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At the End of Our Article III Rope

WHY WE STILL NEED THE EQUAL RIGHTS AMENDMENT

Sarah M. Stephens[†]

“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”¹

INTRODUCTION

Historically, women’s organizations were “hopelessly divided upon the Equal Rights Amendment.”² The National Woman’s Party (NWP)³ began pursuing a constitutionally based equal rights solution, known as the *constitutional strategy*, around 1919.⁴ Meanwhile, groups such as the American Civil Liberties Union (ACLU) and eventually the National Organization of Women (NOW) tried to achieve women’s equality by seeking favorable interpretation of existing Fourteenth Amendment jurisprudence on a case-by-case basis, referred to as

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¹ H.R.J. Res. 208, 92d Cong. (1972). The most recent text of the Equal Rights Amendment, as proposed in the 113th Congress, provides:

Section 1: Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2: Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

S.J. Res. 10, 113th Cong. (2013); H.R.J. Res. 56, 113th Cong. (2013).

² Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 781 (2004).

³ The National Woman’s Party, sometimes known as the Alice Paul Party, was formed by Alice Paul and Lucy Burns in 1916 to organize for constitutional-based rights, including women’s suffrage and the Equal Rights Amendment. In 1997, the NWP became a non-profit, nonpolitical, educational organization. See *Women of Protest: Photographs from the Records of the National Woman’s Party*, LIBRARY OF CONGRESS, <http://www.loc.gov/collections/static/women-of-protest/images/history.pdf> (last visited Feb. 28, 2015).

⁴ For a historical account of the competing interests behind this dual strategy, see Mayeri, *supra* note 2, at 756-801.

the *litigation strategy*. By the end of the 1960s, these divergent feminist factions coalesced around a dual strategy to pursue equal rights for women under the law.⁵ The ACLU, NOW, and others lent their support to the Equal Rights Amendment (ERA) to encourage its passage in Congress and to achieve ratification by the states, while continuing to campaign for equal protection by challenging existing law in federal court.⁶

At times, the decision to pursue change on dual fronts hindered both the constitutional strategy and the litigation strategy. The constitutional strategy, exemplified by the pendency of the ERA, hindered the litigation strategy by making the Supreme Court more hesitant to rule that sex is a suspect class subject to heightened scrutiny review.⁷ Meanwhile, the litigation strategy impeded the constitutional strategy by lending support to those who argued that women's rights could be achieved without the ERA.⁸ The extensive number of discouraging losses suffered by equal rights advocates before a Supreme Court that upheld sex-based differentiation in government benefits,⁹ disparate treatment of pregnant women,¹⁰ discrimination on the basis of sex in the provision of medical care,¹¹ and unequal treatment in the military,¹² made

⁵ See generally Mayeri, *supra* note 2.

⁶ See, e.g., Califano v. Westcott, 433 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Reed v. Reed, 404 U.S. 71 (1971). During this period, equal rights advocates also campaigned for the inclusion of sex as a protected category for purposes of the Civil Rights Act of 1964, as well as the passage of the Pregnancy Discrimination Act of 1978.

⁷ See *Frontiero*, 411 U.S. at 692 (Powell, J., concurring) (“[T]he Court has assumed a decisional responsibility at the very time when state legislatures, functioning with the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.”). The Court ultimately held that sex-based distinctions are only subject to intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976).

⁸ Mayeri, *supra* note 2, at 767.

⁹ See Califano v. Webster, 430 U.S. 313 (1977) (upholding a Social Security rule that allowed women to exclude more low-wage-earning years from their average monthly wage calculation than men); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a tax exemption for widows but not widowers). While applying unequal treatment to men and women, these decisions, as well as *Schlesinger v. Ballard* cited *infra* can be seen as allowing affirmative action on behalf of women to compensate for past discrimination.

¹⁰ Geduldig v. Aiello, 417 U.S. 484 (1974) (finding that pregnancy discrimination is not discrimination “on the basis of sex” and therefore not violative of the Constitution’s equal protection guarantee).

¹¹ Harris v. McRae, 448 U.S. 297 (1989) (upholding the constitutionality of the Hyde Amendment which prohibited federal funding for abortions except where the procedure is necessary to save the life of a pregnant woman); Maher v. Roe, 432 U.S. 464 (1977) (holding that the Equal Protection Clause of the Fourteenth Amendment does not require a state participating in the Medicaid program to pay the expenses incident to non-therapeutic abortions for indigent women where the state pays

clear the continued utility of a constitutional amendment that could prohibit sex discrimination and preserve bodily integrity.

Unfortunately, the ERA failed to gain the necessary votes for ratification and feminists were left with only the litigation strategy. Yet, despite significant losses in the courts, feminists remained optimistic they could overcome legally entrenched sex discrimination without the ERA. They were buoyed by piecemeal judicial pronouncements that ultimately recognized a heightened scrutiny standard when reviewing sex-based laws.¹³ In fact, litigants continued the struggle for equal rights throughout the conservative Reagan years¹⁴ and into the 1990s, when some legal scholars began to claim victory, arguing a *de facto* ERA could be found in the Supreme Court's equal protection jurisprudence.¹⁵ Shortly after the Court decided *United States v. Virginia*¹⁶ in 1996, requiring a "genuine" and "exceedingly persuasive" justification for sex-based discrimination, Justice

expenses incident to childbirth); *Beal v. Doe*, 432 U.S. 438 (1977) (holding that Title XIX of the Social Security Act does not require the funding of non-therapeutic abortions as a condition of participation in the joint federal-state Medicaid program established by that statute); *Poelker v. Doe*, 432 U.S. 519 (1977) (holding that the a St. Louis city policy that prohibited non-therapeutic abortions in the city's two publicly run hospitals did not violate the Equal Protection Clause of the Fourteenth Amendment where the city did provide facilities for childbirth in those same hospitals).

¹² *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding the male-only draft by reasoning that women's exclusion from combat justified sex-based differentiation in other areas, including the draft); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (holding the military could enforce a sex-specific "up or out" policy that gave male officers less time than female officers to win a promotion before forcing their resignations). It is worth noting that members of the movement against the ERA cited women in combat as being one outcome of its passage. On January 23, 2013, the United States military officially lifted its ban on female soldiers serving in combat roles. Ernesto Londoño, *Pentagon Removes Ban on Women in Combat*, WASH. POST (Jan. 24, 2013), http://www.washingtonpost.com/world/national-security/pentagon-to-remove-ban-on-women-in-combat/2013/01/23/6cba86f6-659e-11e2-85f5-a8a9228e55e7_story.html.

¹³ See *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁴ For a discussion of the conservative backlash against women's rights that took place in the eighties, see SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

¹⁵ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1332-34 (2006) ("Cass Sunstein observes, 'The American constitution now has something very much like a constitutional ban on sex discrimination—not because of the original understanding of its text but because of new judicial interpretations.'").

¹⁶ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (although expressly adhering to the intermediate standard, the Court emphasized that for sex-based classifications to pass muster under the intermediate standard, the state must demonstrate an "exceedingly persuasive" justification, and "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," thus practically elevating the standard to something closer to strict scrutiny); *but cf.*, *Nguyen v. INS.*, 533 U.S. 53, 74 (2001) (O'Connor, J. dissenting) (undermining the analysis of *United States v. Virginia* and applying something less than intermediate scrutiny).

Ginsburg herself observed: “There is no practical difference between what has evolved and the [ERA].”¹⁷

The opinions authored by the Supreme Court in the last several years indicate this victory was prematurely declared. The application of the Equal Protection Clause to sex discrimination claims is limited by various factors, including the Court’s failure to subject claims of sex discrimination to the “strict scrutiny” standard of review; the Court’s formalistic requirement that men and women must be “similarly situated” for any heightened scrutiny standard to apply, and the Court’s unwillingness to recognize discrimination claims based upon a theory of disparate impact.¹⁸ Moreover, in the 20 years since *Virginia*, as Court politics have polarized, the Court has interpreted the intermediate scrutiny standard with increasing leniency and women have lost many of the protections hard-won in the 1970s. In the wake of the Supreme Court’s recent decision in *Burwell v. Hobby Lobby*,¹⁹ allowing employers to interfere with women’s healthcare choices, women’s rights advocates surely must feel disappointed in the litigation strategy’s failures and compelled to reinvigorate the fight for the ERA.

This article argues that it is time to return to the clean sweep approach of the constitutional strategy and pursue ratification of the ERA. The ERA remains the best option to overcome the inability of existing equal protection jurisprudence

¹⁷ Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES MAG., Oct. 5, 1997, at 65.

¹⁸ Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1205 (2005).

¹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014). In a television interview regarding her dissent in the Hobby Lobby case, Justice Ginsburg stated, “Contraceptive protection is something every woman must have access to, to control her own destiny . . . [Hobby Lobby] has no constitutional right to foist that belief on the hundreds and hundreds of women who work for them who don’t share that belief.” Katie Couric, *Ruth Bader Ginsburg on Hobby Lobby Dissent*, YAHOO! NEWS, <http://news.yahoo.com/katie-couric-interviews-ruth-bader-ginsburg-185027624.html> (last visited Feb. 28, 2015). “The Court’s decision, at heart, is rooted in a very old and very outdated misunderstanding about women. And that is the idea that women’s reproductive health is somehow ‘extra,’ ‘different,’ or ‘separate.’ This fundamentally wrong assumption about women’s reproductive health has been used for ages to take away women’s rights. By reinforcing this dangerous approach to women’s reproductive health, the Court has put all aspects of women’s rights at risk.” Sharon Levin, *The Hobby Lobby Decision Takes a Fundamentally Flawed Approach to Reproductive Health*, NAT’L WOMEN’S LAW CENTER BLOG (Oct. 16, 2014), available at <http://www.nwlc.org/our-blog/hobby-lobby-decision-takes-fundamentally-flawed-approach-reproductive-health>. “This ruling goes out of its way to declare that discrimination against women isn’t discrimination.” Ilyse Hogue, *Statement: NARAL Pro-Choice America Reaction to the Supreme Court Decision on Hobby Lobby*, June 30, 2014, available at http://www.prochoiceamerica.org/media/press-releases/2014/pr06302014_sctous_hobbylobby.html.

to achieve rigorous protection against sex discrimination. Part I provides a background of the ERA and the surrounding movement. Part II problematizes Article III jurisprudence, focusing on the limits of the Supreme Court's analysis of the Equal Protection Clause in sex discrimination cases. Part III highlights court opinions that have interpreted state constitution ERAs to provide extensive protection against sex discrimination in the reproductive rights context, and then reimagines the *Hobby Lobby* decision as it would result under a federal ERA, in light of those analyses.

I. BACKGROUND OF THE ERA

A. *The Nineteenth Amendment: "[T]he right by which all others could be secured"*²⁰

The history of the ERA dates back to 1848 and the first Women's Rights Convention in Seneca Falls, New York.²¹ Elizabeth Cady Stanton and Lucretia Mott, who met as abolitionists working against slavery, convened a two-day meeting of 300 women and men to call for justice for women in a society that systematically barred them from the rights and privileges of citizenship.²² A Declaration of Sentiments²³ and 11 other resolutions were adopted with ease, but the proposal for women's suffrage passed only after impassioned speeches by Stanton and former slave Frederick Douglass, who declared

²⁰ See Rutgers, The State Uni. of N.J., *Declaration of Sentiments and Resolutions*, THE ELIZABETH CADY STANTON AND SUSAN B. ANTHONY PAPERS PROJECT, at n.7, <http://ecssba.rutgers.edu/docs/seneca.html> (last updated Aug. 2010) [hereinafter *Declaration of Sentiments and Resolutions*] (internal quotation marks omitted) (referencing Elizabeth Cady Stanton and Frederick Douglass's description of women's suffrage).

²¹ The history of the struggle for women's rights in the United States dates back to its very formation, through the Reconstruction Era, and up to present day. See Abigail Adams' plea for her husband, John, Massachusetts representative to the Continental Congress in Philadelphia, to "remember the ladies" when drafting the "new [C]ode of laws." *Abigail Adams' "Remember the Ladies" Letter*, PBS (Aug. 26, 2005), http://www.pbs.org/wgbh/amex/adams/filmmore/ps_ladies.html. That request, sadly, went unheeded. See Letter from Abigail Adams to John Adams (Mar. 31, 1776), available at <http://www.historytools.org/sources/Abigail-John-Letters.pdf> ("As to your extraordinary code of laws, I cannot but laugh . . . we know better than to repeal our masculine systems."); see also Rebecca Hall & Angela P. Harris, *Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of United States v. Cruikshank*, in *WOMEN AND THE LAW STORIES* (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (explaining the brave actions of minority women in response to acts of violence and male dominance against them following the Civil War, their hopes in the new Reconstruction Civil Rights Regime, and the failure of the Supreme Court to grant them privileges and immunities of citizenship in light of its decision in the *Slaughter-House Cases*).

²² See *Declaration of Sentiments and Resolutions*, *supra* note 20.

²³ *Id.*

suffrage as the “right by which all others could be secured.”²⁴ Unfortunately, few outside of the women’s movement took this call for women’s suffrage seriously.

After the Civil War, Elizabeth Stanton, Susan B. Anthony, and Sojourner Truth fought in vain to have women included in new constitutional amendments that gave rights to former slaves.²⁵ The Fourteenth Amendment defined citizens as, “[a]ll persons born or naturalized in the United States,” and guaranteed equal protection of the laws, but rather than expand the rights of all disenfranchised people, in referring to the electorate, the amendment introduced the word “male” into the Constitution for the first time.²⁶ Women were likewise omitted from the Fifteenth Amendment, which declared that “[t]he right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”²⁷ Women of all races continued to be denied the ballot. In 1875, the Supreme Court in *Minor v. Happersett* confirmed that while women qualified as citizens, not all citizens held the right to vote, and states were not required to allow women to vote.²⁸

Excluded from both Reconstruction-era Amendments, Stanton and Anthony immediately began campaigning for a new constitutional amendment to ensure women the right to vote.²⁹ As the first wave of suffragists died out, leaders such as Carrie Chapman Catt of the National American Woman Suffrage Association and Alice Paul, founder of the NWP took

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. CONST. amend. XIV, §§ 1-2. The Fourteenth Amendment provides,

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Id.

²⁷ U.S. CONST. amend. XV, § 1.

²⁸ *Minor v. Happersett*, 88 U.S. 162 (1874).

²⁹ See Roberta W. Francis, *The History Behind the Equal Rights Amendment*, THE EQUAL RIGHTS AMENDMENT: UNFINISHED BUSINESS FOR THE CONSTITUTION, <http://www.equalrightsamendment.org/history.htm> (last visited Feb. 28, 2015).

up the cause.³⁰ Seventy-one years after the Seneca Falls Convention, the Nineteenth Amendment granted women the right to vote when it finally passed through Congress.³¹

After the Nineteenth Amendment passed Congress in 1919, it quickly gained “more than half the ratifications it needed in the first year. Then it ran into stiff opposition from states’ rights advocates, the liquor lobby, business interests against higher wages for women, and a number of women themselves, who believed claims that the amendment would threaten the family”³² by dividing husband and wife and disrupting the social order. “Finally, the battle narrowed down to a six-week seesaw struggle in Tennessee.”³³ Illustrating the precarious nature of the passage of the Nineteenth Amendment, its fate “was decided by a single vote, that of 24-year-old legislator Harry Burn, who switched from ‘no’ to ‘yes’ in response to a letter from his mother saying, ‘Hurrah, and vote for suffrage!’”³⁴

Suffragists thus won the first, and still the only, specific written guarantee of women’s equal rights in the Constitution, the Nineteenth Amendment, which declared, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”³⁵

B. *Beyond Suffrage: The Equal Rights Amendment*

Despite the significant change wrought by the Nineteenth Amendment, many laws and practices in the workplace and in society still perpetuated men’s status as privileged and women’s status as second-class citizens.³⁶ Unsatisfied, some in the suffrage movement began to call for a prohibition on all laws based upon sex distinctions.³⁷ In 1923, for the celebration of the 75th anniversary of the 1848 Women’s Rights Convention, Alice Paul introduced the ERA (then known as the Lucretia Mott Amendment), proclaiming,

³⁰ *Id.*

³¹ For more on the history of woman suffrage, see 5 NAT’L AM. WOMAN SUFFRAGE ASS’N. THE HISTORY OF WOMAN SUFFRAGE: 1900-1920 (Ida Husted Harper ed. 1922), available at <http://www.gutenberg.org/files/29878/29878-h/29878-h.htm>.

³² Francis, *supra* note 29.

³³ *Id.*

³⁴ *Id.* (citing Carol Lynn Yellin, *Countdown in Tennessee, 1920*, 30 AM. HERITAGE 12 (1978)).

³⁵ U.S. CONST. amend. XIX.

³⁶ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1013-14 (2002).

³⁷ *Id.*

“[w]e shall not be safe until the principle of equal rights is written into the framework of our government.”³⁸

The ERA was first proposed in Congress on December 13, 1923 as H.R.J. Res. 75³⁹ and was re-introduced into every session of Congress between 1923 and 1972.⁴⁰ During that period, American feminists split into the two opposing camps that would ultimately pursue the divergent constitutional and litigation strategies. Some feminists, like the members of the NWP and certain professional women’s groups, believed that adoption of the ERA represented a critical step in the fight to eliminate sex-based legal distinctions, and offered strong support in favor of the constitutional amendment.⁴¹ These same advocates were opposed to protectionist legislation and believed that special laws for women did not protect women so much as hinder their advancement.⁴² The other camp, which included unions and the ACLU, had fought hard for minimum wage, maximum hours, and additional sex-based protections that they feared the ERA would eliminate.⁴³ This camp preferred a piecemeal strategy, promoting discriminatory laws that arguably benefitted women, while attacking discriminatory laws that did not.⁴⁴

³⁸ See Francis, *supra* note 29.

³⁹ Equal Rights Amendment, H.R.J. Res. 75, 68th Cong. (1923). The original text of the ERA, which differed only slightly from the current version, provided:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

⁴⁰ *Martha Griffiths and the Equal Rights Amendment*, NAT’L ARCHIVES, <http://www.archives.gov/legislative/features/griffiths/> (last visited Feb. 28, 2015); see *infra* note 49, at pp. 2-8.

In most years, [the ERA] never reached the full Senate. But in 1946, after debate on the Senate floor, the ERA commanded a majority of votes, though less than the requisite two-thirds for a constitutional amendment. In 1950 and 1953, the Senate passed the ERA with a rider that nullified its equal protection aspects.

Martha Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 429-30 (2008).

⁴¹ Mayeri, *supra* note 2, at 762.

⁴² *Id.* Protectionist legislation included laws limiting the number of hours women could work. See *Muller v. Oregon*, 208 U.S. 412 (1908). Such laws discouraged employers from hiring women, as the Supreme Court had previously held that men could not be subject to such laws. Further, protectionist legislation served to reinforce stereotypes of women as fragile or feeble.

⁴³ Mayeri, *supra* note 2, at 762.

⁴⁴ *Id.* at 764.

In 1969, the Equal Employment Opportunity Commission (EEOC) began to argue that Title VII's prohibition on sex discrimination outlawed most sex-based workplace protections.⁴⁵ This meant that the protectionist laws which benefitted women in their employment were now illegal, while many of the discriminatory laws which harmed women in other areas of their lives remained in place. Their arguments over the value of protectionist legislation rendered moot, the two groups could finally reunite. Indeed, frustrated by a lack of progress in the courts, those in favor of the litigation strategy joined with other feminist organizations to begin a hard push for the ERA, while cautiously continuing to pursue litigation which would ultimately lead to successes such as *Reed v. Reed*⁴⁶ and *Frontiero v. Richardson*.⁴⁷

In 1972, the ERA finally passed Congress and it was sent to the states, with a seven year deadline for ratification.⁴⁸ Like the Nineteenth Amendment, a great deal of momentum surrounded the ratification of the ERA. In the first year, the ERA received 22 of the necessary 38 state ratifications.⁴⁹ But the pace slowed as the same opposition groups that resisted the Nineteenth Amendment began to organize against the ERA.⁵⁰

⁴⁵ Mayeri *supra* note 2, at 797-99. Other women's rights organizations, which had previously opposed the ERA, began to offer their support in favor of the constitutional amendment during the late sixties because of the EEOC's refusal to enforce the prohibition against sex discrimination provided for in Title VII. *Id.* at 775 n.90. This refusal to enforce a statutorily provided equal protection in employment guarantee united feminists in the need for political mobilization. *Id.*

⁴⁶ *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a court cannot discriminate in the naming of an executor of an estate on the basis of sex).

⁴⁷ *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that the U.S. military could not discriminate in the administration of benefits for dependent spouses on the basis of the sex).

⁴⁸ THOMAS NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 8 (2013), available at http://www.equalrightsamendment.org/misc/CRS_2013_summary.pdf.

⁴⁹ *Id.* at 9.

⁵⁰ Phyllis Schlafly, a conservative activist, led the movement against the ERA after it was passed in the U.S. House and Senate in 1972. Her campaign, "Stop ERA," galvanized opposition against the attempt to secure equal rights for women in the U.S. Constitution. Schlafly and members of the Eagle Forum group traveled around the United States arguing that protective laws against sexual assault and for alimony would be swept away; the tendency for the mother to receive child custody in a divorce case would be eliminated; same-sex marriages would be permitted; the all-male military draft would become immediately unconstitutional; and that even single-sex restrooms would be banned if the ERA became law. Siegel, *supra* note 15, at 1401; Davis, *supra* note 40 at 426-27; see also DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY & GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE, ch.9 (2005). The "ERA failed, but the consequences happened anyway. Unisex bathrooms are in college dorms around the country. Women are joining the armed forces—by choice. And modern alimony laws look at sex-neutral factors, such as need and contribution, when determining who should receive support." Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the*

Only eight states ratified the ERA in 1973, three in 1974, one in 1975, and none in 1976.⁵¹ In all, 35 states ratified the ERA,⁵² but the seven-year time limit for ratification passed without the three additional states needed to make the amendment law.⁵³ Congress extended the ratification period an additional five years.⁵⁴ However, the political tide continued to turn more conservative, and on the congressionally imposed deadline of June 30, 1982, no additional states had voted for ratification.⁵⁵ One hundred thirty-four years after the Seneca Falls Convention and sixty-two years after ratification of the

Century, 75 N.Y.U. L. REV. 1, 23 (2000). Even same-sex marriage is now permitted in about half of the states, and discrimination on the basis of sexual orientation has been ruled unconstitutional in many arenas, including in the administration of various federal programs and benefits. See *The Changing Landscape of Same-Sex Marriage*, WASH. POST, (Oct. 17, 2014), <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/>; see also e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that, because the Defense of Marriage Act, which defined marriage as a union between one man and one woman, is unconstitutional under the Due Process Clause of the Fifth Amendment, the IRS cannot discriminate against same sex surviving spouses for the purposes of federal estate tax exemptions). Schlafly and others also argued that the ERA would lead to “abortion on demand.” In order to increase their political capital, proponents of the ERA have argued that the ERA would have a limited impact on reproductive autonomy. Mayeri, *supra* note 2, at 1274-80. The author firmly disagrees. See *infra* Part III.

⁵¹ NEALE, *supra* note 48, at 9.

⁵² *Id.* at 9 n.45. States that have not ratified the ERA include: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. *Battle Lines Being Drawn in Illinois on Equal Rights Amendment*, CHICAGO SUN-TIMES (Aug. 10, 2014), <http://politics.suntimes.com/article/washington/battle-lines-being-drawn-illinois-equal-rights-amendment/sun-08102014-329pm>.

⁵³ NEALE, *supra* note 48, at 9 n.45.

⁵⁴ Whether Congress had the authority to extend the time for ratification set forth in the ERA’s proposing clause without re-submitting the ERA to the states is a matter in dispute. After the 27th Amendment, also known as the “Madison Amendment,” was ratified by Michigan in 1992 and became part of the Constitution 203 years after it was submitted to the states, some legal scholars argued that the ERA could still become law. See Allison Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997) (arguing that the seven year time limit in the ERA’s proposing clause was irrelevant because states ratify only the text of the amendment and not the proposing clause and that Congress has the power to determine the timeliness of the ERA after final state ratification and can extend, revise, or ignore a time limit); *but cf.*, Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL’Y 19 (1979) (arguing the extension of time for ratification violated the Article V process). The Congressional Research Service analyzed this legal argument in 1996 and concluded that acceptance of the Madison Amendment does have implications for the premise that approval of the ERA by three more states could allow Congress to declare ratification accomplished. As of 2007, ratification bills testing this three-state strategy have been introduced in one or more legislative sessions in eight states (Arizona, Arkansas, Florida, Illinois, Mississippi, Missouri, Oklahoma, and Virginia), and supporters are seeking to move such bills in all 15 of the unratified states. NEALE, *supra* note 48, at 12.

⁵⁵ NEALE, *supra* note 48, at 10.

Nineteenth Amendment, the country remained unwilling to guarantee women constitutional rights equal to those of men.

Women's rights advocates were undeterred.⁵⁶ Congress reintroduced the ERA on July 14, 1982 and it has been before every session of Congress since that time.⁵⁷ Two different types of ERA legislation came before Congress in the 2014 session: traditional legislation to ratify the ERA by the Constitution's Article V ratification process⁵⁸ and legislation designed to remove the time limit on the ERA's ratification process and declare it complete when three additional states ratify the amendment.⁵⁹

Ratification remains an active issue in state legislatures as well. In February 2014, the Virginia House voted to ratify the ERA, but a Republican House subcommittee killed the proposal later that month.⁶⁰ In May 2014, the Illinois Senate voted to ratify the ERA.⁶¹ A vote in the Illinois House could occur before the end of the 2014-2015 legislative term.⁶² Also, the Senate Committee on Legislative Operations and Elections in the Nevada Legislature has requested the drafting of a Senate Joint Resolution to ratify the ERA in 2015.⁶³

II. LEGAL CHALLENGES TO DISCRIMINATION HAVE NOT ACHIEVED EQUALITY OF RIGHTS

While Congress and state legislatures debated the ERA during the 1970s, a new field of equal rights jurisprudence started to develop in the courts. Drawing from the race discrimination cases of the 1950s and 1960s, the Supreme Court began to interpret the Equal Protection Clause to provide a

⁵⁶ *Francis*, *supra* note 29.

⁵⁷ For more on the re-introduction of the ERA in 1982, see Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 N.W. U.L. REV. 1223 (2009).

⁵⁸ H.R.J. Res. 56, 113th Cong. (2013); S.J. Res. 10, 113th Cong. (2013).

⁵⁹ H.R.J. Res. 113, 113th Cong. (2014); S.J. Res. 15, 113th Cong. (2013); *see also* Held et al., *supra* note 54, at 113 (arguing that the ERA will become a part of the U.S. Constitution upon its ratification by three additional states).

⁶⁰ Bill Sizemore, *Equal Rights Amendment Rejected Again in Virginia House*, VIRGINIAN-PILOT (Feb. 27, 2014), <http://hamptonroads.com/2014/02/equal-rights-amendment-rejected-again-va-house>.

⁶¹ *See* Feminist Newswire, *Illinois Senate Passes Resolution to Ratify the Equal Rights Amendment*, FEMINIST FOUND. MAJORITY BLOG (May 23, 2014, 12:52 PM), <http://feminist.org/blog/index.php/2014/05/23/illinois-senate-passes-resolution-to-ratify-era/>; *Senate Votes to Ratify Equal Rights Amendment*, ILLINOIS SENATE DEMOCRATS (May 23, 2014, 3:22 PM), <http://www.illinoissenatedemocrats.com/index.php/caucus-news/blog-archive/4190-illinois-senate-votes-to-ratify-equal-rights-amendment>.

⁶² Sean Whaley, *ERA Isn't Nostalgia in Nevada*, LAS VEGAS REV.-J. (July 28, 2014, 12:53 AM), <http://www.reviewjournal.com/politics/government/era-isn-t-nostalgia-nevada>.

⁶³ *Id.*

prohibition against sex discrimination in certain circumstances where none had previously existed. Although this has led to some fundamental protections for women and perhaps has achieved most of the early goals of ERA proponents, Article III courts have stopped short of providing women comprehensive equal protection under the law.

The ability of the Equal Protection Clause to eliminate sex discrimination is limited by the Court's inconsistent application of the intermediate scrutiny standard and its refusal to subject claims of sex discrimination to the strict scrutiny standard, the Court's formalistic requirement that men and women be deemed "similarly situated" for heightened scrutiny to apply, and the Court's focus on disparate treatment in all equal protection cases.

A. *Limitations of the Intermediate Scrutiny Standard in Eradicating Sex Discrimination*

Under the existing strict scrutiny standard, where a law distinguishes between individuals on the basis of a "suspect classification," the government actor bears the burden of demonstrating that the classification serves a compelling government interest and is narrowly tailored to accomplish that government interest.⁶⁴ Currently, only classifications based on race and national origin are considered "suspect" and therefore warrant strict scrutiny review.⁶⁵ Classifications based on sex are subject to the lesser standard of intermediate scrutiny.⁶⁶ This is because current equal protection jurisprudence reflects the idea that:

[I]t is appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women . . . [because] the nation never made a collective

⁶⁴ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982).

⁶⁵ Ryan Lozar & Tahmineh Maloney, *Equal Protection*, 3 GEO. J. GENDER & L. 141, 144 (2002).

⁶⁶ *Craig v. Boren*, 429 U.S. 190 (1976). Laws not subject to strict or intermediate scrutiny are subject to rational basis review. Rational basis review is the most deferential of the three standards and applies to all classifications not affecting either a suspect or quasi-suspect class or a fundamental right. To pass rational basis review, a law must have a rational relationship to a legitimate government interest. Under rational basis review, when a legitimate governmental interest is not readily apparent, courts may speculate as to what legitimate governmental interest could conceivably motivate the state action. However, an unclear connection between a classification and proffered governmental objective may render the distinction arbitrary or irrational. At a minimum, a governmental objective cannot be steeped in class-based animus. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE L. REV. 135, 136 n.7-8 (2011).

constitutional commitment to respect women as equal of men . . . [and because of] a pervasive intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination.⁶⁷

To withstand intermediate scrutiny, a quasi-suspect classification, such as sex, must serve government interests and must be substantially related to those objectives.⁶⁸ The Court has demonstrated inconsistency in its interpretation of the intermediate scrutiny standard. In the Court's early sex discrimination jurisprudence, it sometimes "required a less-than-perfect fit between governmental ends and means, at times sustaining classifications based on broad sex-based generalizations."⁶⁹ In later cases, the Court usually applied a more stringent test.⁷⁰ Intermediate scrutiny reached a high water mark in 1996 in *United States v. Virginia*,⁷¹ a case from which the Court has since retreated.

In *Virginia*, the Court found that Virginia Military Institute's (VMI) male-only admission policy violated the Equal Protection Clause.⁷² In an opinion authored by Justice Ginsburg, the Court held that the defender of a law that creates a sex-based classification must produce an "exceedingly persuasive justification" for upholding the law.⁷³ Such justification must be genuine, not hypothesized or invented for purposes of litigation.⁷⁴ Virginia argued that single sex education yields important educational benefits and fosters diversity in educational approaches.⁷⁵ The Court determined, however, that Virginia failed to show that VMI created or maintained its male-only admissions policy in order to further the state's proffered justification.⁷⁶ Moreover, the Court held that a purpose to advance an array of education options was not

⁶⁷ Siegel, *supra* note 36, at 1013-14.

⁶⁸ Lozar & Maloney, *supra* note 65, at 147-48. However, the Court has upheld sex based classifications without explicitly analyzing whether the relationship between the objective and the classification qualified as substantial. In such instances, the Court has relied at least in part on legislative judgment to find that a sufficient nexus existed between the objective and the sex based classification. *Id.*

⁶⁹ Davis, *supra* note 40, at 430-31 (upholding a Florida statute providing a property tax exemption for widows, but not widowers, reasoning that widows generally face greater financial difficulties than widowers (citing Kahn v. Shevin, 416 U.S. 351, 353-56 (1974))).

⁷⁰ See *supra* note 6.

⁷¹ *United States v. Virginia*, 518 U.S. 515 (1996).

⁷² *Id.* at 534.

⁷³ *Id.* at 531.

⁷⁴ *Id.* at 535-36 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

⁷⁵ *Id.* at 535.

⁷⁶ *Id.* at 535-37.

served by VMI's male-only admissions policy and, therefore, VMI's justification was not "exceedingly persuasive."⁷⁷

Virginia represented the pinnacle of intermediate scrutiny as applied to sex discrimination cases. The inclusion of the "exceedingly persuasive justification" language and the extent to which the Court's opinion repeated the phrase seemed to heighten the state's burden when defending a law discriminating on the basis of sex.⁷⁸ Even though the stronger version of intermediate scrutiny expressed in *Virginia* did not go as far as the strict scrutiny standard, many scholars felt there was no practical difference.⁷⁹

Following *Virginia*, though, the Court almost immediately backed away from the heightened intermediate scrutiny standard, demonstrating its unwillingness to apply a robust standard to sex discrimination cases. For example, in *Nguyen v. INS*,⁸⁰ the majority opinion did not use the exceedingly persuasive justification language when it set out the definition of intermediate scrutiny. In fact, while the Court claimed to apply the intermediate scrutiny standard, the standard it actually applied was considerably more lenient and seemed more like rational basis than intermediate scrutiny.

In *Nguyen*, the Court considered a challenge to an immigration law which imposed different requirements for unmarried fathers and unmarried mothers to transmit United States citizenship to children born abroad.⁸¹ An unmarried father could transmit citizenship only if he performed specific steps to establish paternity before the child turned 18, while a child born to an unmarried woman abroad automatically received the mother's United States citizenship.⁸² The majority opinion purported to apply heightened scrutiny in upholding the statute and reasoned that the law did not violate the Equal Protection Clause because it was based on biological differences between men and women.⁸³

As Justice O'Connor's dissent explained, the majority ignored several aspects of the intermediate scrutiny test laid

⁷⁷ *Id.* at 539-40.

⁷⁸ *Id.* at 571-72 (Scalia, J., dissenting).

⁷⁹ See Sabrina Ariel Miesowitz, *ERA is Still the Way*, 3 N.Y.U. J.L. & LIBERTY 124, 135 (2008) (citing Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES MAG., Oct. 5, 1997, at 65).

⁸⁰ *Nguyen v. INS*, 533 U.S. 53 (2001).

⁸¹ *Id.* at 56-57.

⁸² *Id.* at 59.

⁸³ *Id.* at 68.

out in *Virginia*.⁸⁴ The majority in *Nguyen* failed to consider the historical background of the statute.⁸⁵ Historical sex discrimination was described in *Virginia* as the main impetus for using a higher level of scrutiny to review sex-based classifications.⁸⁶ Justice O'Connor's dissent showed that the immigration law at issue reflected a stereotypical assumption that children born out of wedlock were the sole responsibility of the mother, the exact type of historical bias that intermediate scrutiny was developed to combat.⁸⁷ Unfortunately, the majority opinion actually propagated this sexist assumption in its opinion, despite the facts before the Court which directly contradicted the majority's biased view that mothers are more likely to develop meaningful relationships with their children.⁸⁸ Further, the Court relied on arguments that the Immigration and Naturalization Service (INS) had not made to reach its decision, ignoring *Virginia*'s holdings that the burden of justification lies with the defender of the statute and that the Court would only consider genuine arguments, as opposed to those driven by litigation that the defender put forward.⁸⁹

The Court has continued the trend of inconsistent protection against sex discrimination seen in *Virginia* and *Nguyen*. For example, it struck down the Violence Against Women Act's civil rights remedy in 2000 as an unconstitutional exercise of congressional power.⁹⁰ Then, three years later, the Court found the Family and Medical Leave Act was "a valid legislative attempt to combat sex discrimination under Section Five of the Fourteenth Amendment."⁹¹

These apparent contradictions are not unexpected when one considers the difficulty in applying the vague intermediate scrutiny standard. The intermediate scrutiny standard occupies the middle ground somewhere between rational basis and strict scrutiny, and therefore its application by the Supreme Court and the lower courts has proven to be

⁸⁴ *Id.* at 78-79 (O'Connor, J., dissenting).

⁸⁵ *Id.* at 91.

⁸⁶ *United States v. Virginia*, 518 U.S. 515, 534, 538 (1996).

⁸⁷ *Nguyen*, 533 U.S. at 91.

⁸⁸ *Id.* In actuality, Nguyen had been abandoned by his mother and raised by his father. *Id.* at 89.

⁸⁹ See Miesowitz, *supra* note 79, at 140.

⁹⁰ *United States v. Morrison*, 529 U.S. 598, 619, 627 (2000) (holding the civil rights remedy exceeded congressional power under both Section Five of the Fourteenth Amendment, as well as the Commerce Clause).

⁹¹ Mayeri, *supra* note 2, at 757-58 (footnote omitted).

unpredictable. Intermediate scrutiny is not functional because it does not provide a clear and consistent rule.

One important goal of the ERA was to “provide an immediate mandate, a nationally uniform theory of sex equality, and the prospect of permanence to buttress individual and political efforts to end discrimination.”⁹² This goal has not and cannot be achieved using the intermediate scrutiny standard.

In contrast to [the] unpredictability [of the intermediate scrutiny standard,] subjecting sex discrimination to strict scrutiny would provide consistency across identity-based classifications such as race and sex, providing more guidance for both lower courts and policy makers. Further, strict scrutiny provides for less judicial discretion because there are fewer circumstances where discrimination can be justified in the face of such scrutiny According to one study, under strict scrutiny, a claimant alleging discrimination has a [73%] probability of success, while under intermediate scrutiny, a litigant will prevail only [47%] of the time.⁹³

Passage of the ERA would require that courts use a strict or absolute scrutiny standard,⁹⁴ thereby providing consistency in the area of sex discrimination law, ensuring that the vast majority of discriminatory laws would be struck down, and discouraging the passage or enforcement of sex-biased laws.

B. Formal Equality and the Fallacy of “Real” Differences

Under current equal protection jurisprudence, most sex discrimination cases do not receive even the lesser intermediate scrutiny standard of review. The Court will only apply heightened scrutiny to cases where classes of people are alike in all relevant ways except for a protected basis, such as race or national origin (for the purposes of strict scrutiny), or

⁹² Miesowitz, *supra* note 79, at 129 (footnotes omitted).

⁹³ Davis, *supra* note 40, at 437 (footnotes omitted); *see also* Lee Epstein et al., *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL’Y 11, 67 (2004). In contrast to the relatively predictable outcomes under strict scrutiny and rational basis standards, “when courts apply the intermediate standard, litigants alleging sex discrimination are nearly as likely to win as they are to lose.” Epstein et al., *supra* note 93, at 67.

⁹⁴ The absolute scrutiny standard would prohibit laws that distinguish between individuals on the basis of sex except where: (1) they involve a physical characteristic unique to one sex; (2) they are necessary to preserve other constitutional rights, such as the right to personal privacy; or (3) they are part of a genuine affirmative action policy. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). In each of these three exceptional circumstances, the suspect law would be subject to strict scrutiny. *Id.* Thus, laws which restrict reproductive autonomy would be subject to the strict scrutiny standard regardless of whether absolute scrutiny could apply under the ERA.

gender (for purposes of intermediate scrutiny).⁹⁵ Otherwise, the Court will merely look at whether there is any rational basis for the classification and the state's asserted objective in order to uphold the discriminatory law.⁹⁶ The Supreme Court has held that physical or "real" differences between men and women may constitute important reasons for gender classifications and therefore justify discrimination.⁹⁷

The real differences theory arises from the Court's formalistic interpretation that the Equal Protection Clause "is essentially a direction that all persons 'similarly situated' should be treated alike."⁹⁸ Such an analysis severely narrows the definition of what can be considered unconstitutional sex discrimination under the Equal Protection Clause. This is because the Court has held, again and again, that differences in treatment, where they correspond to differences between men and women relating to biology, are not subject to the intermediate scrutiny standard, much less the strict scrutiny standard, because men and women are not "similarly situated" in those circumstances.⁹⁹ In so doing, the real differences theory justifies depriving women of the rights and obligations of citizenship.

For example, in *Michael M. v. Sonoma County Superior Court*, the Court used the real differences theory to justify a criminal statute which provides that only men can be charged with statutory rape.¹⁰⁰ There, the Court stated:

[T]he Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same." . . . [T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.¹⁰¹

The Court found that men and women are not "similarly situated" for purposes of the statutory rape law because only women can become pregnant and as a result women "suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."¹⁰²

⁹⁵ See Wharton, *supra* note 18, at 1216.

⁹⁶ *Id.*

⁹⁷ See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁹⁸ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

⁹⁹ See, e.g., *Michael M. v. Sonoma Cnty. Superior Court*, 450 U.S. 464 (1981).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 469 (citations omitted) (internal quotation marks omitted).

¹⁰² *Id.* at 471.

The statute at issue in *Michael M.* may seem to benefit women by protecting them from criminal prosecution; however, in reality, it exposes children to sexual misconduct and perpetuates stereotypes that portray men as predators and women as docile victims. Like so many other cases, the Court grounds its ruling in gender stereotypes and the idea that it is permissible to treat women differently than men on the basis of women's reproductive capacity.¹⁰³

In *Geduldig v. Aiello*, the Court held that a state disability insurance program which excluded pregnancy from coverage did not violate the Equal Protection Clause because, "[t]here is no risk from which men are protected and women are not."¹⁰⁴ The Court reached such a conclusion by hiding behind the fallacy that the program differentiated between pregnant and non-pregnant women, rather than recognizing that because pregnancy is a physical condition which only appears in women, the program discriminated on the basis of sex.¹⁰⁵ In its insistence on formal equality, the Court ignored

¹⁰³ See, e.g., *Bray v. Alexandria Women's Clinic*, 506 U.S. 263 (1993); *Harris v. McRae*, 448 U.S. 297 (1980); *Geduldig v. Aiello*, 417 U.S. 484 (1974). Before the Court's application of intermediate scrutiny to gender discrimination cases in *Craig v. Boren*, 429 U.S. 190 (1976), it upheld numerous gender classifications on the basis that women require special protections because of their weaker physical and mental nature and childbearer-rearer responsibilities. In fact, before the Court's decision in *Reed v. Reed*, 404 U.S. 71 (1971), the Court upheld every gender classification challenged under the Equal Protection Clause. See *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975) (upholding a law which mandated jury service for men, but permitted service by women because of a woman's need to be in the home, rather than engaged in "community life"); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a law prohibiting women from employment as bartenders except where tavern was owned by the woman's father or husband in order to protect women's moral and physical well-being); *Muller v. Oregon*, 208 U.S. 412 (1908) (allowing prohibition on women working more than ten hours per day despite the recent *Lochner v. New York*, 198 U.S. 45, 64 (1905) decision striking down a ten hour per day limitation applicable to male bakery employees on the basis that it interfered with the constitutional right to contract); *Bradwell v. The State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding ban on women practicing law because their "paramount destiny and mission . . . are to fulfil[] the noble and benign offices of wife and mother").

¹⁰⁴ *Geduldig*, 417 U.S. at 496-97.

¹⁰⁵ *Id.* *Geduldig* was extended to cases under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2000), under *Gen. Elec. Corp. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (holding that the failure to cover pregnancy-related disabilities under a disability benefit plan does not violate Title VII). Congress rejected this analysis for purposes of sex discrimination in employment by passing the Pregnancy Discrimination Act in 1978, which expanded the definition of "because of sex" under Title VII of the Civil Rights Act of 1964 to include pregnancy, childbirth, and other related conditions. Nevertheless, *Geduldig* continues to be good law. For example, in *Bray v. Alexandria Women's Health Clinic*, the Court explicitly relied on *Geduldig's* holding that discrimination on the basis of pregnancy is not discrimination on the basis of sex in holding that the practice of denying women access to medical services by blockading abortion facilities did not constitute the "class-based invidiously discriminatory animus" necessary to prove a

the long history of discrimination against, and subordination of, women based on their reproductive capacity.

Carrying this logic forward, in 1980, the Court upheld the Hyde Amendment which limited Medicaid abortion funding.¹⁰⁶ In *Harris v. McRae*, the plaintiffs argued that the law violated the Equal Protection Clause because Medicaid generally funds all medically necessary procedures and the Hyde Amendment prohibited the funding of medically necessary abortions.¹⁰⁷ The Court found that the class of people affected by the law was poor women.¹⁰⁸ Because poverty is not a suspect class, the Court declined to apply strict scrutiny and upheld the law under the rational basis standard by finding that the government's "legitimate interest in protecting the potential life" supported the law.¹⁰⁹ The Court failed to acknowledge that the Hyde Amendment denied medically necessary procedures only to women and the government had no rational basis for this sex-based disparate treatment.¹¹⁰ In *Geduldig* and *Harris*, one can readily identify the Court's blatant refusal to admit that discrimination based on reproductive capacity, choice, or autonomy is sex discrimination and that laws which impact some, but not all, women on that basis are discriminatory.

By relying on the real differences theory, the Court denies the reality of discrimination against women on the basis of biology and, particularly, their reproductive abilities and choices. The real differences theory "strip[s] the ability to become pregnant of any social meaning, ignoring the ways in which the legal treatment of pregnancy defines the appropriate roles of women

violation of the civil rights statute, 42 U.S.C. § 1985(3). *Bray*, 506 U.S. at 271 (citations omitted) (noting the continued vitality of *Geduldig*).

¹⁰⁶ *Harris*, 448 U.S. 297.

¹⁰⁷ *Id.* at 300-01.

¹⁰⁸ *Id.* at 323.

¹⁰⁹ *Id.* at 324.

¹¹⁰ *Id.* In fact, the Court did not analyze *Harris v. McRae* as a sex discrimination case because it limited the "class" to poor women, as it had previously done in *Geduldig* by limiting that class to pregnant women. In *Harris*, the Court further held that the privacy right to an abortion did not come with a right to have the government fund an abortion. It concluded that there is no right to abortion funding under the Equal Protection Clause because it is a procedural guarantee and not a substantive one. This is a very different conclusion than various state courts had reached, some of which did find that funding all "medically necessary" procedures for men and not all "medically necessary" procedures for women was a violation of the Equal Protection Clause. See *infra* Part III.

and, consequently, dictates women's place in society."¹¹¹ Until discrimination analysis acknowledges that the "real" biological difference distinction is used to the disadvantage of women, women will never be equal under the law.

The ERA would end the real differences approach. As further explored in Part III, state courts construing their own ERAs have generally recognized that when unique physical characteristics are used to prejudice women, the purpose of their respective ERAs is compromised, thus rejecting the Supreme Court's holdings in *Geduldig*¹¹² and *Harris*.¹¹³ Under the ERA, the Supreme Court could no longer ignore the fact that women are discriminated on the basis of their reproductive capacity, and the Court would be prevented from upholding blatantly discriminatory laws on any rational basis.

C. *Covert Discrimination and the Need for Disparate Impact Analysis*

Another difficulty with current equal protection jurisprudence is its inability to address the ubiquity of sex discrimination.¹¹⁴ Most laws that have a disparate impact on women are the product of subtle attitudes and entrenched stereotypes about gender roles that exhibit the same constitutional infirmities as laws that overtly classify men and women, but are not redressed in the same way.¹¹⁵ Many rules that appear neutral are premised on stereotypes of male-female roles, such as the idea that men should and do provide for the family by earning wages, while women are responsible for childbearing and childrearing.¹¹⁶ "Legal rules, moreover, often were built on male norms, but the process of designing such 'male-centered' rules rarely includes—and more rarely provides evidence of—overt discriminatory intent."¹¹⁷

Current equal protection jurisprudence offers no remedy for these more insidious forms of discrimination because it rejects disparate impact analysis. In *Washington v. Davis*, the

¹¹¹ David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1883 (1995).

¹¹² *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹¹³ *Harris*, 448 U.S. at 297; see also *Bray v. Alexandria Women's Clinic*, 506 U.S. 263 (1993).

¹¹⁴ *Mayeri*, *supra* note 57, at 1252.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (footnotes omitted).

¹¹⁷ *Id.* (footnotes omitted) (quoting Memorandum from Phyllis Segal to ERA Legislative History Project (Mar. 21, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 29)).

Court held that race discrimination challenges to facially neutral governmental action require proof of discriminatory purpose to trigger strict scrutiny review under the Equal Protection Clause.¹¹⁸ The Court applied this analysis to sex discrimination in *Personnel Administrator of Massachusetts v. Feeney*.¹¹⁹ In that case, the Court rejected a challenge to Massachusetts' policy of granting a lifetime preference to veterans for state civil service positions.¹²⁰ Like the law at issue in *Washington*, this one was neutral on its face.¹²¹ However, because over ninety-eight percent of veterans in Massachusetts were male at that time, the preference overwhelmingly favored male applicants.¹²²

In ruling against the challenge, the Court held that "purposeful discrimination is the condition that offends the Constitution."¹²³ Since the plaintiffs could not show that the law was enacted because of, not just in spite of, its adverse impact on women, the Court found that the Massachusetts veterans' preference did not violate the Equal Protection Clause.¹²⁴ Even the dissenters in *Feeney* did not move far from an intent-based inquiry.¹²⁵ In his dissent, Justice Marshall wrote that Massachusetts absolute veterans' preference "evinces purposeful gender-based discrimination," and applied heightened scrutiny to the policy on that basis.¹²⁶

The impact of *Washington*, *Feeney*, and their progeny is that as discrimination becomes more subtle, those who are discriminated against find less and less protection under the Constitution.¹²⁷ This is particularly detrimental for women because many "laws and policies [] are embedded in sexist stereotypes but expressed in gender neutral language."¹²⁸

¹¹⁸ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹¹⁹ *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

¹²⁰ *Id.*

¹²¹ *Id.* at 274.

¹²² *Id.* at 270.

¹²³ *Id.* at 274 (citations omitted) (internal quotation marks omitted).

¹²⁴ *Id.* at 280.

¹²⁵ *Id.* at 281-82 (Marshall, J., dissenting).

¹²⁶ *Id.*

¹²⁷ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works." (footnote omitted)); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1145 (1997).

¹²⁸ Ann E. Freedman & Sylvia A. Law, *Thomas I. Emerson: A Pioneer for Women's Equality*, 38 CASE W. RES. L. REV. 539, 551 (1988).

Further, “courts fail to question the assumptions that social institutions are gender-neutral, and that women and men are therefore similarly related to those institutions.”¹²⁹ In order to address latent gender discrimination in employment, courts have interpreted Title VII to prohibit policies and practices which have a disparate impact on women, even where there is no discriminatory intent.¹³⁰ However, discriminatory impact claims have been severely limited since their initial creation. Claims which do not involve objective measures, such as employment testing, are rarely successful.¹³¹

Under the ERA, evidence of a purpose or intent to discriminate would not be required to invalidate governmental action that has a disparate impact on gender.¹³² Rather, heightened scrutiny would apply to those laws which reinforce or perpetuate patterns similar to those associated with facial or intentional discrimination.¹³³ Strict review of indirect, covert, or unconscious sex discrimination is essential to effect an absolute ban on gender discrimination and only the ERA can accomplish that goal.

III. PASSING THE ERA TO CURE THE LIMITATIONS OF EQUAL PROTECTION JURISPRUDENCE IN ACHIEVING REPRODUCTIVE JUSTICE

Without significant reimagining of the Supreme Court’s equal protection jurisprudence, it appears that women’s rights advocates have achieved as much as can be achieved under

¹²⁹ Edith Y. Wu, Short Essay, *American Women—The Struggle Continues*, 12 J.L. & SOC. CHALLENGES 13, 22 (2010).

¹³⁰ See Siegel, *supra* note 127, at 1144-45; see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226-30 (1989); Wharton, *supra* note 18, at 1226. Under Title VII, employment practices which have the effect of discriminating on some prohibited basis are illegal. See 42 U.S.C. § 2000e-2(k) (1991); see also Griggs v. Duke Power Co., 401 U.S. 424 (1971). To state a *prima facie* case under the disparate impact theory, a plaintiff must show that a facially neutral employment practice causes women to experience substantially different opportunities or employment status than men. See 42 U.S.C. § 2000e-2(k) (1991); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Once the plaintiff meets her burden, the defendant will have to show that the practice is “job related” and “consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991). If the employer meets this burden, then the plaintiff can still succeed if she shows that a less discriminatory alternative employment practice would serve the same purpose. *Id.* § 2000e-2(k).

¹³¹ See generally Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (concluding that disparate impact theory has had a limited impact outside of cases involving written employment tests and suggesting that the theory has had the inadvertent impact of limiting intentional discrimination theory).

¹³² See Wharton, *supra* note 18.

¹³³ *Id.*

existing law. In fact, rights that women do have continue to be constrained. The new laws proposed or passed in recent memory which impact women all seem to restrict their rights, particularly with regard to their rights to bodily integrity and reproductive freedom.¹³⁴ Even more troubling, laws of equal application, like the Affordable Care Act, have been struck down in whole or in part where they would act to protect the rights of women—because women do not have the constitutional protection necessary to defend their right to bodily integrity in the face of the purported religious beliefs of others.¹³⁵

The ERA would extend the scope of protection against sex inequality well beyond that which is currently provided for by the Equal Protection Clause. State high courts' interpretations of their respective state constitution ERAs¹³⁶ illustrate that the ERA is better situated to achieve comprehensive gender equality under the law, particularly with regard to discrimination based on women's reproductive capabilities.¹³⁷

A. *More Favorable Outcomes under the ERA, as Seen in State Courts*

In direct contradiction to the Supreme Court's holding in *Harris v. McRae*,¹³⁸ state courts successfully have invoked ERAs to support government funding of abortions for low income women. "Some states[,] . . . notably Connecticut and New Mexico, have applied a strict equality analysis to hold that their constitutions require state funding of medically necessary abortions for low income women."¹³⁹ In *New Mexico Right to Choose/NARAL v. Johnson*, the New Mexico Supreme Court reviewed N.M. Rule 766, which restricted state funding of

¹³⁴ See Sarah M. Stephens, *The Search for Authenticity and the Manipulation of Tradition: Restrictions on Women's Reproductive Rights in the United States and Egypt*, 19 CARDOZO J. OF LAW & GENDER 325, 326-27 (2013).

¹³⁵ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014) (finding the contraceptive mandate violative of RFRA).

¹³⁶ The following states have ERAs in their Constitutions: Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. LESLIE W. GLADSTONE, CONG. RESEARCH SERV., RS20217, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS 3-6 (2004), available at <https://maloney.house.gov/sites/maloney.house.gov/files/documents/olddocs/era/082304crsStateERAs.pdf>.

¹³⁷ "However . . . not every state with an ERA has adopted strict scrutiny or absolute scrutiny. A few follow federal equal protection law in construing their ERAs and apply intermediate scrutiny." Davis, *supra* note 40, at 434 (footnotes omitted). A federal constitutional amendment would remedy the lack of uniformity across jurisdictions.

¹³⁸ *Harris v. McRae*, 448 U.S. 297 (1980).

¹³⁹ Davis, *supra* note 40, at 442.

abortion “to those certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest.”¹⁴⁰

The court first held that strict scrutiny was appropriate even though Rule 766 addressed a physical characteristic unique to women, plainly abrogating the real differences approach.¹⁴¹ In making this determination, the court specifically noted “the fact that [s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.”¹⁴² The court found that New Mexico’s ERA demanded it look “beyond the classification to the purpose of the law” to decide whether the law under scrutiny operated to the disadvantage of women.¹⁴³ “The question at hand is whether the government had the power to turn th[e] capacity [to bear children] limited as it is to one gender, into a source of social disadvantage.”¹⁴⁴ The court found that both sexes were “similarly situated” in relation to Medicaid coverage because the criteria for Medicaid eligibility was the same for each sex and the state was required to fund all medically necessary services.¹⁴⁵ The court also determined that there was “no comparable restriction” on coverage for any condition that was “unique to men.”¹⁴⁶ Drawing on these facts, the court struck down N.M. Rule 766, holding that the rule unconstitutionally “single[d] out for less favorable treatment a gender-linked condition that is unique to women”¹⁴⁷ and that the interests “put forward by the state [in] costs savings and interest in potential life of the unborn[]” were insufficient to justify the measure.¹⁴⁸

Likewise, in *Doe v. Maher*,¹⁴⁹ the Connecticut Superior Court found unconstitutional a regulation restricting Medicaid payment for therapeutic abortions¹⁵⁰ to those necessary to save the life of the mother.¹⁵¹ The court criticized the five member majority in *Harris v. McRae* who held that similar restrictions

¹⁴⁰ New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 846 (N.M. 1998).

¹⁴¹ *Id.* at 854.

¹⁴² *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citations omitted) (internal quotation marks omitted).

¹⁴⁵ *Id.* at 855.

¹⁴⁶ *Id.* at 856.

¹⁴⁷ *Id.* at 856-57.

¹⁴⁸ Davis, *supra* note 40, at 443.

¹⁴⁹ *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986).

¹⁵⁰ A “therapeutic abortion” is an “abortion[] necessary to ameliorate a condition that is deleterious to a woman’s physical or psychological health.” *Id.* at 135 n.4.

¹⁵¹ *Id.* at 135.

under the Hyde Amendment did not violate the federal Equal Protection Clause.¹⁵² The court found “it difficult to accept the rationale of the majority of the United States Supreme Court” that held “the restriction on Medicaid [funded] abortions [does] not impinge on the constitutional right of liberty and the classification is not predicated on ‘criteria that are, in a constitutional sense, suspect.’”¹⁵³ The court also disagreed that the discriminatory restrictions on Medicaid funding “were rationally related to the legitimate governmental objective of ‘protecting the potential life of the fetus.’”¹⁵⁴

The Connecticut court rejected the formal equality framework used by the Court in *Harris v. McRae*. The court found that the Connecticut regulation violated the privacy rights of “the plaintiff poor woman class and the physician class under the state’s due process clause.”¹⁵⁵ The court went on to find that the regulation discriminated on the basis of sex in violation of the state’s ERA.¹⁵⁶ The court pointed out that under the Medicaid program, all medically necessary expenses for men and women are covered, except for therapeutic abortions that are not life-threatening.¹⁵⁷ The court also specifically pointed out that all medical expenses associated with male reproductive health, family planning, and medical conditions unique to men were covered.¹⁵⁸ Most importantly, the court found that:

[B]y adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities. It is therefore clear, under the Connecticut ERA, that the regulation excepting medically necessary abortions from the Medicaid program discriminates against women, and, indeed, poor women.¹⁵⁹

Applying the strict scrutiny standard, the court went on to find the regulation violated Connecticut’s ERA.¹⁶⁰

¹⁵² *Id.* at 158.

¹⁵³ *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 322, 324 (1980)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 157.

¹⁵⁶ *Id.* at 160.

¹⁵⁷ *Id.* at 159.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 160.

¹⁶⁰ *Id.* at 162; *see also* *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 397 (Mass. 1981) (holding that the failure to pay for medically necessary abortions violated the due process clause of the Massachusetts constitution).

B. Applying an ERA Analysis to Burwell v. Hobby Lobby Stores, Inc.

In contrast to the rulings of these and other state supreme courts,¹⁶¹ the United States Supreme Court consistently refuses to recognize discrimination based on women's reproductive capabilities as sex discrimination. If the ERA were enacted, it would force the Court to re-evaluate its position on the treatment of pregnancy and the related issue of abortion funding.¹⁶² It would also prohibit the Court from relying on sex

¹⁶¹ "The majority of state courts, however, have found that a central reason that their ERA was enacted was to treat sex discrimination with at least the same degree of skepticism as racial discrimination, requiring a higher level of review than intermediate scrutiny." Davis, *supra* note 40, at 434.

¹⁶² It is likely that the innumerable restrictions on abortion funding would be struck down following the passage of the ERA. For an explanation of these restrictions, see JON SHIMABUKURO, CONG. RESEARCH SERV., RL33467, ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE 12-13 (2014). For example,

The Hyde Amendment process has not been limited to appropriations for [Health and Human Services (HHS)]. Beginning with P.L. 95-457, the [DOD] appropriations measures have contained Hyde-type abortion limitations. This recurring prohibition was eventually codified and made permanent by P.L. 98-525, the [DOD] Authorization Act of 1984. In 1983, the Hyde Amendment process was extended to the Department of the Treasury and Postal Service Appropriations Act, prohibiting the use of funds for the Federal Employees Health Benefits Program (FEHBP) to pay for abortions, except when the life of the woman was in danger. Prior to this restriction, federal government health insurance plans reportedly paid an estimated \$9 million for both therapeutic and non-therapeutic abortions Under [DOJ] appropriations, funding of abortions in prisons is prohibited, except where the life of the mother is endangered, or in cases of rape. First enacted as part of the FY1987 Continuing Resolution, P.L. 99-591, this provision [was] reenacted as part of the annual spending bill in each subsequent fiscal year [S]ince 1979, restrictive abortion provisions have been included in appropriations measures for the District of Columbia Under the so-called Dornan Amendment [P.L. 100-462] D.C. was prohibited from using both appropriated funds and local funds to pay for abortions [T]he Family Planning Services and Population Research Act of 1970, P.L. 91-572 (42 U.S.C. 300a-6), bars the use of funds for programs in which abortion is a method of family planning. The Legal Services Corporation Act of 1974, P.L. 93-355 (42 U.S.C. 2996f(b)(8)), prohibits lawyers in federally funded legal aid programs from providing legal assistance for procuring non-therapeutic abortions and prohibits legal aid in proceedings to compel an individual or an institution to perform an abortion, assist in an abortion, or provide facilities for an abortion [Additionally,] the Civil Rights Commission Amendments Act of 1994, P.L. 103-419 (42 U.S.C. sec. 1975a(f)), prohibits the commission from studying or collecting information about U.S. laws and policies concerning abortion. [Finally, under the Patient Protection and Affordable Care Act (ACA, P.L. 111-148),] individuals who receive a premium tax credit or cost-sharing subsidy will be permitted to select a qualified health plan that includes coverage or elective abortions. However, to ensure that funds attributable to such a credit or subsidy are not used to pay for elective abortion services, ACA prescribes payment and accounting requirements for plan issuers and enrollees [The plan issuer is] required to collect two separate payments from each enrollee in the

stereotyping or formalistic and superficial analyses when deciding sex-related cases. As illustrated by *New Mexico Right to Choose* and *Doe v. Maher*, a rehearing of cases such as *Harris v. McRae*,¹⁶³ *Maher v. Roe*,¹⁶⁴ or *Rust v. Sullivan*¹⁶⁵ within the ERA framework would produce a different outcome.

Under the ERA, the Supreme Court also would have likely reached a different decision in its most recent opinion to impact women's reproductive choices: *Burwell v. Hobby Lobby Stores, Inc.*¹⁶⁶ In *Hobby Lobby*, the Court ruled that Hobby Lobby, as a privately owned corporation,¹⁶⁷ has the right to refuse to comply

plan”—a separate payment for coverage of elective abortions—and] deposit the separate payments into separate allocation accounts that consist solely of each type of payment and that are used exclusively to pay for the specified services . . . The ACA also permits a state to prohibit abortion coverage in exchange plans by enacting with such a prohibition.

Id. at 12-14. In obvious discrimination, “the ACA requires that there be at least one multi-state plan in each exchange in each state that does not cover abortion services beyond those permitted by the Hyde Amendment.” *What Women Need to Know About Healthcare Reform*, NAT'L WOMEN'S LAW CTR (2010), available at http://www.nwlc.org/sites/default/files/pdfs/hcr_abortion_updated_11-10.pdf (emphasis added). Meanwhile, states are allowed to pass laws to prohibit all private insurance coverage of abortion within the state, banning coverage in plans both inside and outside an exchange. SHIMABUKURO, *supra*, at 14 (referring to Patient Protection and Affordable Care Act, Pub. L. No. 111-148 sec. 1303(a)(1) (2010)).

¹⁶³ *Harris v. McRae*, 448 U.S. 297 (1980); see also *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980) (finding that an Illinois statutory funding restriction that was comparable to the Hyde Amendment also did not contravene the constitutional restrictions of the Equal Protection Clause of the 14th Amendment).

¹⁶⁴ *Maher v. Roe*, 432 U.S. 464, 480 (1977) (holding that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses incident to nontherapeutic abortions simply because the state has made a policy choice to pay expenses incident to childbirth and holding that Connecticut's policy of favoring childbirth over abortion did not impinge upon the fundamental right to privacy recognized in *Roe v. Wade*).

¹⁶⁵ *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (upholding on both statutory and constitutional grounds the Department of Health and Human Service's Title X regulations restricting recipients of federal family planning funding from using federal funds to counsel women about the option of abortion). The Court reasoned that there was no constitutional violation because the government has no duty to subsidize an activity simply because it is constitutionally protected and because a woman is “in no worse position than if Congress had never enacted Title X.” *Id.*; see also *Beal v. Doe*, 432 U.S. 438, 446-47 (1977) (holding that “nothing in either the language or the legislative history of Title XIX” of the Social Security Act (Medicaid) requires a participating state to fund every medical procedure falling within the delineated categories of medical care). The Court ruled that it was not inconsistent with the act's goals to refuse to fund unnecessary medical services. However, the Court indicated that Title XIX left a state free to include coverage for non-therapeutic abortions should it choose to do so. *Beal*, 432 U.S. at 446-47; see also *Poelkher v. Doe*, 432 U.S. 519, 521 (1977) (upholding a municipal regulation that denied indigent pregnant women non-therapeutic abortions at public hospitals).

¹⁶⁶ *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014).

¹⁶⁷ The majority opinion attempted to cast this decision as narrow because it applies to a “for-profit closely held corporation[.]” *Id.* slip op. at 31. *Hobby Lobby*

with the Affordable Care Act's mandate that health insurance plans offered to employees make certain contraceptives available.¹⁶⁸ Hobby Lobby objected to the provision of four particular contraceptives, which it denoted as "abortifacients"¹⁶⁹ and argued that offering an insurance policy which covered those particular contraceptives violated its rights under the First Amendment and the Religious Freedom Restoration Act (RFRA).¹⁷⁰

The RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion . . ." unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁷¹ The Court determined that the RFRA applies to privately held corporations and that the owners of Hobby Lobby hold sincere Christian beliefs that life begins at conception and that offering a health insurance policy which covers the four contraceptives would be

employs 13,000 employees in 600 locations through 39 states. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 53 (2014). Forbes Magazine estimates Hobby Lobby's annual revenue exceeds \$2 billion. *Id.* at 53 n.6. It is estimated that as many as 90% of all businesses in the United States are closely held and that closely held corporations employ more than half of the American workforce. Aaron Blake, *A LOT of People Could Be Affected by the Supreme Court's Birth Control Decision—Theoretically*, WASH. POST (June 30, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/>.

¹⁶⁸ *Hobby Lobby*, slip op at 48. The Affordable Care Act (ACA) does not itself require insurance plans to cover contraception. Rather, the ACA requires coverage of preventative women's healthcare without cost sharing by patients. The Institute of Medicine used neutral scientific and medical criteria to determine that preventative care coverage should include all FDA-approved contraceptive methods. George J. Annas et al., *Money, Sex, and Religion—The Supreme Court's ACA Sequel*, 371 NEW ENG. J. MED., 862, 862 (2014).

¹⁶⁹ *Hobby Lobby*, slip op. at 12. Both federal law and the American Medical Association specifically negate this factual contention. While the Court referred to these medications as "abortifacients" in its opinion, this is a misnomer. *Id.* The four medications that Hobby Lobby objected to are two intrauterine devices (IUD) and two emergency contraceptive pills. None of these medications will disrupt an established pregnancy. While it is a common belief, even at the Supreme Court, that an IUD will prevent implantation of a fertilized egg, current science indicates that IUDs prevent fertilization. See Brief for Physicians for Reproductive Health et al. as Amici Curiae in Support of Defendants-Appellees at 12-20, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3rd Cir. 2013) (No. 13-1144).

¹⁷⁰ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-2000bb-4, (1993), amended by Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 21C (2000) (RFRA).

¹⁷¹ *Id.* (note this statute incorporates the strict scrutiny standard currently denied to sex discrimination claims).

contrary to that religious belief.¹⁷² The Court, ruling in favor of *Hobby Lobby*, held that the Affordable Care Act's contraceptive mandate substantially burdens the exercise of religion provided for in the RFRA; and the mandate is not the least restrictive means of furthering the government's interest.¹⁷³ "For the first time, the Supreme Court exempted for-profit businesses from employee-protective law in the name of religion."¹⁷⁴ Not surprisingly, the only other legislative exemptions for for-profit corporations are statutes which allow hospitals to refuse to provide critical reproductive healthcare: abortions.¹⁷⁵

The majority opinion in *Hobby Lobby* is overtly prejudicial against women. Singling out women's reproductive choices, the Court states "[t]his decision concerns only the contraception mandate and should not be understood to hold that all insurance coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fail if they conflict with an employer's religious beliefs."¹⁷⁶ Thus, employers and federal healthcare programs may discriminate against women in their medical care, but the Court's opinion should not be read to apply where it might impact men or non-reproductive related issues.¹⁷⁷ Under the Court's prior decisions in *Geduldig* and its progeny, this result is permissible.¹⁷⁸

The *Hobby Lobby* decision demonstrates the need for a constitutional guarantee of equality and provides a good example of the ongoing tension between women's rights and other constitutionally or statutorily protected rights.¹⁷⁹ Opponents of women's rights have been using their right to religious freedom as a sword in the so-called "War on Women."¹⁸⁰ Without a constitutional shield, women's rights,

¹⁷² *Hobby Lobby*, slip op. at 30.

¹⁷³ *Id.* at 39. The Court did not reach *Hobby Lobby's* First Amendment argument. *Id.* at 48.

¹⁷⁴ Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 28 (2014).

¹⁷⁵ *Id.* (citing 42 U.S.C. § 300a-7(b)).

¹⁷⁶ *Hobby Lobby*, slip op. at 45. Although outside the scope of this article, the Court's opinion also appears to violate the Establishment Clause by favoring religion, as opposed to the absence of belief, and specifically the Christian faith. Here, he specifically points out that medical procedures objected to on religious grounds by Jehovah's witnesses would be covered despite their religious beliefs. See generally Gedicks & Koppelman, *supra* note 167.

¹⁷⁷ The Supreme Court arguably sidestepped this issue by suggesting that the government could just cover the cost of the contraceptives, however this suggestion would still place a significant and unnecessary burden on female employees and on the government. *Hobby Lobby*, slip op. at 39.

¹⁷⁸ See *supra* Part II.B.

¹⁷⁹ See Stephens, *supra* note 134, at 326-27.

¹⁸⁰ *Id.*

even the constitutionally protected right to privacy guaranteed by *Griswold v. Connecticut*,¹⁸¹ will be outweighed by the right to freedom of expression, whether provided for by statute or the First Amendment.

If analyzed under the ERA, *Hobby Lobby's* challenge to the contraceptive mandate would have failed. The Court still may have concluded that the RFRA applies to private corporations and that the contraception mandate interfered with Hobby Lobby's exercise of that right under the RFRA. However, the Court would also have had to acknowledge that the RFRA is federal government action and, as applied in *Hobby Lobby*, violates women's right to equal treatment under the law and deprives them of a valuable legal entitlement by preventing their equal access to a federally mandated insurance program. Analyzing *Hobby Lobby* within the ERA framework shows that the RFRA works to unconstitutionally disadvantage women because of their sex, in the same way that restrictions on Medicaid funding for medically necessary abortions were found unconstitutional under state ERAs in *New Mexico Right to Choose/NARAL v. Johnson* and *Doe v. Maher*.

Under the ERA, recent Supreme Court jurisprudence that has negatively impacted women's rights likely would have been decided differently, and, indeed, the passage of the ERA would act to revise the legal basis for some of these precedents. Decisions such as *Hobby Lobby*, demonstrate both the limitation of the litigation strategy pursued by women's rights advocates and the reinvigorated need to write the "principle of equal rights . . . into the framework of our government."¹⁸²

CONCLUSION

The litigation strategy pursued by equal rights advocates achieved many of the results hoped for by feminists in the 1960s and 1970s. There has been arguably little progress since then. Women continue to be treated unequally under the law, in part because the intermediate scrutiny standard permits gender discrimination in certain circumstances. This is particularly true when analyzing laws that deal with women's

¹⁸¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding the right of married people to obtain and use contraception pursuant to a right of marital privacy); *see also* *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy to protect a woman's right to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried persons on equal protection grounds).

¹⁸² *Francis, supra* note 29.

biological differences from men and impact women's reproductive autonomy. Further, it appears that the Supreme Court is unwilling to expand existing constitutional jurisprudence to grant any greater protection against discrimination than currently exists. Our best hope for equality is an expansive constitutional amendment which purports to outlaw overt and covert gender discrimination. "No ordinary statute can provide the bedrock protection assured by a Constitutional Amendment. No Court decision can provide that protection, for the courts may interpret, but they may not amend the Constitution."¹⁸³

In 1978, and again in 1981, the bipartisan United States Commission on Civil Rights urged ratification of the ERA, declaring:

attainment of full, equal rights for women and men requires ratification of the proposed amendment. The need for the ERA is at least as great today as it was when Congress proposed the amendment to the States in 1972. Measured by any standard, gender lines have not been erased, and the history of unequal treatment of men and women has not been adequately redressed under existing law. Moreover, as a result of experiences under State constitutional amendments virtually identical to the proposed Federal amendment, it is even clearer now than it was in 1972 that the ERA is the appropriate remedial action to address this inequality and assure women and men equal justice before the law.¹⁸⁴

This statement is as true today as it was then. Equality of rights for women and men remains as elusive now as it did in 1981, but state ERAs have shown that greater equality can be achieved through a constitutional amendment. The ERA continues to be an active goal of women's rights organizations and remains viable before the United States Congress, as well as legislatures around the country.¹⁸⁵ It is time to re-focus on the ERA as the avenue to create a new paradigm for analyzing case law, to undo the negative jurisprudence which allows discrimination on the basis of gender stereotypes and women's biological ability to bear children, and to create new momentum for true equality under the law.

¹⁸³ UNITED STATES COMM'N ON CIVIL RIGHTS, THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION 5 (1981), available at <https://www.law.umaryland.edu/marshall/uscr/documents/cr11068.pdf> (citing American Bar Association, *About the ERA* 2 (Apr. 1980)).

¹⁸⁴ *Id.* (quoting UNITED STATES, COMM'N ON CIVIL RIGHTS, STATEMENT ON THE EQUAL RIGHTS AMENDMENT 4 (1978)).

¹⁸⁵ See *supra* notes 57-63 and accompanying text.