's deadline was invalid.[455] In

451. *National Woman's Suffrage Association*, WIKIPEDIA, https://en.wikipedia.org/wiki/National_Woman_Suffrage_Association (last visited, Oct. 16, 2021).

452. *Id.*

453. *Detailed Chronology, National Woman's Party History*, https://www.loc.gov/static/collections/women-of-protest/images/detchron.pdf (last visited, Oct. 16, 2021).

454. *Id.*

455. For example, the author gave several PowerPoint presentations in 2017 and 2018. At one such event in 2018 at the Belmont-Paul House in Washington D.C. (formerly the Woman's Party Headquarters),

2018, soon after EME started publicly discussing its strategy, some women's groups asked Congress to file a bill to remove the ERA's deadline.[456] This was a strange and hostile move because the bill presumed that the deadline was valid (why else would it need to be removed) at exactly the moment in time when EME was preparing to argue in court that the deadline was not valid. The timing was particularly suspicious because such a bill *could* have been filed after the lawsuits ended—if they were unsuccessful. If they were successful, there would have been no need to file such a bill, because the courts would have "removed" the deadline by declaring it unconstitutional.

That some women disagreed about whether Congress or the courts should fix the deadline was not the problem. The problem was that some women were asking *Congress* to fix the deadline problem by passing a law *at the same time* that women were planning to ask the *courts* to fix the deadline problem by declaring it unconstitutional. This caused a schism among groups that were fighting for the ERA, with some devoting time and resources to congressional action while others focused on the courts, and still others supported both options. Not having group unity around a single strategy weakened women's overall effectiveness.

Both ERA lawsuits might have been successful if women had been united in their strategy, but some groups only supported the congressional approach. This was curious because the Archivist had said in his 2012 letter regarding publication of the ERA that Congress would have no role after the last State ratified;[457] a view shared by constitutional scholars and the Biden Administration whose DOJ argued as much to the D.C. Circuit Court of

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the author explained EME's litigation strategy and outlined the legal arguments they would make in court in support of the ERA's validity. Ellie Smeal from the Feminist Majority was also invited to speak. During her remarks, Smeal stated that she agreed 100% with the author's strategy and had "teams of lawyers" across the country ready to file lawsuits when the last necessary State ratified the ERA. In reality, Smeal did not have any lawyers preparing to file any lawsuits, and no lawyers on her behalf ever filed any lawsuits after the last necessary State ratified the ERA. When the Massachusetts ERA lawsuit was filed in January 2020, Smeal and the Feminist Majority were asked to support the litigation by signing onto an amicus brief, but they, along with the ERA Coalition, declined.

456. *On International Women's Day, Cardin Calls on U.S. Senate to Remove the Deadline for the Equal Rights Amendment,* BEN CARDIN U.S. SENATOR FOR MARYLAND (March 8, 2018), https://www.cardin.senate.gov/newsroom/press/release/on-international-womens-day-cardin-calls-on-us-senate-to-remove-the-deadline-for-the-equal-rights-amendment (last visited, Oct. 16, 2021). Bills to remove the deadline had been filed before, after the Twenty-Seventh Amendment was adopted in 1992, but the 2018 version of the bill was the only one that undermined women's then imminent plans to ask the courts to invalidate the deadline by creating a conflict around which branch of government had authority to fix the deadline problem.

457. *See supra* note 279 and accompanying text. No doubt relying on *Coleman*, 307 U.S. at 452-54, where the Supreme Court held that Congress can only determine whether an amendment is invalid due to the passage of time if the amendment had no deadline, the Archivist noted in his 2020 statement declining to publish the ERA that he would publish it if a *court* ordered him to do so. He made no mention of being willing to publish in response to an act of Congress. *See* THE U.S. CONSTITUTION AND CONSTITUTIONAL LAW, *supra* note 16.

Appeals in 2022 when the court asked whether Congress might play a role in validating the ERA. The Justice Department attorney replied, "The Constitution doesn't contemplate any role for Congress at the back end."[458]

Notwithstanding a near total lack of support for the idea that Congress had any authority whatsoever to pass a law removing the ERA's deadline or validating the ERA, Congress held a hearing in 2019 during which one scholar said Congress could remove the deadline because a prior Congress cannot bind a future Congress.[459] This claim had nothing to do with the real issue, which was whether any Congress could *retroactively* remove a constitutional amendment's ratification deadline after it expired. Simply put, if the deadline could be removed, it had to be valid, and it if was valid, it was too late to remove it because it had expired. On the real issue of retroactive removal the only testimony came from an opponent to the bill who said Congress has no such authority.[460] More recently, Yale Constitutional Law Professor Akhil Amar laughed at the idea that Congress has authority to retroactively remove a deadline that no longer exists.[461] A similar opinion was expressed by a team of scholars who testified before Congress in 1978 on the issue of whether Congress had authority to extend the ERA's original deadline from 1979 to 1982.[462] Congress ultimately concluded in 1978 that it could extend the deadline because it had not yet expired, but that its power to affect the deadline would end once it expired.[463]

That the deadline removal bill was filed in 2018 *and* had a public hearing in 2019 despite a lack of scholarly support for the idea that Congress had any authority to act led many to conclude that the bill was not filed in good faith and was instead meant to generate partisan political support for Democrats, while undermining and distracting public attention away from forthcoming ERA lawsuits where, unlike Congress, courts *did* have authority to invalidate the deadline by declaring it unconstitutional.

458. Oral Argument, *Illinois v. Ferriero*, at 67:02-69.07, 60 F.4th 704 (2023) (No. 21-5096), www.courtlistener.com/audio/82795/state-of-illinois-v-david-ferriero/.

459. *Removing the Deadline for Ratification of the Equal Rights Amendment*, H. REP. No. 116-378, at 14, 116th Congress (2019-2020), https://www.congress.gov/congressional-report/116th-congress/house-report/378.

460. *Id.*

461. Video call with author, November 24, 2021.

462. H. REP. NO. 116-278, at 9 (2019-2020).

463. During the ERA deadline extension hearings before Congress in 1978, Congressperson Harold Volkmer (D-MO) asked what power Congress would have to affect the deadline after it expired, to which Congressperson Barbara Jordan (D-TX) replied, ". . .Congressman Volkmer, the time will have expired for that resolution, and I do not feel that would be a viable issue for consideration by the Congress because the resolution would, for all intents and purposes, be dead." House ERA Hearings, 5/18/78, H. J. Res. 638, p. 242.

Congress made things even worse for women in 2019 when it proposed the Equality Act.[464] The Act mirrored similar laws from other countries where the legal definition of sex has been conflated with the legal definition of gender identity.[465] While most feminists support equality for all people, including those who feel that their gender identity does not match their biological sex, they do not support merging the definitions of sex and gender as these are very different things that raise distinct issues and each is worthy of its own category, yet that is what was proposed in the Equality Act.[466] Changing the legal meaning of sex to include gender identity, rather than maintaining both as their own categories, would make it harder for women to exist as a stable (hence potentially powerful) *political* class of people.

The Equality Act also posed serious legal problems for the ERA. Why would women need the Constitution to establish men and women as equal if women could just declare themselves to be men? Perhaps more importantly, if women can simply call themselves men, and vice versa, then sex becomes mutable. This threatens the future of women's Equal Protection rights even if the ERA is validated because immutability of characteristics is a key factor in the Supreme Court's assessment of which classes of people are considered "suspect classes" entitled to strict scrutiny.[467] The Supreme Court has previously ruled that "sex, like race, is determined at birth and immutable."[468] But if the Equality Act becomes law and the Supreme Court has another opportunity to rule on the issue, the Court could point to the Equality Act to support new ruling declaring that sex is no longer immutable, thus unworthy of strict scrutiny protection even under ERA.

Women are rightly suspicious that the Equality Act has less to do with ensuring equal rights for all and more to do with exploiting the concept of gender identity to weaken rights and political power for women.[469] Indeed, if the Equality Act were truly about protecting all types of people from discrimination based on their chosen identity rather than their biological reality, it would have also proposed to change the definition of race to include "racial identity" because many people sincerely identify with a race that does

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464. *Equality Act,* H. REP. NO. 5, 116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/5 (last visited Oct. 17, 2021).

465. *See, e.g.,* S. Daisley, *Is Scotland Changing the Law on Gender By Stealth?*, THE SPECTATOR (July 31, 2020), https://www.spectator.co.uk/article/is-scotland-changing-the-law-on-gender-by-stealth- (last visited Oct. 17, 2021).

466. C. Burt, *Scrutinizing the US Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramifications*, June 2020, Feminist Criminology 15(4).

467. *Frontiero*, 93 S. Ct. at 688.

468. *Id.* at 686; Regents of the Univ. Of California v. Bakke, 438 U.S. 265, 361 (1978).

469. W. Murphy, *How 'The Equality Act' Will Hurt Women,* 4W (May 29, 2021), https://4w.pub/how-the-equality-act-fails-women-and-cements-the-destruction-of-title-ix/ (last visited, Oct. 17, 2021).

not match their biological reality. But the Equality Act does nothing to protect "racial identity."[470]

Mainstream and social media are saturated with stories that pressure women to embrace ideas like gender identity, diversity, inclusion, and intersectionality, but little is written about women's need to focus solely on their status *as women* or the unique ways they suffer *as women*. Women have a fundamental human right to center and prioritize their sex-based suffering, and to organize politically around the need to reduce their suffering by establishing their full legal equality, but to do this they must resist even seemingly benevolent ideologies that blur the clear lines that bind them *as women*.[471]

It is culturally difficult not to follow the crowd, and to say "no thank you" when well-funded organizations ask women to support those who find the word "woman" exclusionary, or who insist that women should only speak of their struggles through an "intersectional" lens, but that is what women must do if they are to unite and fight *as women*. The problem is not that intersectionality and inclusion are harmful ideas, it is that they have no place in a *political* movement to elevate women out of their historically mandated second-class citizenship and into full equality. Diluting women's political power and the visibility of their suffering in the name of tolerance, intersectionality, inclusion, or any other culturally or politically constructed idea that makes it harder to see women as women, is dangerous, not progressive.

Women's rights in America and around the world are under attack,[472] perhaps in response to women rising up and using social media to organize more effectively than ever before, even across nations, to demand better rights.[473] As with most social movements, when an oppressed group rises up, they can expect new and stronger efforts to divide and silence them.[474] How women respond to these attacks can mean the difference between progress and regression. Women must stand taller and stronger in the face of growing efforts to render them politically invisible amidst unprecedented levels of

470. H. Rep. No. 5, at 1 (2019-2020).

471. *Intersectionality*, WIKIPEDIA, https://en.wikipedia.org/wiki/Intersectionality (last visited, Oct. 23, 2021).

472. Even women's educational civil rights have been weakened. Women were given equal access to and equal protection against sex discrimination in education when Title IX was enacted in 1972, but Title IX has been significantly weakened in response to women demanding better enforcement. MURPHY, *supra* note 166.

473. Clay Shirky, *The Power of Organizing Without Organizations*, PENGUIN PRESS, 2008; *Women Human Rights Defenders Face Worsening Violence, Warns UN Human Rights Expert,* (Feb. 28, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24232.

474. Mirae Yang, *The Collision of Social Media and Social Unrest: Why Shutting Down Social Media is the Wrong Response*, 11 NW. J. TECH. & INTELL. PROP. 707, 714-19 (2013), https://scholarlycommons.law.northwestern.edu/njtip/vol11/iss7/7.

misogyny, and the emergence of new hate groups that openly threaten violence against them to induce their submission and keep them in their politically and legally subjugated place.[475]

Women have been pushing crumbs around on a broken plate, and told to wait their turn for equality, for a very long time. Without equality, the laws they fight for will always fall through the constitutional cracks in the plate. It is time to fix the plate. Women were intentionally excluded from the Fourteenth Amendment *as women*, which has caused them to suffer enormous harm *as women*, so they need to respond to this constitutional insult *as women* to ensure that the Fourteenth Amendment is repaired once and for all to include *them*. After women achieve equality, they can afford to focus on other things, and their voices will have more clout on all the things they care about, such as poverty, the environment, racism, etc. Until then, the battle cry must be simple and clear: Equality first, everything else second. People who disagree with this strategy must move to the sidelines. Women want and need full equality first because no laws, policies or programs, and no *rights* of any kind, must, as a constitutional matter, be written, or enforced *equally* on women's behalf without it.

Women's inequality is not just a technical legal problem, it is a systematic, constitutionally directed regime by which the government asserts social, political, and economic control over all aspects of women's lives. It was under this regime that the Supreme Court recently overturned *Roe v. Wade* in *Dobbs* and ruled that pregnant women are no longer "persons" with rights to liberty, Due Process, personal autonomy, and bodily integrity, under the Fourteenth Amendment.[476] The Court had the authority to treat women with derision in *Dobbs* because without the ERA femaleness is unworthy of legal focus as the obvious central issue of every reproductive health case. Put more simply, the Court can do whatever it wants to women so long as femaleness remains a second-class category of human existence.[477]

Without equality *for women*, all laws, and all rights, including abortion rights, are vulnerable to restriction and even outright dissolution when applied *to women*. This is unconscionable in any country, but especially in the United States of America.

The harm women endure on a daily basis because they are women, ranges from femicide at one end of the spectrum and offensive language at the other. All of it is legally and culturally tolerated *because* women are not equal. As Justice Scalia said when he dismissed the idea that the government must treat

475. *Male Supremacy*, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/ideology/male-supremacy (last visited, Oct. 19, 2021).

476. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (June 24, 2022).

477. Law, *supra* note 441 at 1028 ("control of reproduction is the *sine qua non* of women's capacity to live as equal people").

women as fully equal persons under the law, "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."[478]

And it never will, until the ERA is in the Constitution.

478. Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS NEWS (Jan. 4, 2011), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/. Justice Scalia was correct to say that the Constitution does not prohibit sex discrimination, but he was wrong when he added, "Nobody ever thought that's what it meant," meaning that everyone understood when the Fourteenth Amendment was adopted in 1868 that the word "persons" in the Equal Protection Clause did not include women. In fact, political leaders were well aware that women had been demanding equal rights since before the Seneca Falls Convention of 1848. Ellen DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America* (Cornell University Press, 1978). And women *did* think they were included in the word "persons," which is why they argued before a congressional subcommittee in 1871 that the Equal Protection Clause gave them a right to vote despite contrary language in a different section of the Fourteenth Amendment, and in the text of the Fifteenth Amendment. Michael Les Benedict, *The Ratification of the Fourteenth Amendment,* Origins, Current Events in Historical Perspective, Ohio State University, https://origins.osu.edu/milestones/july-2018-150-years-fourteenth amendment?language_ content_entity=en. A year later when Virginia Minor sued the state of Missouri for prohibiting her from voting in 1872, she asserted an Equal Protection Clause claim. *Minor,* 88 U.S. at 165. It was not until 1874, when the Supreme Court not only ruled against Ms. Minor, but also ignored her Equal Protection Clause claim, that women realized they had a problem, not in the plain language of the Equal Protection Clause, but in the Court's reprehensible refusal to recognize women as "persons" with Equal Protection rights. Women immediately set out to amend the Constitution to give themselves personhood and equality, first by establishing their political power with voting rights (the woman suffrage amendment was filed with Congress only four years after *Minor*, in 1878), and once that was done in 1920, by establishing equal rights for women under all laws (the first ERA was filed with Congress in 1923, right after the Nineteenth Amendment was adopted). To be fair to Justice Scalia, his claim that "nobody" thought the Equal Protection Clause applied to women, though incorrect, is reflected in Supreme Court jurisprudence, as when the Court ruled in 1880 that the Equal Protection Clause was "designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons," *Strauder v. West Virginia*, *supra* note 114. But if everyone understood that the Equal Protection Clause was primarily aimed at addressing slavery, the Court would hardly have felt compelled to extend it to other races, ethnicities, national origins, and even non-citizens, in 1886, but that is what the Court did in *Yick Wo*. *See supra* note 115. Even if it was logical in 1886 for the Court to extend the Equal Protection Clause to cover categories such as national origin, it is not credible to claim that an amendment intended to address slavery also needed to be extended to corporations in 1886, but the Court did exactly that in *Santa Clara County v. Southern P.R. Co.*, *supra* note 117. The simple truth is, women were denied Equal Protection rights because the Supreme Court decided to make a list of who was worthy of such rights, and women were not on it. This subjugation of women by omission was less obvious and less incendiary than having the Fourteenth Amendment or the Supreme Court expressly declare women unworthy, but it was no less effective as a means by which the social and legal conditions were created that kept women in the home, performing free labor, uneducated, out of the workforce, unprotected from abuse, dependent on men, and powerless.